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BACON'S

Abridgement of the Law:

VOL. I.

A

NEW

Abridgement of the Law.

BY MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

THE SEVENTH EDITION, CORRECTED;

WITH LARGE ADDITIONS, INCLUDING THE LATEST STATUTES AND AUTHORITIES.

VOLUMES II. III. AND IV. (EXCEPT THE ADDENDA,)

BY SIR HENRY GWILLIM,

OF THE MIDDLE TEMPLE, KNIGHT;
LATE ONE OF THE JUDGES OF HIS MAJESTY'S SUPREME COURT
AT MADRAS.

VOLUMES I. V. VI. VII. AND VIII. AND THE ADDENDA TO THE
OTHER VOLUMES,

BY CHARLES EDWARD DODD,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN EIGHT VOLUMES.

VOL. I.

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LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

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1832.



TO

HENRY,

BARON BROUGHAM AND VAUX,

OF BROUGHAM, IN THE COUNTY OF WESTMORLAND,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

THIS EDITION

OF

BACON'S ABRIDGEMENT OF THE LAW

IS,

(WITH HIS PERMISSION,)

MOST RESPECTFULLY DEDICATED BY THE EDITOR,

CHARLES EDWARD DODD.

Temple, November, 1831.

PREFACE

TO

THIS SEVENTH EDITION.

THE last edition of *Bacon*'s Abridgement was published in 1807; but that edition was merely a reprint of the fifth edition, published in 1798. The task, therefore, devolved on the Editors of the present edition, of incorporating into the various titles of the work the decisions and statutes which, during thirty-three years, have so materially qualified, confirmed, and reversed the law as laid down in the last corrected edition. To the profession, for whom the work is designed, the extent and labour of this task will in a great degree account for the delay which has occurred in the publication of the present edition. The second, third, and fourth volumes were prepared by the former Editor, Sir *Henry Gwillim*, above ten years since, and were then printed; but his ill state of health preventing his proceeding with the work, the completion of it was entrusted, several years ago, to the present Editor, who is responsible for the first, fifth, sixth, seventh, and eighth volumes, and for the "ADDENDA," which it became indispensable to append to the three volumes printed by Sir *Henry Gwillim*. The improvements made by that gentleman in the edition of 1798, in correcting and verifying the references, in retrenching repetitions and redundancies, in expunging unintelligible passages, and

generally, in purifying and perfecting the text, left comparatively little to be done by the Editors of this edition, except (what indeed was of itself difficulty and toil sufficient) the introduction into the work of the decisions pronounced by the several courts and of the statutes enacted since the edition of 1798. In executing this task, in the five volumes for which he is answerable, the present Editor has endeavoured to adapt the new matter to the old text in the most convenient and suitable shape, so that the text and notes may present a connected and accurate view of the former state of the law, of the changes it has undergone, and of its condition at this day on the various subjects treated of. Where the new matter introduced is short, where it forms a concise qualification, confirmation, or contradiction of the old text, it is generally inserted in the shape of a note, in which form the Editor has also carefully printed all observations or inferences not resting on the certain authority of decided cases. Where, however, the additions, whether of adjudications or statutes, are of considerable extent, it seemed more convenient to engraft them into the text of the work than to crowd them into the less convenient form and the minute type of notes. In all cases, whether they occur in the body of the work or in the notes, the additions to this edition are carefully distinguished by being inserted within these marks ‖ ‖, a mark used both by Sir *Henry Gwillim* in the three volumes which he edited, and by the present Editor in the five volumes for which he has stated himself to be responsible. The marks [] distinguish the additions made by Sir *Henry Gwillim* in the edition of 1798, and the marks *, †, ‡, indicate the labours of former editors.

The Editor has in some instances availed himself of extracts from Treatises of acknowledged accuracy or authority

authority on the subjects under consideration. Where the result of a series of decisions has been concisely stated by a text writer intimately acquainted with the particular branch of law, the Editor could not hope to improve on such an abridgement either in accuracy or perspicuity. He believes that in all such cases he has acknowledged the obligation by reference to the author to whom it is incurred.

It did not fall within the scope of the Editor's duty to render the work a complete modern abridgement of the law, desirable and useful as such a work might be to the profession. He has, therefore, on the one hand, neither added new titles to the work, nor has he, on the other, felt at liberty to expunge matter on the ground of its having grown obsolete and useless, or of its being now only useful to the historical and curious enquirer. Of this description must be considered a great part of titles "APPEAL," "PAPISTS AND POPISH RECUSANTS," "PRÆMUNIRE," "SCANDALUM MAGNATUM," "SUMMONS AND SEVERANCE," "WAGER OF LAW," "WARRANTY." The Editor conceived himself to stand, as to this point, in a very different situation from the author of an original work.

Though the Editor has introduced no new titles, he has inserted subdivisions of some of the heads, and has also, in some instances (as in titles "AGREEMENT," "ANNUITY," "BANKRUPT," "LEGACIES AND DEVISES," "STAMPS,") occasionally transposed and rearranged the matter, for the sake of greater perspicuity and facility of reference. He has been careful, however, not to confuse his own additions with the previous text of the book, but has invariably marked, as above mentioned, whatever rests on no better authority than his own.

Although

Although the Editor has endeavoured to consult brevity in the additions as much as was consistent with perspicuity, and with the style of dissertation in which the Abridgement is written, the work has necessarily been enlarged by the addition of a volume, and by much increasing the bulk of all the volumes. The extent of the additions to this edition may be estimated from the fact, that the cases in the index are about twice the number of those in the former edition, and there is an increase of about fifteen hundred pages.

The Editor begs to acknowledge here some very useful assistance which he received from Mr. *Blanshard*, Barrister at Law (now of York,) in preparing the titles in the fifth volume from "LEGACIES AND DEVISES" to "MONOPOLY," both inclusive.

The Editor cannot send the work forth to the profession without earnestly bespeaking their candid indulgence for its errors, omissions, and imperfections. He can hardly venture to hope that these are not numerous in a work so extensive, so difficult, and so multifarious, which has often exceeded the Editor's powers and has always tasked his industry, and which has been necessarily completed in the intervals of his professional avocations as a Special Pleader and a Barrister.

C. E. DODD.

King's Bench Walk, Temple,
Michaelmas Term, 1831.

PREFACE

TO

THE FIFTH EDITION.

IT was the hard fate of the excellent writings of the late Chief Baron GILBERT, to lose their Author, before they had received his last corrections and improvements, and in that unfinished state to be thrust into the world, without even the common care of an ordinary editor. Those invaluable tracts were for the most part published not only with all their original imperfections, without any attempt to supply their defects, or explain or correct what seemed in them perplexed or erroneous; but with all the improprieties and inaccuracies which the ignorance and neglect of the amanuenses, whom the Author's infirmities compelled him to employ, could accumulate upon them.

Some of those tracts, it is well known, fell into the hands of the Compiler of the present work, and from them the materials of the greater part of it, as far as the title "SIMONY," were collected. Unfortunately, our Compiler had not the most happy dispositions for the work he had undertaken, nor were those parts of the learned Judge's writings which appeared in the New Abridgement much better prepared to meet the public eye, than the other tracts, which had been published by persons to whom chance or an undistinguishing choice had committed the inspection of the press.

In

In the course of the work, Mr. *Bacon* seems to have made different use of the materials that lay before him, sometimes taking the tracts at length, sometimes giving only extracts from them: but whether he inserted the whole of any tract, or only a part of it, we have reason to think, he inserted it just as he found it. If the Author, in different treatises, in order to make each treatise perfect within itself, introduced the same matter conveyed in the same expression, the Compiler implicitly copied it, and under different titles of his work introduced the same passages to the extent of several pages. If the manuscripts were in any part defective, if the subjects were but partially treated of in them*, the titles which related to those subjects were left equally defective in the Abridgement. The Compiler seemed to have as little inclination to supply the deficiences of his Author, as he had sagacity to mark or correct his errors.

With these defects and redundancies the work has passed through three subsequent editions; the only anxiety discoverable in the later editors being to crowd it with reference to cases inapposite to the point in the text, and which, at the best, had only some relation to remote branches of the general subject.

In preparing the present Edition for the press, it has been the first care of the Editor to retrench what was redundant in the work, and to expunge what appeared to him impertinent. In retrenching, he has substituted reference for repetition; and where the same matter which had occurred under one title seemed naturally to fall under and belong to another, he has referred to the

* It should seem, from some manuscript treatises of this author in the possession of Mr. *Hargrave*, which have never appeared in print, that he had formed and actually executed the comprehensive plan of writing distinct treatises upon every branch of the law, except the criminal jurisprudence.

preceding

preceding title, instead of introducing it again. In expunging, he has not indulged himself in any arbitrary or capricious licence; nor has he presumed to strike out one supervenient authority of a later editor, before he had satisfied himself by careful examination that it had no pretensions to the place it affected to occupy.

In the original text he has rarely ventured to make any alteration, except where it was manifestly corrupted by the carelessness of the copyist or of the press, or rendered perplexed by the want of due attention to punctuation. One or two passages, indeed, where the meaning could not be collected either from the expression or the references, he thought himself at liberty to expunge. Conjectural emendation is not admissible in a work of this kind; and he trusts no man will complain of the loss of nonsense.

He has attempted to mark, and guard his readers against, the mistakes of the author: but he is sensible that many, too many, erroneous passages have been suffered to pass without observation. In the course of so long a work, it cannot be expected that the exertions of the mind should be always equal, or that it should always be alike disposed to proceed in the task it had undertaken. It must occasionally sicken at some parts of the labour as beneath its attention, and shrink from others as beyond its powers. It is well known that the most obvious errors sometimes most easily escape detection. In reading, every man must have felt that his mind is sometimes more attentive to its own preconceptions on the subject, than to the ideas of the author; and the better it is satisfied with the rectitude of the former, the more steadily it pursues them, and the less sensible it is of the aberrations of the latter. The form, too, in which error presents itself to us, may help to facilitate its escape: it is more likely to pass silently and unobserved when proposed in the form of a simple affirmation,

affirmation, than when it challenges our enquiry in that of an interrogation. We often readily admit upon a statement what we should instantly deny, if it were offered to us in the way of question.

It should be observed, that, even where the Editor has detected error, he has not always immediately apprised his reader of it: he has sometimes subjoined his remarks upon the erroneous passage at the end of the division where it has occurred: he has at other times left its confutation to its inconsistency with the better-considered and more recent determinations which he has afterwards introduced.

In the additions he was to make, he found it necessary to prescribe to himself some limitations: he therefore in general attempted no more than to fill up the chasms that were left under those general divisions into which he found the work already disposed, and then to engraft upon the whole the later decisions. He has indeed given two new titles, viz. "PISCHARY," and "SET-OFF;" and he knows that he might have given others, as the work is at present far from a complete abridgement of the law. But he had neither time nor encouragement to go farther. Besides, much of the learning which is wanting, is to be met with in books that are in every one's hand: and what was to have been gleaned from other writings of the same kind, though it might have increased the bulk of the work, would not have added to its intrinsic value, or have done any credit to the industry or integrity of the Editor. If there should be some who complain that more might have been done, there will be others, he fears, who will say, perhaps with more justice, that much of that which has been done might have been spared.

As the Abridgement is written in the style of dissertation, he has in his additions availed himself largely of those

those tracts which have been published upon different parts of the law, and received the approbation of the profession. He has been in general careful, whenever he has made an extract from any of those tracts, to acknowledge the obligation by reference to the work itself. If he has in any instance (and he may have done so in many) neglected to make such reference, the author may be assured that it was by mere accident or inadvertency, and not from any design to take to himself the credit of another man's labours. But wherever such omission may have been made, let not the author be under any uneasiness: the world will too easily distinguish what properly belongs to the Editor.

He thought himself at full liberty to transplant into the work as much of the Chief Baron *Gilbert*'s tracts as he had occasion for: it was in truth only re-uniting disjointed members, many parts of the work itself being only parts of several of those tracts. One of the learned Judge's treatises, viz. the Treatise upon the Doctrine of Remainders, from which the collections in the Abridgement under that title were extracted, he has been enabled to give entire by the kindness of Mr. *Hargrave*. The manuscript had been purchased by that gentleman at no inconsiderable price; but, disdaining all private considerations where the interests of that profession, of which he is so distinguished an ornament, seemed in any degree concerned, he made a voluntary tender of to the Editor, as soon as he was informed that he was engaged in preparing another edition of the present work. By this generous act, Mr. *Hargrave* has highly flattered the Editor, and has added one more to the many obligations his profession were already under to him.

The Editor has been anxious to separate his own additions, and those of preceding editors, from the original work. Whatever, therefore, he is responsible for,

for, is included between crotchets, thus []; whilst the insertions of the other editors are distinguished by one or other of these marks, *, †, ‡. It is well known that Mr. *Bacon* did not live to carry the work any farther than to the title "SHERIFF," inclusive, and that the remainder was added by Mr. Serjeant *Sayer* and Mr. *Ruffhead*. It was not thought necessary to give any distinguishing marks to this latter part: it seemed sufficient to give this intimation of it.

HENRY GWILLIM.

Boswell-Court,
Michaelmas Term, 1797.

ABATEMENT.

ABATEMENT, in the general acceptation of the word, signifies a plea put in by the defendant, in which he shews cause to the court why he should not be empleaded; or, if empleaded, not in the manner and form he now is.

Gilb. Hist. C. P. 186. [For the derivation and different senses of the word.

Abatement in our law, see 3 Bl. Comm. 168. Co. Litt. 134. b. 181. a. 242. b. 271. a. 277. a. Finch's Law, 195. Pleas to the jurisdiction, and to the person of the plaintiff, are pleas in disability, and only in the nature of pleas in abatement. Pleas in abatement, strictly such, are pleas to the writ. Finch's Law, 362. 3 Black. Comm. 301.] For the order of pleading, see title *Pleas and Pleadings*, (A).

We will consider this title in the following order, though several of its divisions are more largely treated of under their proper heads.

(A) Of Pleas to the Jurisdiction of the Court.

(B) To the Person of the Plaintiff.

1. *Outlawry.*
2. *Excommunication.*
3. *Alienage.*
4. *Premunire.*
5. *Popish Recusancy.*
6. *Coverture.*

(C) Of Pleas in Abatement with respect to the Person of the Defendant; and herein of privileged Persons.

(D) Of Misnomer and want of Addition.

(E) Of Abatement by the Demise of the King.

(F) By the Death of Parties.

(G) By reason of Coverture.

(H) By a Defect in the Writ.

(I) By the Writ's not agreeing with the Count.

(K) Where the Writ is abated *de Facto*, or only abateable.

(L) Where the Writ shall abate *in toto*, or in Part.

(M) Where it shall abate by Reason of another Action brought for the same Thing.

(N) Where a Person may plead in Bar, or in Abatement.

[(O) Dilatory Pleas, how restrained.]

(P) Of the Manner of pleading in Abatement, and the Proceedings and Judgment on such Plea.

[(Q) Of the Writ by Journies Accompts.]

(R) Foreign Plea.

(A) Of Pleas to the Jurisdiction of the Court.

Gilb. Hist. C. P. 187. 22 H. 6. 7 Barnes, 334.

A PLEA to the jurisdiction of the Court must be put in before (*a*) any imparlance, for by craving leave to imparl, the defendant submits to the jurisdiction.

[(*a*) But after a general special imparlance, that is, an imparlance with a general saving of all manner of exceptions, it seems that it may be pleaded: but the granting of such an imparlance is discretionary in the court, and it cannot be had but by special motion. Grant v. Lord Sondes, 2 Black. R. 1094. Wentworth v. Squib, 1 Lutw. 46. 12 Mod. 529. S. C. Clapham v. Lenthal, Hardr. 365. Barrington v. Venables, Raym. 34.] ‖And if the defendant plead such a plea after a special imparlance, with a saving only of all exceptions to the writ, &c. though the plea is demurrable it is not a nullity. Godefroy v. Jay, 6 Bing. 616.‖

The defendant must plead *in propriâ personâ*, for he cannot plead by attorney without leave of the Court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the Court; and if defendant puts in a plea by an officer of the Court, that plea must be supposed to be put in by leave of the Court.

Co. Litt. 127. Gilb. Hist. C. P. 188. See Ventr. 334.

He must make but half defence; for if he makes full defence *quando et ubi curia consideraverit*, &c. he submits to the jurisdiction of the Court.

Alexander v. Mawman, Willes's R. 40. Wilkes v. Williams, 8 Term R. 631.; and 3 Bos. & Pull. 9. (*a*)

‖But a plea which goes no farther than "defending the force and injury when, *&c.*" is not a full defence, the "*&c.*" implying a full or a half defence according as the one or the other is requisite.‖

Doctr. Pl. 224. Mostyn v. Fabrigas, Cowp. 172. Earl of Derby v. Duke of Athol, 1 Ves. 203. 2 Ves. 357. Rex v. Johnson, 6 East, 583.

Every plea to the jurisdiction must state another jurisdiction.

Attorney General

[A plea that the suit is of visitatorial cognizance, must shew the

the extent of the visitor's authority, and aver that he is able to do complete justice.] neral v. Talbot, 1 Ves. 3 Atk. 662.

S. C. Green v. Rutherforth, 1 Ves. 474. and Rex v. Bland, *B. R.* Mich. 14 G. 2. there cited.

See tit. COURTS, AND THEIR JURISDICTION IN GENERAL.

(B) To the Person of the Plaintiff.

1. *Of Outlawry.*

OUTLAWRY in the plaintiff is a good plea in abatement, for he thereby loses his *liberam legem*, and is out of the protection of the law; for not having been amenable to the law, he ought not to have any privilege or benefit from it. Gilb. Hist. C. P. 196, 197. Litt. Sect. 197. Co. Litt. 12. But no man shall be said to be outlawed till the return of the exigent. Bro. Nonability, 25. 28. Ass. 49. Dyer, 222.

But outlawry does not entirely abate the writ, but is only a temporary impediment that disables the plaintiff from proceeding; for upon obtaining a charter of pardon, or reversing the outlawry, he is restored to his law, and can oblige the defendant to plead to the same writ. Co. Litt. 128. Doctr. Pl. 397. Ord. in Ch. 97.

Outlawry in a personal action goes only to personal actions, in respect of the person; but outlawry in felony goes to actions generally. Doctr. Pl. 397. cites 33 H. 6. 19.

See further tit. OUTLAWRY (D), 3. 2. 3.

‖And as to pleading outlawry in equity, see *ibid.* and 1 Sim. & Stu. 225. 720. 1 Ves. & B. 184. 1 Vern. 184.‖

2. *Excommunication.*

See tit. EXCOMMUNICATION (C), (D).

3. *Alienage.*

See tit. ALIENS (D), (E).

4. *Premunire.*

Persons attainted of a premunire are incapable of bringing any action, for they are out of the protection of the law. Gilb. Hist. C. P. 205. Doctr. Pl. 10. Co. Litt. 129.

See tit. PREMUNIRE.

5. *Popish Recusancy.*

This disability of popish recusancy convict is by virtue of the statute 3 Jac. c. 5. which disables to all intents, *&c.* except where the party sues for lands, tenements, leases, annuities, rents, and hereditaments, or the issues or profits thereof, which are not to be seised into the hands of the king, his heirs or successors. Gilb. Hist. C. P. 207. Ld. Raym. 243. 3 Lev. 308. 8 Mod. 43. Lev. Entr. 19. See 18 G. 3. c. 60. 31 G. 3. c. 32. 43 G. 3. c. 30.

See tit. POPISH RECUSANCY.

‖6. *Coverture.* See *post*,‖

(C) Of Pleas in Abatement with respect to the Person of the Defendant; and herein of privileged Persons.

2 Mod. 297. Vaug. 155. 2 H. 7. 2. 2 Roll. Abr. 272. Lut. 44. 639. 2 Inst. 551. 4 Inst. 71, 72. Crom. Jur. Courts, 11. Gilb. Hist. C. P. 209. 212.

THE officers of each court enjoy the privilege of being sued only in those courts to which they respectively belong; the reason whereof is, because of the duty they are under of attending those courts, and lest their clients' causes should suffer if they were drawn to answer to actions in other courts.

What persons are privileged, *vide* head of *Privilege*, Vol. VI., and for precedents of pleas of privilege, *vide* Thomp. 4. Rob. Ent. 199. Rast. Ent. 106. 178. 472. Brownl. 161. 167. 168. Hern. 3. 3 Inst. Clericalis, 32 — 55. Where they are not obliged to put in special bail; and where bail must be put in when they sue, *vide* head of *Bail in Civil Causes*. ‖As to pleas to the person of the defendant in courts of equity, see Beames's Plead. Eq. 129., &c.‖

Lutw. 44. 639. Bro. Traverse, 27.

[Whenever therefore an attorney is sued out of his own court, he may say that he is attorney, *&c.* of another court, and conclude with *unde non intendit quod cur., &c. hic placit. prædict. versus eum cognoscere velit aut debeat, &c.* But the plaintiff may reply that he is a husbandman, *&c.* in the country, and traverse his being an attorney.

2 Wils. 42. 228. 1 Str. 546. 4 Bur. 2109. Andr. 45. 1 Bos. & Pul. 4.

The privilege is not the privilege of the officers, but of the suitors; and attendance being the ground and foundation of it, it must be alleged that the officers are actually attendant in their respective courts, otherwise the plea will not be allowed.] ‖See head *Privilege* (B), Vol. VI.‖

Saund. 67, 68. Turvill's case. Gilb. Hist. C. P. 209. 210. *Contr.* Lodge's case, 2 Leon. 156. Dy. 217. a.

But the plaintiff must have the same remedy against the officer in his own court, as in that where he sues him; for if money be attached by foreign attachment in the sheriff's court of *London*, the officer shall not have his privilege; because in that case the plaintiff would be remediless.

Watkins v. Hews, 1 Sid. 362.; [and *vide* Ridge v. Hardcastle, 8 Term R. 417. *acc.*]

Saund. 97. Gilb. Hist. C. P. 210. So, if an attorney of the Common Pleas be sued in an appeal, he shall not have his privilege; for his own court hath no cognizance of this action; nor if sued as *bail*. Rep. & Cas. Pract. C. P. 64. Gilb. Hist. C. P. 210.

So, if a writ of entry, or other real action, be brought against an attorney of the King's Bench, he cannot plead his privilege; because if this should be allowed, the plaintiff would have a right without a remedy; for the King's Bench hath not cognizance of real actions.

Gardner v. Jessop, 2 Wils. 42. Wiltshire v. Lloyd, Dougl. 381. Hussey v. Jordan, *ibid.* Board v. Parker, 7 East, 35. *Vid. contr.* Silk v. Kennet, 3 Burr. 1583. and 382. notes.

[The jurisdiction of the court of conscience for *Westminster* extends to attornies; but not that of the county court of *Middlesex*, or of the *London* court of conscience; and a defendant who resides within the jurisdiction of this last court is not entitled to the benefit of the statute of 23 G. 2. c. 33., if the plaintiff is an attorney (*a*), unless the plaintiff wave his privilege by declaring as a common person.]

(*a*) Tagg v. Madan, 1 Bos. & Pull. 629. Parker v. Vaughan, 2 Bos. & Pull. 29.

The

The privileges which the courts indulge their officers with, is restrained so those suits only which they bring, or which are brought against them in their own right; for if they sue or are sued as executors or administrators, they then represent common persons, and are to have no privilege.

Hob. 177. Gage's case Gilb. Hist. C. P. 211. 2 Roll. Abr. 275. pl. 23. Noy, 68.

17 Vin. Abr. 517. pl. 2. Vent. 299. Godb. 10. pl. 13. Dy. 377. pl. 30. Latch. 199. Brownl 37. 47. 12 Mod. 316. Ld. Raym. 533. Salk. 2. pl. 4. 7. pl. 18. 2 Sid. 157. Dy. 24. 150. in marg. Sav. 20. pl. 49.

So, if an officer of one court sue an officer of *another court*, the defendant shall not have his privilege; for the attendance of the plaintiff is as necessary in his court, as that of the defendant in his: and therefore the cause is legally attached in the court where the plaintiff is an officer. (*a*)

Gilb. Hist. C. P. 211. Godb. 81. pl 95. Brownl. 37. [2 Black. R. 1525. ‖See 3 Price, 16.‖

(*a*) If privilege be pleaded to privilege, the court will not determine it on motion to set aside the plea, but oblige the party to demur. 2 Str. 857. 1 Bl. Rep. 54.] ‖And, where one attorney sued another of the *same court* by attachment of privilege and held him to bail, the Court of K. B. stayed the proceedings upon motion. However, considering this mode of application as a substitute for a plea in abatement, they did so without costs. Barber v. Palmer, 6 Term R. 524. Nicholls v. Earle, 8 Term R. 895.‖

So, if a privileged person bring a joint action, or, if an action be brought against him and others (*b*), he shall not have his privilege: but this is to be understood where the action is joint, and cannot be severed; for if the action can he severed, without doing any injury, the officer shall have his privilege. *Qu.*

Gilb. Hist. 212. Dyer, 377. p. 30. Godb. 10. 2 Roll. Abr. 275. 2 Lev. 129. Vent. 298, 299. ‖See Robarts v. Mason, 1 Taunt. 254. (*b*) But an attorney sued jointly with a person having privilege of parliament, does not lose his privilege. Ramsbottom v. Harcourt, 4 Maul. & S. 585.‖

[So in equity, if a suit be instituted against different persons, some of whom have privilege, and some not (*c*), or, if one defendant be not amenable to the particular jurisdiction, the plea of privilege will not be allowed.]

Mit. Eq. Pl. 183. Vin. Abr. tit. *University* (K), p. 3. (*c*) Hutton, 59.

An officer shall not have his privilege against the king (*d*); for as the executive power is lodged in the king, it would be unreasonable that his court, which gives relief to private persons, should protect any subject from being brought to justice for offending against the laws, which concern the whole commonwealth.

Fortesc. 342. Bro. Supersed. 1. 2 Roll. Abr. 274. Gilb. Hist. C. P. 208. (*d*) But in an action *qui tam* at the suit of an informer, he shall have his privilege. Lil. Reg. 7. 5 Lev. 398. Lutw. 193.

If an attorney of the Common Pleas be *in custodiâ maresch.* for want of bail at the suit of *A.*, he may plead his privilege. (*e*)

(*e*) But if he be in *custodiâ mareschal.* at the suit of *A.*, and *B.* declare against him in *custodiâ mareschal.* if he has waved his privilege as to *A.*, he cannot take advantage of it against *B.* For this *vide* 2 Roll. Abr. 275. pl. 7. Salk. 1 pl. 3. 5 Mod. 310. 3 Lev. 343. Ld. Raym. 155. ‖1 Stra. 191. 4 Barn. & A. 88.‖

After a general imparlance, an officer cannot plead his privilege (*g*), because by imparling he affirms the jurisdiction of the court; but by the better opinion it seems, that after a special imparlance he may plead his privilege. (*h*)

Bro. Priv. 25. 22 H. 6. 7 Sid. 29. Hard. 365. Lutw. 46.

Salk. 1. Str. 522. ‖(*g*) If a plea in abatement be pleaded after a general imparlance, the plaintiff may either demur to it generally, or treat it as a nullity, and sign judgment as for want of a plea.

a plea. Boddle v. Wilson, 6 Term R. 369. Doughty v. Lascelles, 4 Term R. 520. But if the bill is filed in *vacation* entitled of the preceding term, the defendant may plead in abatement within the first four days of the next term. Holme v. Dalby, 3 Barn. & A. 259. 1 Chitt. R. 704.; and see 2 Will. Saund. 2. *notâ.* (5th edit.)‖ (*h*) [By a special imparlance, in this case, must be understood a special general imparlance. *Vide suprà* (A), notes.] Plea of privilege without affidavit set aside. 2 Str. 738. ‖See Tidd. 640. (9th edit.), and *post.* (P).‖ It must be pleaded, it cannot be allowed on motion. 2 Salk. 544. 1 Wils. 306.] ‖*Sed vide suprà* Barber v. Palmer, 6 Term R. 524.; and Tidd's Prac. 81. (9th edit.)‖

2 Black. R. 1085. Crosley v. Shaw.

[An attorney who is arrested by *capias* on a special original out of the same court, is not entitled to his discharge on serving the sheriff with a writ of privilege, but must plead the privilege in abatement.

Comerford v. Price, Dougl. 312.

He may plead it as well to an action on a bill of exchange, as to any other personal action.

Fortesc. 343, 344. 4 Burr. 2027.

An attorney has not any privilege to be sued in *Middlesex* only; it is enough that he be sued in his own court.]

Salk. 1. pl. 2. Peaso v. Parsons. — Privilege should be pleaded — *prout patet per recordam.* Ibid.

In an action against *B.* he pleaded *quod ipse est unus attornat. cur. domini regis de B.* without saying *fuit tempore impetrationis brevis* (*a*); and a *respondeat ouster* was awarded.

‖(*a*) The privilege attaches only upon practising attornies. See the *rule of Court of* 1654. It is founded upon a presumption that the attorney is already in court attending his duty, so that the issuing of process merely to bring him there would be nugatory. But this reason does not apply to an attorney who is not practising at the time. Brooke v Bryant, 7 Term R. 25. Dyson v. Birch, 1 Bos. & Pull. 4.; and see 2 Maul. & S. 605.‖

Stokes v. Mason, 9 East, 424.

‖The courts will take notice of the privileges of their officers, so far as to support a plea, notwithstanding little informalities or want of precision, provided enough appear in it to shew that the defendant is entitled to privilege.

(*b*) 1 Lutw. 25. 3 Inst. Cl. 71. (*c*) 3 Inst. Cl. 69. (*d*) Id. 51. Rastal. 325. a. (*e*) 3 Inst. Cl. 53. Rastal, 324.

Under the head of Pleas in Abatement to the person of the defendant, may also be included coverture in the defendant (*b*), or that the plaintiffs or defendants, suing or being sued as husband and wife, are not married (*c*), or any other plea for want of proper parties, as that there is an executor (*d*), administrator (*e*), or other person (*h*) not named.

(*g*) 3 Inst. Cl. 53. 119. 1 Lutw. 696.; and see 1 East, 634.

(*h*) 2 Will. Saund. 115, 116. 1 Vent. 167. 1 Ld. Raym. 127. 2 Wils. 414.

If an action be brought for a *tort* by one of several joint tenants or tenants in common, the defendant must plead the nonjoinder of the others in abatement, or he cannot take advantage of the objection. (*h*)

(*i*) 2 Atk. 510. 5 Burr. 2611. 2 Black. R. 947. 5 Term R. 649. 1 Will. Saund. 291. c. d. (5th edit.)

And so also, if an action on a *contract* is brought against one of several joint contractors, the defendant can only take advantage of the nonjoinder by plea in abatement. (*i*)

(*k*) Moo. & Malk. 88. 1 Stark. Ca. 358.

The defendant cannot, however, plead a secret partnership in abatement. (*k*)

3 *Id.* 8.; *sed vide contrà*, 5 Taunt. 609. 1 Marsh. 246.

If an action be brought against a carrier in *case* for not safely carrying

carrying goods, the defendant may plead in abatement that his partners ought also to have been sued. (*a*)

(*a*) 6 Term R. 369. 2 New R. 365.; but see 5 Term R. 649. 2 Chitt. R. 1. 6 Moo. 141. 3 Brod. & B. 54. 2 Marsh. 485.; from which it seems that if the action on the case is grounded on the custom of the realm, it is otherwise; and see 1 Will. Saund. 291. e. (5th edit.)

If an action of debt be brought on the stat. 9 Ann. c. 14. to recover back money won at play, the defendant may plead in abatement that the money was due from others not named as well as himself. (*b*)

(*b*) 7 Term R. 257.

In these cases, the defendant, if required, must deliver to the plaintiff the places of abode, and additions of the parties jointly liable, or the Court of King's Bench will set aside the plea. (*c*)

(*c*) 4 Barn. & Ald. 93.; and see 1 Younge & J. 257.

In an action on the case against a common carrier, for not safely carrying a passenger, the defendant cannot plead in abatement the nonjoinder of a co-proprietor. (*d*)‖

(*d*) 2 Chitt. R. 1.; and see 5 Term R. 649. 6 Moo. 141. 3 Brod. & B. 54. 9 Price, 408.

See further tit. ATTORNEY and PRIVILEGE.

(D) Of Misnomer, and want of Addition.

MISNOMER is a good plea in *abatement*; for since names are the only marks and *indicia* which human kind can understand each other by, if the name be omitted or mistaken, there is a complaint against nobody. (*e*)

[(*e*) It is pleadable only in abatement. 2 Black. R. 1120.] ‖That is where the process is not bailable. 7 Dow. & Ry. 258. Tidd, 448. (9th edit.) But if the defendant has been arrested by a wrong name, the court will set aside the proceedings. 1 Marsh. 477. 4 Maule & S. 360. 1 Chitt. R. 282.; *sed vide* 4 Barn. & C. 970. 5 Bing. 296.; and discharge him if in custody. 2 Taunt. 599. 4 Maule & S. 360.; but see 1 Price, 277. 391. 2 Price, 328. Tidd, 447. (9th edit.)‖

But, though a defendant may, by pleading in *abatement*, take advantage of a *misnomer* when there is a mistake in the writ or declaration, as to the name of baptism or surname; yet in such a plea he must set forth his right name, so as to give the plaintiff a better writ. (*g*)

Finch. 363. 9 H. 5. 1. pl. 3. Where by his appearing by that name, or not taking advantage of it, such mistake will be aided, *vide* tit. *Error*. *Vide* Yelv. 112. ‖Tidd, 447. 657. (9th edit.)‖ Must, in setting forth his name, say, that by such name he was known at the time of the writ purchased. Skin. 620. pl. 17. *Vide* Salk. 7. pl. 17. Goulds. 86. (*g*) So, if he plead a mistake in the addition, he must set forth his right addition. 2 Stra. 816. 10 Mod. 208. 2 Ld. Raym. 1178. 1541.]

One defendant cannot plead *misnomer* of his companion; for the other defendant may admit himself to be the person in the writ. Lutw. 36.

The defendant, though his name be mistaken, is not obliged to take advantage of it; and therefore if he be empleaded by a wrong name, and afterwards empleaded by his right name, he may plead in bar the former judgment, and aver that he is *una et eadem persona*.

2 Stra. 1218. J. Villars, who pretended himself to be Earl of Buckingham, was arrested by the name of *J. Villars, armiger*; and on motion, the court gave him leave to put in bail, without joining in the recognizance, and thereby not estop himself. *Vide* Salk. 3. pl. 7. Ld. Raym. 64. 249. 7 Mod. 38. Stra. 205. 2 Stra. 811. ‖If a party make a bond by the name of *A. B.*, of *C.* in the county of *D.*, and in an original writ on the bond he is described accordingly, and is outlawed, he cannot reverse the outlawry on the ground that he was not conversant in *C.* in the county of *D.*, and that there is no such place, for he is estopped by his bond. Bonner v. Wilkinson, 5 Barn. & A. 682.‖

Vide Cro. Car. 104. 21 E. 4. 72. 2 Inst. 670. Sid. 40. Litt. R. 1. *Vide* head of *Misnomer and Addition*, and

In case of felony at common law, if a person were indicted by a wrong name, he could not plead *misnomer*, but was obliged to plead to the felony; for the fact being sworn against the party present, it was thought that there could be no injury by the *misnomer*, as there might be, where the party appeared by attorney; and felons generally go by no certain name, nor have they any fixed habitation.

2 Hawk. P. C. 186, 187.; that the party accused may take advantage of *misnomer*, or *the want of addition*, but yet must plead over to the felony; but though such plea be found for him, he is not to be discharged, but must be indicted over again: neither shall such plea, if found against him, be peremptory, but he shall be tried on his plea in chief. ‖By 7 G. 4. c. 64. § 19. no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition or wrong addition, if the court shall be satisfied by affidavit of the truth of such plea; but the court shall amend the indictment, &c. and call on the party to plead thereto.‖

‖A plea of this statute, and that no addition had been given to the defendant either in the recital of the writ or in the

But it is now necessary to set forth the state, place of abode, and dignity of the person empleaded, lest an innocent person, by having the same name with the real defendant, should suffer; therefore the 1 H. 5. c. 5. enacts, That in all personal actions, appeals, and indictments there shall be added to the names of the defendants their estates, degrees, mystery, and place of abode.

subsequent part of the declaration, was considered as a nullity by the Court of C. P. and the plaintiff had leave to sign judgment. Gray v. Sidneff, 3 Bos. & Pull. 395. Murray v. Hubbart, 1 Bos. & Pull. 645. Or he might have moved to quash it. Wallace.v. Duchess of Cumberland, 4 Term R. 371. Deshons v. Head, 7 East, 385.; and see 2 New R. 188. 4 Taunt. 668.‖

(*a*) Mistakes in such additions are good objections in

Additions (*a*), which are inducements to the action, must be made use of; as, if one is liable as heir, he must be named heir: so, if as executor, he must be named such.

abatement both at law and in equity. Rast. 324. 11 H. 7. 11. Mitf. Eq. Pl. 192. Pr. Reg. 278.

See further tit. MISNOMER and ADDITION, (E) (F).

(E) Of Abatement by the Demise of the King.

Proceedings on an information, in nature of a *quo warranto*, are not abated by the demise of the crown. 2 Stra. 782. Where the king brings a writ of error in *quare impedit*,

AT common law all patents of justices, commissions civil and military, were determined by the death of the king; and all suits depending in the king's courts were discontinued, so that the plaintiffs were obliged to commence new actions, or to have re-summons or attachment on the former processes, to bring the defendants in; but to prevent the inconvenience, expense, and delay, which this occasioned, were the statutes of 1 E. 6. cap. 7. 7 & 8 W. 3. cap. 27. § 21. and 1 Ann. st. 1. cap. 8. § 5. made, which *vide* under title COURTS, AND THEIR JURISDICTION IN GENERAL, (C).

it abates by his death. 2 Stra. 837. Fort. 213. Fitzgib. 35, 36. *Scire facias* to repeal a grant of a market, is an original writ, and within the general words of the statute 1 E. 6. c. 7. and 1 Ann. c. 8. and does not abate. Stra. 43. ‖By 11 G. 4. and 1 W. 4. c. 43. § 4. all commissions for taking affidavits in any court, and for taking recognizances of bail shall, notwithstanding the demise of the crown, remain in force during the pleasure of the successor.‖

(F) Of

(F) Of Abatement by the Death of Parties.

HERE the general rule to be observed is (*a*), that wherever the death of any party happens pending the writ, and yet the plea is in the same condition as if such party were living, there such death makes no alteration; for, where the death of the parties makes no change of proceedings, it would be unreasonable that the surviving parties should make any alteration in the writ; for if such writ and process were changed, it would set rights but in the same condition they were in at the death of the parties; and it would be absurd that what made no alteration should change the writ and the process: and on this rule all the diversities turn.

5 Mod. 249. 2 Vent. 196.

[(*a*) The rule in a court of equity in this respect, is similar to that which is here stated to prevail at law. If the interest of a party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, the suit does not abate. Or, if the interest of a party dying survives to another party; as, if a bill is filed by or against trustees or executors, and one dies; or by and against husband and wife in right of the wife, and the husband dies, the proceedings do not abate. So, if a surviving party can sustain the suit, as in the case of several creditors plaintiffs on behalf of themselves and other creditors. For the persons remaining before the court in all these cases, either have in them the whole interest in the matter in litigation, or at least are competent to call upon the court for its decree. Mitf. Eq. Pl. 56. 3 Chan. R. 40. 2 Vern. 249. 3 Atk. 726.] ‖Where husband and wife were defendants to a bill praying an assignment of a term, which the wife by her answer claimed to hold to preserve her dower on the death of the husband, Lord *Eldon* inclined to think the suit might proceed without a supplemental bill. 1 Jac. R. 495. Where a married woman by her next friend was plaintiff, and the next friend died, she was ordered to name a new one within two months, or the bill to be dismissed with costs out of the fund in court. Barlee v. Barlee, 1 Sim. & Stu. 100. The death of one defendant does not necessarily prevent judgment. Davies v. Davies, 9 Ves. 461. A suit by a corporation does not become defective by death of some of the members, *aliter* of a suit by the members in their individual character. Blackburn v. Jepson, 3 Swanst. 138.; see 1 Jac. R. 73. 1 Russell, 317.‖

The first difference is in real actions; where there are several plaintiffs, and there is summons and severance, as there is in most real actions, *there* the death of one of the parties abates the writ; but in personal and mixed actions, (where one entire thing is to be recovered,) *there* the death of the parties does not abate the writ; and the reason of the difference is, that where there are two joint tenants, and the one goes on to recover his moiety, and the other will not proceed, there is no reason that he who is willing should not recover his right, since such tenant has a distinct moiety, and therefore should have an action to recover. But no summons or severance lies in personal actions, as, if trespass be committed on such joint tenants, they must both join in the action; for as one may release the whole, so the other may refuse to go on, and his companion cannot recover his part of the damage without him: so, in debt on an obligation to two there can be no summons and severance, because one of the joint obligees may release the bond: but, if a man appoints two his executors, there shall be summons and severance, because one of the executors may release; yet such a release is a *devastavit* in him; but, if he will not proceed at law, it is no *devastavit*; and therefore both executors being only trustees for the person deceased, they shall not be compelled to go on together: but if one refuses, the other may bring his action in the name of both, and have summons and severance; for otherwise

Cro. Eliz. 982. Co. Litt. 139. Cro. Jac. 117. 10 Co. 134. Jon. 452. 6 Co. 26.

wise each executor might by collusion with the debtor, and not proceeding, keep the other from recovering the assets, and yet not create a *devastavit* in himself. But after such summons and severance he does not proceed for the moieties as in real actions, but he proceeds as the sole representative of the testator, and is entitled to the whole the testator was in his lifetime.

Co. Lit. 139. From these premises it follows, that if there be two joint-tenants or copartners, and they bring a real action, and one be summoned and severed, the other shall proceed for his moiety; and if the person severed die, the writ abates, because he goes for the whole, in case of the death of the joint-tenant, or of the co-partner without issue; and it would be improper to do it on that writ, where by the summons and severance he went only for a moiety before; and the writ cannot have a double effect, for a moiety in case of summons and severance, and for the whole in case of survivorship; and therefore since the nature of things is changed by the death of one of the parties, there must be another writ. And it is the same law, if such joint-tenants proceed without summons or severance; for since both by the writ might by possibility recover their moieties, they shall not go on for the whole in case of survivorship; because the words and effect of the writ at the time of its first purchasing were, that each might recover his moiety; and therefore a new writ must be purchased to enable one to proceed for the whole: but in personal and mixed actions, where there is summons and severance, and yet after such summons and severance the plaintiff goes on for the whole, *there*, if one of them die, the writ shall not abate, because he goes on for the whole after summons and severance; and if he were to have a new writ, it would only give the court authority to go on for the whole.

Cro. Eliz. 652. Leon. 44. Therefore, if there are two executors, and they bring an action of debt, and one of them is summoned and severed, or not, and such severed person dies, yet the writ shall not abate.

Co. Lit. 139. So, if two joint-tenants bring a writ of ward, and they are summoned and severed, and the severed person dies, the writ shall not abate; because after such severance he went on for the whole, and so he does after the death.

Dyer. 279. So, in a *quare impedit* by two joint-tenants, and one summoned and severed; if the severed person die, the writ shall not abate; because the adowson is an entire thing, and the survivor proceeded for the whole after the severance, and so he may after the death.

10 Co. 134. Co. Lit. 139. In judicial writs, the suit shall not abate by death, if the person surviving be entitled to the whole (*a*); as if a fine be levied by two coparceners, and one of them die without issue, proceedings shall go on for the other, because he is entitled to the whole by survivorship; but if the other coparcener have issue, then the writ shall abate, for the survivor is only entitled to a moiety; for there is no summons and severance in judicial writs.

(*a*) But shall abate in a *sci. fa.* being an original writ. Brownl. 64. but not upon a *writ of enquiry*. Leon. 265.

20 H. 6. 30. But if there be several persons named as plaintiffs in the writ, and

and one of them was dead at the time of purchasing the writ, this may be pleaded in abatement; because it falsifies the writ, and because the right was in the survivors at the time of suing the writ, and the writ not accommodated, as the case then was. 18 E. 4. 1. 2 H. 7. 16. Brownl. 5. 4. Clift's Ent. 6. Rast. Ent. 126.

But if an erroneous judgment be given against two, either of them may bring a writ of error, and he may summon and sever the other; for it would be unreasonable that the one should not discharge himself of an erroneous judgment, because the other will not intermeddle; and default of one in a personal action shall not prejudice the other. 26 Ass. p. 25. Bro. Summ. & Sev. 19.

If there be several defendants in the original action, and one die, the writ does not abate, because there being a joint demand, it survives against the residue; but if one happen to die pending the writ, there must be a suggestion on the roll, because it would be error to give judgment against a dead person. Cro. Car. 426. Jon. 367. Stil. 299. Hard. 151. 161. 1 Show. 186.

In a writ of error, if there be several plaintiffs, and one die, the writ shall abate; because the writ of error is to set persons *in statu quo* before the erroneous judgment was given; and the plaintiffs in error are distinct sufferers in the judgment, since there might be different executions issued thereupon, and different liens made by such judgment on the lands of each of them; and, by consequence, the survivor cannot prosecute the writ of error for the whole, lest by collusive persuasion, or by negligence, he should hurt the representative of the deceased. Yelv. 208. 212, 213. Ventr. 34. *contrà* Sid. 419. [But see Penoyer v. Brace, Ld. Raym. 244. where the doctrine advanced in the text is admitted by the court.] ‖But the above cases (even the last) seem all to have been before the 8 & 9 W. 5. c. 11. (see *post.*), and by the effect of that statute the death of one plaintiff in error does not abate the writ. Clarke v. Rippon, 1 Barn. & A. 586.‖

But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment is to go to the survivor, and he only is to defend it. Sid. 419. Ld. Raym. 244. ‖1 Salk. 319.‖

In *audita querela* by two, the death of one shall not abate the writ; for the survivor is not to be restored to any thing that he has lost, but only to discharge himself of the execution, and thereupon, notwithstanding the death of the other, he may proceed for a discharge *in toto* for himself. Theol. 139. 3 H. 7. 1. 3 Mod. 249.

[Upon the same principle it was holden, that a prohibition by husband and wife to a suit in the spiritual court, did not abate by the death of the husband.] Middleton and Wife v. Crofts, Andr. 57. Cas. temp. Hardw. 395.

‖Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action, it was held, that it thereby abated.‖ Checchi v. Powell, 6 Barn. & C. 253. 8 Dow. & Ry. 592.

[The death of the lessor of the plaintiff in ejectment (though only tenant for life) is no abatement. 2 Stra. 1056. ‖As to costs in such case, see Tidd, 1243. (9th edit.)‖

A *fieri facias* doth not abate by the death of the plaintiff *after* the seizure of the goods; for by the seizure the property is changed. But if the goods seized are not sufficient to satisfy the debt, a second *fieri facias* cannot issue without a revivor of Clerk v. Withers, 2 Ld. Raym. 1072. 1 Salk. 322. S. C. 6 Mod.

290. S. C. (a) Wharam v. Broughton, 1 Ves. 180.

of the judgment. (a) An *extent* abates where the death happens *before* the *liberate*; for until that is awarded, the execution is incomplete. So, a *sequestration* to compel performance of a decree when the party dies before order for sale of the goods.

8 & 9 W. 3. c. 51. § 3. 27 Eliz. c. 13. § 3.

A suit for partition of lands is not abated by the death of one of the tenants. Nor is a suit on the statute of *hue and cry*, commenced in the name of the clerk of the peace, abated by his death or removal.

1 Burr. 147. 219. 4 Burr. 2277. Bates v. Lockwood, 1 Term R. 637. ‖1 Ken. 253. 1 East, 409. 1 Taunt. 585. Tidd, 932. (9th edit.) 1 Crompton & Jervis, 47.‖

If the plaintiff or defendant die whilst the court are considering of their judgment, ‖or after a special verdict or special case, and pending the time for argument, or for advising thereon, or on a motion in arrest of judgment, or for a new trial,‖ they will permit the judgment to be entered up as of the term in which it *regularly* might have been: so, perhaps, if there be any frivolous delay by the other party; but, where the proceedings are in the common course of law, they cannot interfere.

Sir Thomas Waller v. Hanger, 2 Bulstr. 261. Morby v. Urlin, Hardr. 161. (b) Hammon v. Gryffith, Cro. Eliz. 583. Anon. Moor, 541.

An information does not abate by the death of the attorney-general; nor by the death of a relator who prosecutes for the king: nor, it seems, by the death of the informer *qui tam* (b), &c. for in such case the attorney-general may proceed for the king's moiety.

Mitf. Eq. Pl. 91. Pr. Ch. 13. 2 Eq. Cas. Abr. 1. 1 Ves. 71. 2 Ves. 327.

The proceedings upon an information in equity can only *abate* by the death or determination of interest of the defendant. But, if there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit: but, if all the relators die, or if there is but one, and that relator dies, the Court will not permit any further proceeding till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly; otherwise there would be no person liable to pay the costs of the suit, in case the information should be deemed improper, or for any other reason should be dismissed.

Eq. Cas. Abr. 2. p. 7.

The benefit of a decree in equity may be had, notwithstanding the death of some of the parties, provided that nothing be requirable of their representatives.

1 Vern. 351.

After a cause has been heard on a bill of interpleader, and a trial at law has been directed to settle the right between the defendants, the death of the plaintiff does not abate it, for his interest is at an end.

Continued by 30 Car. 2. c. 6. and made perpetual by 1 Jac. 2. c. 17. § 5.

By the 17 Car. 2. c. 8. it is enacted, "That in all actions "personal, real, or mixed, the death of either of the parties (c) "between verdict and judgment shall not be alleged for error, so "as such judgment be (d) entered within two terms after such "verdict." (e)

(c) If either of the parties die at any time before the assizes, it is out of the statute; but if after the assizes begin, though before trial, it is no error; for the assizes are but one day in law. Salk. 8. pl. 21. [7 Term R. 31. And in the former case, the court said it was in their discretion whether they would arrest the judgment. Salk. *ubi supra*. But in Lord Raym. 1415. it was holden not assignable for error, it being stated on the record that the defendant appeared *per attornatum*

attornatus suum.] (*d*) If after the verdict, and before the day in bank, the plaintiff dies, and the defendant signs judgment the second term after the verdict, this is within the statute, and the same as if he had actually entered judgment on the roll. Sid. 385. [Judgment entered according to this statute, after the plaintiff's death, shall relate in all respects to his life. 1 Lev. 278. Raym. 210. Where the jury found a special verdict, and the plaintiff died in the term in which it was to be argued, the judgment was by consent entered up as of the first day of that term. Pond v. King, 1 Wils. 124. Where the plaintiff dies between the verdict and the entry of the judgment, his representative cannot take out execution without a *scire facias*. Earl v. Brown, 1 Wils. 302.] ‖(*e*) The statute does not apply to cases of nonsuit, Dowbiggin v. Harrison, 10 Barn. & C. 480; nor to cases where the party dies between interlocutory judgment, and before the return of the enquiry; it is confined to verdicts. 4 Taunt. 884.‖

[An information for a penalty under the French act was adjudged not to be within this statute, but to abate by the death of the defendant between the verdict and the judgment; for, in the first place, it is not an action real, personal, or mixed; secondly, the king cannot be properly said to be a party; thirdly, it is not a duty, or in lieu of customs, or any revenue of the crown; and lastly, actions do not comprehend informations between party and party, or include the king. A suggestion of the death upon the roll confessed by the attorney-general was thought sufficient without a writ of error. Attorney General v. Buckley, Parker, 264.

The rule laid down by the Lord Chief Baron *Gilbert* in the preceding part of this chapter respecting the non-abatement of a suit by the death of any of the plaintiffs or defendants, when such death made no alteration in the proceedings, though founded in reason, was not uniformly supported by authorities; it is therefore enacted by the 8 & 9 W. 3. c. 11. § 7. 'That 'if there be two or more plaintiffs or defendants, and one or 'more of them die, if the cause of action survive to the surviving 'plaintiff or plaintiffs, or against the surviving defendant or 'defendants, the writ or action shall not be thereby abated; but 'such death being suggested on the record, the action shall pro-'ceed at the suit of such surviving plaintiff or plaintiffs against 'such surviving defendant or defendants.'

The formal suggestion of the death need be only on the plea-roll; nothing more is necessary on the nisi-prius-roll than merely to point out to the judge what he is to try, and between whom. Farr v. Denn, 1 Burr. 362.

Although the statute makes mention only of actions at law, yet it hath been construed to prevent the abatement of a suit in equity, provided that the subject-matter of the suit be not affected by it.] Brown v. Higden, 1 Atk. 291.

'By the last-mentioned statute, § 6. it is enacted, That if any 'plaintiff happen to die after an interlocutory judgment, and 'before a final judgment obtained therein, the said action shall 'not abate by reason thereof, if such action might originally be 'prosecuted or maintained by the executors or administrators of 'such plaintiff; and if the defendant die after such interlocutory 'judgment and before final judgment therein obtained, the said 'action shall not abate, if such action might originally be pro-'secuted or maintained against the executors or administrators 'of such defendant (*a*), and the plaintiff, or if he be dead after 'such interlocutory judgment, his executors or administrators, 'shall

[Where a defendant died before the expiration of the time to plead under a judge's order, it was holden, that the plaintiff could not, under this act, sign judgment, and sue out a *scire facias*

thereon. 1 Wils. 315. Wollop v. Irwin.] ‖(a) See 4 Taunt. 884.‖

'shall and may have a *scire facias* against the defendant, if living 'after such interlocutory judgment; or if he died after, then 'against his executors or administrators, to shew cause why 'damages in such action shall not be assessed and recovered by 'him or them; and if such defendant, his executors or admini-'strators, shall appear at the return of such writ and not shew 'or allege any matter sufficient to arrest the final judgment; or 'being returned warned, or upon two writs of *scire facias* it be 'returned, that the defendant, his executors or administrators, 'had nothing whereby to be summoned, or could not be found 'in the county, shall make default, that thereupon a writ of 'enquiry of damage shall be awarded, which being executed and 'returned, judgment final shall be given for the said plaintiff, 'his executors or administrators, prosecuting such writ or writs 'of *scire facias*, against such defendant, his executors or admi-'nistrators respectively.'

Berger v. Green, 1 Maule & S. 229.; and see 3 Maule & S. 281. 2 Chitt. R. 233.

‖Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in term, the court granted a rule to compute principal or interest on the bill of exchange on which the action was brought.‖

Turner v. Cowper, Barnes, 210.

[Where plaintiff died after a rule by consent to refer to the prothonotary, and before the report, the court allowed his executor to be made a party to the rule, and directed the prothonotary to proceed without the defendant's consent.]

6 G. 4. c. 16. § 67.

‖By 6 Geo. 4. c. 16. § 67. whenever an assignee of a bankrupt shall die, or a new assignee or assignees shall be chosen, no action at law or suit in equity shall be abated, but the court in which any action or suit is depending may, upon suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in place of the former, and such action or suit shall be prosecuted in the name of or names of such surviving or new assignee or assignees in the same manner as if he or they had originally commenced the same.

7 G. 4. c. 57. § 26.

A similar provision is contained in the last insolvent debtors' act in case of the death or removal of assignees of insolvent debtors.‖

(G) By Reason of Coverture.

Doct. Pl. 3. Sid. 410. Leon. 168. 169. *Vide* tit. *Baron and Feme.* In an action against baron and feme, the buron died

COVERTURE is a good plea in *abatement*, which may be either before the writ sued, or pending the writ. By the first the writ is abated *de facto*, but the second only proves the writ abateable; both are to be pleaded, with this difference, that coverture pending the writ must be pleaded *post ultimam continuationem*; whereas coverture before the writ brought may be pleaded at any time (*a*), because the writ is *de facto* abated; but, if a feme sole takes out a writ, and after marries, the defendant was

was legally attached on such suit; and therefore may plead in chief to it any defence he has.

and the feme married again *pendente placito*; and the court inclined to think the writ abated, because her name was changed. Stile, 138. [But 2 Ld. Raym. 1525. 2 Stra. 811. Barnard. K. B. 70. are all express that coverture in the defendant after action brought cannot abate plaintiff's writ. See too, to the same effect, 2 Rolle's R. 53.] (*a*) *Vide infrà.*

If a writ be brought by *A.* and *B.* as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in *abatement*; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out.

Fitz. Brief, 476.

If a writ be brought against a feme covert as sole, she may plead her coverture; but if she neglect to do it, and there be a recovery against her as a feme sole, the husband may avoid it by writ of *error*, and may come in at any time and plead it.

Latch, 24. Stile, 254. 280. 2 Roll. R. 53. [The plea of coverture, whether in plaintiff or defendant, can only be in abatement. Milner v. Milnes 3 Term R. 627. See tit. *Baron and Feme.* ‖This is too generally stated. Coverture at the time when the supposed contract was made, or cause of action arose, may be pleaded in bar or given in evidence on *non-assumpsit*, for it shews an incapacity to contract, &c.; but if the feme was unmarried when the cause of action arose, then the plea must be in abatement; for it does not destroy the contract, &c. but only shows that the husband is a necessary party to the action. 8 Term R. 545. 3 Camp. 123. 3 Term R. 627. 6 Term R. 265.‖

If an action be brought in an inferior court against a feme sole, and pending the suit she intermarry, and afterwards remove the cause by *habeas corpus*, and the plaintiff declare against her as a feme sole, she may plead coverture at the time of suing the *habeas corpus* (*b*), because the proceedings here are *de novo*, and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the court will grant a *procedendo*; for though this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; and the plaintiff had bail below to this suit, which by this contrivance he is ousted of, and, possibly, by the same means, of the debt.

Salk. 8. pl. 20. Hetherinton v. Reynolds. Gilb. Hist. C. P. 245. (*b*) [But the plea of coverture in this case hath been disallowed. Haddock v. Howard. Barnes, 355.]

If a feme sole plaintiff, after the verdict, and before the day in bank, takes husband, she shall have judgment, and the defendant cannot plead this coverture, for he has no day to plead it in.

Cro. Car. 135. 1 Bulst. 5.

‖If she take husband after suing out the writ, and before declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement; and so also if a married woman sues alone for an injury to her property whilst single.‖

Morgan v. Painter, 6 Term R. 265. Milner v. Milnes, Term R. 327.

[In equity, a suit does not abate by the marriage of a female defendant, but the plaintiff may proceed, only entering the name of the husband and wife in the subsequent proceedings.

1 Ves. 182.

Though a suit in equity regularly become abated by the marriage *of a female* plaintiff, yet if she afterwards proceed in the suit *as a feme sole*, the mere want of a bill of revivor is not error *upon which* a decree can be reversed upon a bill of review by the *defendant.* (*c*) And if the husband die before revivor, she may *proceed without* it, for then her incapacity to prosecute the suit is

Lady Cramborne v. Dalmahoy, 1 Ch. R. 231. (*c*) Godkin v. Earl Ferrers, 1772, cited in

not be permitted to proceed any farther in the superior court.

(a) Petrie v. White, 3 Term R. 5.

(a) So, if in an action for bribery on the statute of 2 G. 2. c. 24. it appear that the plaintiff was guilty of *wilful* delay in the prosecution of his suit, which fact the defendant could not introduce either on the record, or at the trial, the court will stay the proceedings; for *wilful* delay is expressly prohibited by the statute.

Peshall v. Layton, 3 Term R. 712.

So, where they find that actions have been brought against several upon a penal statute which makes only one offence; they will stay the proceedings upon payment of one penalty.]

(b) Salk. 2. pl. 5. See 2 Ld. Raym. 853. Show. 169. Roll. Abr. 783.

Where the writ is only abateable, it must be abated by pleading in time; for matters in (b) and before the writ (c), cannot be taken advantage of in error. That a man shall not assign that for error which he might have pleaded in abatement. Carth. 124. There is a difference between original and judicial writs; for in the former, matter of form abates them as well as substance; *aliter* in the latter; for if the substance be good, the want of form will be aided. 41 E. 3. 13, 14. (c) Otherwise, of faults in the proceedings after the writ. Bro. Faux Latin, 9. 48. For this, *vide* tit. *Error*.

Carth. 124. *per Holt.* 3 Term R. 627. Cro. El. 554.

Therefore, if a feme covert bring an action in her own name *per attornatum*, and the defendant plead in bar to the action, he shall never afterwards assign the coverture for error.

Salk. 4. pl. 10.

So, though it be a good plea for a defendant to say that a stranger is tenant in common with the plaintiff, yet if he does not plead it in *abatement*, he shall not have advantage of it in arrest of judgment.

arth. 261.

So, if an action be brought against one executor, where there are more, if that one executor do not plead this in abatement, but plead to the action, he shall never have advantage of this plea afterwards.

‖Cro Eliz. 554. Moor, 466.‖

So, where trespass is brought by one joint-tenant, or by one tenant in common, and the defendant pleads to the action, and the jury find specially, that another (not named) is joint-tenant or tenant in common with the plaintiff; yet he shall have judgment, notwithstanding the writ at first was abateable.

Saund. 291.

So, where an action of debt is brought on a joint bond against one of the obligors, and upon *non est factum* pleaded, the jury find that *J. S.* (then living) was jointly bound with the defendant, yet the plaintiff shall have judgment.

Trin. 24 Car. 2. Rot. 1216. in *B. R.* between Blackburn v. Grove, cited in Carth. 63.

Tenant in common of lands brought an action of trover in his own name alone for cutting down trees and carrying them away; the defendant pleaded to issue; and in a special verdict it was found, that the plaintiff was tenant in common with *J. S.* not named; yet the plaintiff had judgment, because this was a matter pleadable in abatement.

Rees v. Abbot, Cowp. 812. Abbot v. Smith, 2 Black. R. 947.

[If one only be sued on a joint note, it must be pleaded in abatement; it will not be error. So, in actions against partners. But where an action is brought by a joint covenantee (d), advantage may be taken of it by demurring generally.

Rice v. Shute, 5 Burr. 2611. 1 Black. R. 695. S. C. (d) Cabel v. Vaughan, 1 Saund. 291. 1 Sid. 420. S. C. 1 Ventr. 34. S. C. B. N. P. 158. 5 Co. 119. ‖That is if it appears on the record that there is another covenantee living and not joined, or if it be made to appear by praying

praying oyer of the deed and setting it forth, 1 Will. Saund. 154, a. *notâ*, and cases therein; and in such case the nonjoinder is also a ground of nonsuit or of error. *Ibid.*‖

In such a plea to an action on a bond, it must be stated that the other obligor executed the deed, and that he is still alive. It is not sufficient to say, that another, not named, was jointly bound. But, if it appear on the face of the declaration that both obligors have sealed, and both are living, the objection is good in arrest of judgment.

Sayer v. Chaytor, 1 Lutw. 696. 1 Saund. 291. Horner v. Moor, M. 2 G. 2. cited in 5 Burr. 2614.; ‖and 91 in notes.‖

see 1 Will. Saund.

But in trespass it is no plea in abatement that there is another joint-trespasser not named. (*a*)]

11 H. 7. 6.

‖(*a*) So, in any case of tort; Govett v. Radnidge, 5 East, 62. 1 Will. Saund. 291. e.; for torts are several in their nature, and the plaintiff may elect to sue all or any of the parties. But if the action is founded on matter *ex quasi contractu*, though its *form* be in *tort* the defendant may plead in abatement that other parties ought to be joined. Buddle v. Wilson, 6 Term R. 369. Powell v. Layton, 2 New R. 365. Weall v. King, 12 East, 452.; and see Green v. Greenbank, 2 Marsh. 485. Bretherton v. Wood, 3 Brod. & B. 54.; and there is a distinction between *personal* actions of *tort* and such actions when they concern *real property*. Therefore, if one tenant in common be sued in *tort* for any thing connected with the land held in common, he may plead the tenancy in common in abatement; see 1 W. Saund. 291 f. *notâ*, and cases there.‖

‖If one of several part owners of a chattel sue alone for a tort, advantage can be taken of the objection only by plea in abatement, even though the defect appear in the declaration. And if a defendant neglect to take advantage of it in that manner, in such an action by one part-owner, he cannot afterwards avail himself of it by a plea in abatement to another action by another part-owner. (*b*)‖

Addison v. Overend, 6 Term R. 766. Sedgeworth v. Overend, 1 Will. Saund. 291. k. 7 Term R. 279. (*b*) Although in actions of tort the nonjoinder of a co-plaintiff is matter in abatement only, yet according to the doctrine in the note above it would seem, that where the action is substantially founded on contract, the *form* of it in tort will not prevent the plaintiff being nonsuited for nonjoinder of other plaintiffs.

If a *quare impedit* be brought against the bishop and incumbent only, without naming the patron, though this might have been pleaded in *abatement*, yet if the defendant plead in bar, *&c.* it cannot after, upon a writ of *error*, be assigned for error; for though the want of a patron's being made a defendant might make the writ abateable, yet it was not thereby actually abated; and nothing shall be assigned for error concerning the writ, but what actually abates it.

Cro. Jac. 651. Bulst. 4, 5. 2 Brownl. 229. Palm. 306. 311. 2 Roll. Rep. 239. Dy. 76.

If an action be brought against Sir *Francis Fortesque, militem et baronettum*, and he appear and plead to issue, and a verdict and judgment be given for the plaintiff, the defendant in a writ of *error* shall not assign for error that he was a *knight of the bath*, and ought to be so named; for he has lost this advantage by appearing to the other name, and thereby concluded himself.

Roll. Abr. 781. 791. 869. Roll. Rep. 450. S. C.

If a writ be brought to the damage of 40*l.* and the plaintiff declare *ad damnum* 200*l.* and the verdict give 30*l.* this is no error after verdict, for the writ is not abated *de facto*, but only abateable by plea.

Palm. 270, 271. But as to this the difference is, that if the declaration varies in form, the defendant must plead it in *abatement*; but, if it varies in substance, the defendant may move it in arrest of judgment, or take advantage of it in error; because the

Court has no authority to proceed, having prosecuted a different matter from that which the writ has given it authority to take cognizance of. Jones, 304. Cro. Eliz. 722. Cro. Jac. 654. For this *vide* tit. *Error*.

Anon. 2 Atk. 15. Gwinn v. Poole, 4 Bro. P. C. 122. Fawkes v. Pratt, 1 P. Wms. 593. Mitf. Eq. Pl. 221.

[A bill in equity is not dismissed for want of parties; but stands over for amendment on paying the costs of the day. The want of parties may be pleaded in abatement; but, upon allowing the plea, the court will give the plaintiff leave to amend.]

(L) Where the Writ shall abate *in toto*, or in Part.

22 E. 4. 4. Hob. 199. 217. 245. Bulst. 1.

WHATEVER proves the writ false at the time of suing it out, shall abate the writ entirely (*a*); as, if it appears by the plaintiff's own shewing that he had no cause of action for part; therefore if an action of trespass be brought against two defendants, and the one plead that the other was dead *die impetrationis brevis*, or that there is none such *in rerum naturâ*, the whole writ shall abate; for it is the plaintiff's fault to use the authority of the court to call in a man that was dead; and it was no less an abuse of the process to issue it against a feigned person.

(*a*) But this falsification of the writ must be in a material point; for in a *præcipe quod reddat* against two, if one pleads non-tenure, and the other takes the whole tenancy on himself, the writ shall not abate in the whole, but stand good against him that hath accepted the tenancy, because there is a proper defendant to the action; and the non-tenure of the one does in no ways prejudice the other defendant. Rast. Entr. 365. Doctr. Pl. 7.

Doctr. Pl. 7.

But, if one of the defendants die pending the writ, this shall not abate the action against the other defendant; for this is the act of God, and no default in the plaintiff. See the 8 & 9 W. 3. c. 11. § 7. *supra* (F).

Hewitt v. Bibbins, 2 Wils. 374. Kretchman v. Beyer, 1 Term R. 463. Waugh v. Austen, 3 Term R. 437. Anon. 1 Atk. 263. Butler v. Davidson, Exchequer, East. 33 G. 3. But *contr. per* Lord *Thurlow*, where it happens before decree or judgment. Sellas v. Dawson, in Chancery, *Dec.* 8th, 1790. Co. Bpt. Laws, 622. 3d edit. Hedley v. Brown, Barnes, 389. ‖The case of Sellas v. Dawson, was considered and overruled by the Court of Exchequer in Butler v. Davidson. But in a later case, where after a decree in a cause, referring it to a master to take the accounts, the plaintiff, before the accounts were taken, took the benefit of an insolvent act, and assignees were appointed, who conceiving the suit did not abate, took out warrants to proceed in the accounts before the master; Lord *Loughborough*, upon a motion to stay proceedings till a supplemental bill should be filed, held, that there is no other way for the assignees to come into that court but by filing a bill: that though at law assignees have been allowed to proceed in the bankrupt's name, giving security for the costs, yet at law the defendant can lose nothing by the bankruptcy of the plaintiff but his costs; and security for the costs, therefore, is all that is necessary: that in equity more is necessary; a plaintiff may be decreed to account and to pay the balance, and there must therefore be a substantive plaintiff, a party to the cause, who may abide such decree as may be made. Williams v. Kinder, 4 Ves. 387.; and see Rylands v. Latouche, 2 Bligh, P. C. 566. And though bankruptcy of the plaintiff does not abate a suit in equity, yet a motion will be granted that plaintiff procure his assignees to file a supplemental bill within a given time, or that the suit be dismissed without costs. Wheeler v. Malins, 4 Madd. 171. Porter v. Cox, 5 Madd. 80. Randall v. Mumford, 18 Ves. 424. As to abatement by death or removal of assignees, see *ante* (F).‖

[A bill in equity is not dismissed for want of parties; but stands over for amendment on paying the costs of the day. The want of parties may be pleaded in abatement; but, upon allowing the plea, the court will give the plaintiff leave to amend.]

If

If there be two executors, and one who is named of *D.* say he is of *C.* the writ shall abate against both, because they are both representatives of one person, and must both be legally summoned; and as they are both but one person in the eye of the law, the plaintiff cannot proceed against the one without the other (*a*); but, in this case, the other defendant will be obliged to plead, though the defendant's plea in *abatement* shall be first determined; and if it be found for him, shall abate the writ *in toto*.

Co. Lit. 285. a. Doct. Pl. 7. 21 H. 6. 4. (*a*) The disability of one plaintiff shall stop the others from proceeding: for the writ, when abated for want of form, is abated *quoad* all, though they have pleaded to issue. 8 Co. 159. Carth. 96. But, if two executors sue, and set forth themselves to be executors, and that they proved the will, but upon the probate set forth, it appears that one only proved the will, and the defendant pleads this in *abatement*, a *respondeas ouster* will be awarded; for both have a right; and he that did not prove may come in when he pleases. Salk. 3. pl. 6. The setting forth that they had proved the will amounted only to surplusage; the method is, to declare as executors generally, and make a profert of the letters testamentary, whereby it appears they are executors.

At common law, non-tenure of parcel of the lands abated the whole writ; for this falsified the writ which alleged the defendant to be tenant of the whole. But it was thought very hard that a writ which was good in part, should be totally destroyed by this plea; and therefore 25 E. 3. c. 16. enacts, that the writ shall only abate for that part of which non-tenure is alleged.

Booth, 29. Bro. Nontenure, 33. 40. 50. From this statute arose the distinction in our books, that the plaintiff cannot destroy, but may abridge, his demand.

At common law, if the tenant plead *non-tenure and disclaimer*, the plaintiff cannot aver his writ, and say he was tenant; for in real actions anciently there were no damages given; and the plaintiff by this plea has the effect of his writ, which is to be put into possession of the lands. But if *non-tenure* be pleaded, without *disclaimer*, the plaintiff may aver his writ, and shew that the tenant has the reversion in fee in him as well as the freehold, or take judgment at his election.

Co. Lit. 362, 3. Rast. Entr. 224, 225. 276. 3 Lev. 330. Lutw. 963.

If the demandant enters into any of the lands, pending the writ, this shall abate the writ *in toto*.

4 E. 4. 32. Doct. Pl. 5.

The plaintiff declared for arrears of a rent-charge, and demanded a larger sum than was due to him, upon his own shewing, by 7*l.* 10*s.* The defendant pleaded a bad plea, and the plaintiff had judgment for his whole demand; but perceiving his mistake on the entry of the judgment, he released the 7*l.* 10*s.* and it was holden a good release (*b*); and that it was not a falsification of his writ, but rather an affirmance; but, if the defendant had taken advantage of it in due time, it would have abated the writ. (*c*)

Saund. 282. Duppa and Mayo. ‖(*b*) The difference seems to be, that where the duty to be recovered is certain and *entire*, on the face of the contract or specialty, a demand of more than is due is bad, and cannot be aided by the entry of a *remittitur*; but where the duty is composed of several *parcels* a demand of more than is due may be aided by remitting the overplus. Cro. Jac. 499. Lord Raym. 815. 7 Mod. 88.; and see Barnard v. Duthy, 5 Taunt. 27. Forty v. Imber, 6 East, 434. (*c*) It seems it would only have abated the writ as to the 7*l.* 10*s.* and not *in toto*, according to Godfrey's Ca. 11 Rep. 45. b. See 1 Will. Saund. 285. a. b. notes, (5th ed.); and that the defendant in replevin may recover so much rent as he proves due, although he has avowed for more, see tit. *Replevin* (K), Vol. VII.‖

If an action is well begun, and part of the action determines by act in law, and yet the like action is given for the residue,

Co. Lit. 285. a.

the writ shall not abate, but the plaintiff may proceed for the residue; but, where, by the determination of part, the like action does not remain for the residue, there the action, though well commenced, shall abate.

Co. Lit. 285. a. As, if an action of waste be brought against tenant *per auter vie*, and, pending the writ, *cestuy que vie* die, this shall not abate the writ *in toto*; but the plaintiff may proceed to recover damages on this writ; for the lessor might have an action for the damages, though *cestuy que vie* had died before any action of waste brought.

Co. Lit. 285. a. So, if an ejectment be brought, and the term expire pending the writ, yet the action shall proceed for damages only. (*a*)

[(*a*) So if the lessor of the plaintiff die. 2 Stra. 1056.]

Co. Lit. 285. a. But, if tenant *per auter vie* had brought an assize, and pending the writ, *cestuy que vie* had died, although the action was well commenced, yet the writ should abate; because no assize lies for damages only.

Co. Lit. 285. a. So, if an action of waste were brought by baron and feme in remainder in especial tail, and pending the writ the wife die without issue, the writ would abate, because all actions of waste must be *ad exhæreditationem*.

Co. Lit. 285. a. So, if a writ of *annuity* be brought, and pending the writ the annuity determine, the writ faileth for ever; because the like action cannot be maintained for the arrearages only.

11 Co. 45. Godfrey's case. Saund. 285. Cas. Temp. Hardw. 273. S. P. ‖(*b*) Herrenden v. Palmer, Hob. 88. When a writ is brought for two things, and it appears the plaintiff cannot have any other action for the one of them, the writ shall stand for the part that is good; but where it appears he can have another writ in another form for one, there the whole writ shall abate; because, where there can be no better writ brought for the parcel, it ought to continue; but, if another writ can be brought for that parcel, it is bad, and ought to abate *in toto*. (*b*)

Rogers v. Cooke, Carth. 235. 1 Salk. 10. S. C. 1 Show. 366. S. C. Hookin v. Quilter, 2 Stra. 1271. 1 Wils. 171. S. C. Curtis v. Davis, 2 Lev. 110. Betts v. Mitchell, 10 Mod. 315, Tate v. Whiting, 11 Mod. 196. Petrie v. Hannay, 3 Term R. 659. Jennings v. Newman, 4 Term R. 547. 1 Will. Saund. 285. a. *notis*.‖

(M) Where it shall abate by reason of another Action brought for the same Thing.

9 H. 6. 12. Mo. 418. 539. 5 Co. 61. Doctr. Pl. 10. 67. Where a prior writ of appeal may be pleaded in abatement to a second appeal. 2 Hawk. P. C. 275. Where a prior suit depending, may be pleaded to an information. 2 Hawk. P. C. 275. But it is no good plea in *abatement* of an indictment, as it is of an appeal or an information, there

THE law abhors multiplicity of actions; and therefore whenever it appears on record, that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate; for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer *in infinitum*; and it is not necessary that both should be pending at the time of the defendant's pleading in *abatement*; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill *ab initio*.

there is another indictment against the defendant for the same offence; but in such a case the court, in discretion, will quash the first indictment. 2 Hawk. P. C. 367. [Fost. Cr. Law. 104. Dougl. 227. *Qu.* Whether it be so in any informations but informations *qui tam?*]

But then it must appear plainly to be for the same thing: for an assize of lands in one county shall not abate an assize in another county, for these cannot be the same lands. 4 H. 6. 24. Doctr. Pl. 10.

‖The two suits must be between the same parties. A suit by husband and wife against the wife's trustees cannot be pleaded in bar to a subsequent suit by her and her next friend, against her trustees and her husband, although the relief prayed is the same.‖ Reeve v. Dalby, 2 Sim. & Stu. 464.

In general writs, as *trespass*, *assize*, *covenant*, where the special matter is not alleged, and the plaintiff is nonsuited before he counts; though the second writ be sued pending the other, yet the former shall not be pleaded in *abatement*, because it does not appear to the court that it was for the same thing; for the first writ being general, the plaintiff might have declared for a distinct thing from what he demanded by the second writ; but, when the first is a special writ, and sets forth the particular demand, as in a *præcipe quod reddat*, &c. there the court can readily see that it is for the same thing; and therefore, though the plaintiff be nonsuited before he counts, yet the first shall abate the second writ, it being apparently brought for the same thing. 5 Co. 61. Doctr. Pl. 11, 12. Theol. l. 11. c. 39. § 14. [Upon an *indebitatus assumpsit*, the defendant pleaded in abatement another action depending for the same matter in the Exchequer, and did not allege that the plaintiff had declared in it; and by the court,—This is bad, because it cannot be traversed, whether it be for the same matter or not. 7 W. B. R. Lill. Prac. Reg. 8. Mitchell and King, 2 Barnard. K. B. 143. S. P.]

An action depending in an inferior court cannot be pleaded to an action brought in one of the courts at *Westminster* for the same thing. 5 Co. 62. Sparry's case. Dyer, 92, 93. [The plaintiff counted upon several promises for work and labour in the parish of *Saint Mary Le Bow, London*; the defendant pleaded in abatement, that before this action brought the plaintiff had libelled in the Admiralty for the same cause of action. Upon demurrer it was insisted for the plaintiff, that this was within the rule in Sparry's case, and the whole court gave judgment against the defendant, *quod respondeat ouster*. Fitzgib. 313. 5 G. 2. C. B. Ludfield v Warden.] ‖See 2 Wils. 87.‖

‖If an action is brought in the Court of King's Bench or Common Pleas, and the defendant pleads to it an action pending for the same matter in *Ireland* or the Plantations, this would be no bar to the jurisdiction of the court here. And the law (*a*) should be the same, if such a plea is pleaded to a suit in equity. *Per* Lord *Hardwicke* Foster v. Vassall, 3 Atk. 589. (*a*) Dillon v. Alvares, 4 Ves. 357.

And a suit pending in *England* is not a good plea in bar to a subsequent suit in the Plantations for the same matter. Bayley v. Edwards, 3 Swanst. 703.

It has been determined, that if an action be brought in *Ireland* on a bond, and sued to judgment there, that judgment cannot be pleaded to an action in the courts here.‖ *Per* Lord *Hardwicke*, *ubi supra*. See Harris v. Saunders, 4 Barn. & C. 411.

The law will not allow two *quare impedits* to be brought for the same presentation, *viz.* a second by the defendant against the plaintiff, when there is one pending in court by the plaintiff against the defendant; *et sic in brevi de partitione*, because the

defendant can have the same remedy on the first writ as he could on a second.

(a) Therefore it is a good plea in *trespass*, that the plaintiff has

The law is so watchful against all vexatious suits, that it will neither suffer two actions of the same nature to be pending for the same demand, nor even two actions of a different nature. (b)

brought a replevin for the same thing, because in both cases damages are to be given for that caption. 1 H. 6. 27. Doctr. Pl. 10. *Sed qu.* And see Comb. 229. and Skin. 388. [A replevin depending in the sheriff's court, it seems, cannot be pleaded to trespass for taking cattle. 2 Wils. 87. White v. Willis.] So in an assize of *darrein* presentment, a *quare impedit* depending for the same presentation is a good plea. Hob. 184. And a *quare impedit* is said to be depending when it is returned. 2 E. 4. 11.

Hob. 137. (b) That where an action of trespass is brought, and afterwards replevin for the same thing, there must not be more defendants in the replevin than there were in the action of trespass, because it cannot square with the averment, that it is *una eademque captio*. Doctr. Pl. 10. *Sed qu.* If the other action might not be pleaded in *abatement*, averring the *fact* to be the same.

In a *quare impedit* brought by the Earl of *Bedford* against the Bishop of *Exeter* and others, the defendants plead that the plaintiff had brought another *quare impedit* for the same presentation, which is still depending and undetermined, with an averment that it was the same plaint, avoidance, and disturbance; the earl replies, that since his former writ purchased, the same church being still void, he presented *Henry Curtis* to the bishop, who refused him, which is the disturbance he now complains of, and traverses that it is the same disturbance on which both actions were brought: the defendant demurs; and ruled, the writ should abate; for though there must be a disturbance naturally to maintain the action, yet the principal effect of the suit is to recover the presentation; and the nature of a *quare impedit* is to be final on nonsuit or discontinuance, which this would defeat; for by this rule the plaintiff might bring a new one, without leaving the former suit. And though in this case there was a new defendant (b), yet the writ abated, because there were two *quare impedits* against the same man; and therefore a fresh defendant could no more enable him to bring a second *quare impedit*, than a new disturbance could. But against several persons it is said a man may have as many *quare impedits* as he will.

In trespass against two defendants, they both pleaded in *abatement* another bill of trespass pending against one of them: and three judges against *Holt*, who doubted, held the plea good as to both. Carth. 96, 97.

Mayor, &c. of London v. B. Freem. 401.

[If two actions be brought at the same time for the same thing, with some trifling variation, they may be pleaded each in abatement of the other, averring that the cause of action in both is the same.]

Boyce v. Douglas, 1 Camp. 60.

‖If while *A.* is unlawfully imprisoned by *B.*, *C.* commits an assault on him, *C.* is guilty of the false imprisonment as well as *B.*; and if *A.* sues both separately, the pendency of one suit may be pleaded in abatement of the other.‖

Allen, 54. Gilb. Hist. C. P. 260.

If a second writ be brought tested the same day the former is abated, it shall be deemed to be sued out after the *abatement* of the first.

Dyer, 227. Carth. 453. 517. Lord

If an action pending in the same court be pleaded to a second action brought for the same thing, the plaintiff may pray that the record may be inspected by the court, or demand *oyer* of

of it, which, if not given him in convenient time, he may sign his judgment. Raym. 547. 6 Mod. 122.

So, to an action of battery and false imprisonment brought in K. B. the defendant pleaded in abatement another action depending for the same matter in the same court; the plaintiff replied, *nul tiel* record, and prayed an inspection of the record, without giving the defendant leave to rejoin: upon a demurrer to this replication, the plaintiff had judgment, because this being a record of the same court in which it was pleaded, the plaintiff might have prayed that it might be inspected by the court, if any such there was. (*a*) The court held too, that upon this plea the plaintiff might have prayed oyer of the record pleaded, and for want of oyer might have signed judgment, which is the quickest method of proceeding. Cremer v. Wickett, Ld. Raym. 550. Carth. 517. S.C. (*a*) Dyer, 227.

[To defeat an informer by a plea of this kind of his right of suing, a defendant must shew a prior right attached in somebody else; and therefore if the pendency of another action by another person for the same offence, brought in the same term, be pleaded in abatement, it must be shewn on what particular day such other action was commenced, that its priority may be ascertained. So, if both actions were commenced on the same day, the defendant, it seems, may shew that the action, which he states, was prior in point of time on that day, though it was formerly holden that the right in that case was attached in neither, and the court could give no judgment.] Comb v. Pitt, 3 Burr. 1423. 1 Black. R. 437. S.C. Hutchinson v. Thomas, 2 Lev. 141. Jackson v. Gisling, 2 Stra. 1169.

(N) Where a Defendant may plead either in Abatement, or in Bar.

WHATEVER destroys the plaintiff's action, and disables him for ever from recovering, may be pleaded in bar; but the defendant in such case is not always obliged to plead in bar, but may plead in abatement; as, in replevin for goods, the defendant may plead property in himself, or in a stranger, either in bar or in abatement; for if the plaintiff cannot prove property in himself, he fails of his action for ever, and it is of no avail to him who has the property, if he has it not. Ventr. 249. 2 Lev. 92. Salk. 5. 2 Ld. Raym. 982. 12 Mod. 182. 6 Mod. 81. 105. Bull. Nisi Pri. 54.

Outlawry may be pleaded always in abatement, but not in bar, unless the cause of action be forfeited. Co. Litt. 128. b. Doctr. Pl. 395.

In personal actions where the damages are uncertain, outlawry cannot be pleaded in bar; but in actions on the case, where the debt, to avoid the law-wager, is turned into damages, outlawry may be pleaded in bar; for it was vested in the king by the forfeiture, as a debt certain and due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he once lawfully possessed. 2 Lutw. 1604. 3 Lev. 29. 2 Ventr. 282. 3 Leon. 197. Cro. Eliz. 204. Owen, 22.

Outlawry may be pleaded in bar, after it has been pleaded in abatement, becaue the thing is forfeited, and the plaintiff has no right to recover. 10 H. 7. 11. 2 Lutw. 1604.

Alienage may be pleaded either in bar or abatement; but with this Bro. Denizen,

10 Co. Litt. 129. b. ‖See Brandon v. Nesbitt, 6 Term R. 23.‖ (a) But *qu.* of this difference (*a*), that alienage can be only pleaded in abatement to an alien in league, but may be pleaded in bar to an alien enemy, because the cause of action is forfeited to the king, as a reprisal for the damages committed by the dominion in enmity.

this difference, for in either case the ground of the plea is the incapacity of an alien to take, or at least hold, that which is the object of the suit.

Harman v. Kingston, 3 Camp. 150. Flindt v. Waters, 15 East, 260.; and see 4 East, 502. ‖In an action on a policy, if the parties interested are neutrals when the policy was effected and the loss happened, and became alien enemies before action brought, this can only be pleaded in abatement; for this only suspends the remedy, and if peace be restored it revives.‖

Combe v. Pitt, 3 Burr. 1423. (*b*) Sayer's Rep. 216. [The pendency of a prior action may be pleaded either in bar, or in abatement; though it is said in the case of *Bains* v. *Blackbourne* (*b*) to be pleadable only in bar.]

‖This applies only to popular actions.‖

Carth. 136. (*c*) Carth. 1, 2. [But *Qu. et vide* 10 Mod. 17. Ld. Raym. 47.] In an action of debt on a judgment obtained, the defendant cannot plead a writ of error brought and pending, either in bar or in abatement; but in one place it is said (*c*), it may be pleaded in abatement, though not in bar. (*d*)

(*d*) But the court, on motion, will stay proceedings. ‖Tidd. 531. 1145. (9th edit.)‖

10 Mod. 112. A man may plead in bar or abatement to a *sci. fa.* as well as to other actions.

6 Mod. 103. —— *Prisel in auter lieu* must be In replevin, if the defendant will take advantage of a variance in the place where the taking is laid, from that in which it really was, he must plead it in abatement.

pleaded in abatement, and cannot be pleaded in bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 244. Show. 98. [But in Barnes, 353. it is said that it is considered as a plea in bar, and not in abatement, it not being necessary to file any affidavit with it, or to plead it within four days after the delivery of the declaration.]

Comb. 483. Owen v. Bulkley, Ld. Raym. 345. In debt on a bond the defendant pleads the condition for the payment of three several sums at three several days, and that he hath paid two of them at the days limited, and the third is not yet come, and concludes in abatement; and it was argued, that this ought to be pleaded in bar, and not in abatement: for in every plea in abatement the defendant ought to shew the plaintiff how to bring a better writ, and here he shews that he ought to have none at all, the day of payment of the third sum not being yet come; as, in an action for an attorney's fees, if the defendant pleads that the plaintiff delivered no bill of them to him, he ought to conclude in bar; and of this opinion were the court.

Comb. 375. Sully v. Arundel. The plaintiff in bar to an avowry pleaded a distress for the same duty in other lands chargeable: and *Holt* said the plea was nought; for it should have been pleaded in abatement of the avowry, that a former replevin was depending (if the truth was so), or if determined, then levied by distress, *et issint riens arrere.*

Mayor and Burgesses of ‖A mere misnomer of a plaintiff, whether a body politic or natural, is pleadable only in abatement; for a new writ may be taken

taken out by the right name; but, if the existence of the person or the corporation be denied, the plea is in bar: for if there be no such person or corporation, there is an end of the action. Stafford v. Bolton, 1 Bos. & Pull. 40.

So, if in *assumpsit* by several partners, the defendant would plead the bankruptcy of one of them, the plea should be in bar; because it shews that that person is incapacitated from suing at all.‖ Eckhardt v. Wilson, 8 Term R. 140.

(O) Dilatory Pleas, how restrained.

AS these pleas enter not into the merits of the case, but merely tend to delay, the following restrictions have been laid upon them.

By the statute 4 & 5 Ann. c. 16. for amendment of the law, no dilatory plea is to be received, unless on oath (*a*), or probable cause shewn to the court.

[(*a*) An affidavit required to a plea in abatement that the writ was never returned, though in giving oyer plaintiff had not set it out. Sherman v. Alvarez, 1 Stra. 639. Ld. Raym. 1409. S. C. So, to a dilatory plea in the Crown Office to an indictment; Rex v. Grainger, 3 Burr. 1617. but not if pleaded at bar. Fost. 16. ‖So, to a plea to a *scire facias* against the heir and terre-tenants of the recoveree, that there are other terre-tenants not returned. Phelps v. Lewis, Forrest, 139. So to aid prayer in a writ of right. Onslow v. Smith, 2 Bos. & Pull. 384.‖ Want of addition requires none. Pr. R. 5. Affidavit to the truth of it by the attorney sufficient. Lumly v. Foster, Barnes, 344. Where the affidavit and plea were wrong entitled, the plea was set aside. Clixby v. Dines, Barnes, 348. So, where the affidavit to an information in the Crown Office was without any title. Rex v. Jones, 2 Stra. 1161. The affidavit must be positive as to the truth of every matter of fact contained in the plea: it must leave nothing to be collected by inference; for *per Dennison* J. the words *probable cause* in the statute only extend to a matter of record, or to some other collateral matter, as to the truth of which there cannot be a positive affidavit. Pearce v. Davis, Say. R. 293. ‖It cannot be admitted after the plaintiff has signed judgment for want of it. Phelps v. Lewis, *ubi supra*.‖ For the form of the affidavit, see Lill. Entr.]

No pleas in abatement shall be received after a *respondeat ouster*, else they would be pleaded *in infinitum*. Hetly, 126. 2 Saund. 41.

[But it was formerly holden that more dilatories than one might be pleaded. Thel. D. 163. a. p. 6. Bract: 400. b. Finch's Law, 363.] ‖And so still, where they are of different degrees. Thus, the defendant may plead to the *person* of the plaintiff; and if that be overruled, he may plead to the *form* of the writ. Com. Dig. tit. *Abatement* (I), 4. citing Theol. Dig. lib. x. c. 1.‖

They are to be pleaded before imparlance. Yelv. 112. Lutw. 24. 1 Stra. 520. ‖Tidd's Prac. 639. (9th edit.) and *antè* (A).‖

[They cannot be pleaded at the same time with a plea in bar.] Cas. Temp. Hardw. 135.

When issue is joined on them, if found against the defendant it shall be peremptory. 2 Show. 42. [2 Wills. 367.]

Nothing shall be pleaded in abatement of a *scire facias* upon a judgment that was pleadable in the original action; for it would be unreasonable that the defendant should disable the plaintiff from having his execution after he has admitted him able to have his judgment. Salk. 2. p. 5.

Though a plea in bar, being certain to a common intent, is good; yet every dilatory plea must be certain to every intent. Cro. Jac. 82. [3TermR. 185.]

[A dilatory plea must be pleaded within four days (the first and last both inclusive) (*b*) after the declaration is delivered, if Imp. K.B. 239. C. P. 319. (*b*) Jennings it

it be in term time; but if in vacation, or within less than four days from the end of the term, it may be pleaded (there being a special imparlance) within the first four days inclusive of the next term, *as of the preceding term*; and within that time it must be *filed*, (for it is not sufficient that it be *delivered only*,) whether a rule to plead be given or not. (*c*) Sunday is reckoned as one of the four days, though it happen to be the last, in which case the plea must be filed on the Saturday. (*d*)

v. Webb, 1 Term R. 277. (*c*) Doughty v. Lascelles, 4 Term R. 520. Brandon v. Payne, *Ibid.* 689. ‖See 5 Barn. & A. 259. 1 Chitt. R. 704.‖ (*d*) Harbord v. Perigal, 5 Term R. 210.; but *contrà* Lee v. Charleton, 3 Term R. 642.

Humphreys v. Ward, Barnes, 331.

It is inadmissible after the rule for pleading is expired (*a*), or after forfeiture of a bail-bond.

(*a*) 3 Salk. 519.

Kilwick v. Maidman, 1 Burr. 59.

It is not an issuable plea within an order for time to plead upon the usual terms.

Wilkes v. Earl of Halifax, 2 Wills. 256.

But the court will, *ex debito justitiæ*, compel the plaintiff to entitle his declaration of the true day on which it was filed, in order to give the defendant an opportunity to plead in abatement.

Hutchinson v. Brown, 7 Term R. 298.

‖And a declaration, whether it be in chief or *de bene esse*, is only well filed from the time of notice; so that the four days in which to plead in abatement do not begin to run till after notice.

Dimsdale v. Nielson, 2 East, 406. Binns v. Morgan, 11. East, 411.

If the defendant put in bail within the four days, and give notice of justifying them, he may then plead in abatement; and his plea will stand good, should the bail be ultimately perfected.

It is the same whether in a town or country cause. Hopkinson v. Henry, 13 East, 170.

Douglas v. Green, 2 Chitt. R. 7.

But the defendant cannot plead in abatement before the plaintiff has declared.

Saunders v. Owen, 2 Dow. & Ry. 252. Wakefield v. Marden, 2 Chitt. R. 8.; but see 4 East, 548. 4 Maule & S. 332.

Nor before defendant has put in special bail, or has appeared.

De Normanville v. Meyer, 1 Chitt. R. 209.; and see 3 Taunt. 386.

If a plea in abatement is not signed by counsel, the plaintiff may sign judgment, for it is no plea at all.

Jennings v. Webb, 1 Term R. 277.; and see 5 Term R. 210. 7 Term R. 298.

So if it be not filed in due time.

Pr. Reg. 4. Forrest, 139. Tidd, 640.

So if no affidavit of the truth be annexed, or a defective affidavit.

Bray v. Haller, 2 Moo. 213. Richards v. Setree, 3 Price 197. Forrest, 144.

1 Stra. 638. 2 Stra. 705.

Or the plaintiff may move the court to set it aside.

Tidd. 640.; *sed vide* 2 Moo. 213.

Rex v. Cooke, 2 Barn. & C. 618. 4 Dowl. & R. 114.; and see 4 Taunt. 668.

But the court will not, upon motion, quash a *bad* plea in abatement.

Horsfall v. Matthewman, 5 Maule & S. 154.

Though the affidavit is sworn before the defendant's attorney, the plea is not a nullity.‖

(P) Of the Manner of pleading in Abatement, and the Proceedings and Judgment on such Plea.

THE defendant cannot plead two outlawries, or two excommunications in abatement, duplicity being a fault in abatement as well as in bar. Carth. 8, 9.

In pleas of abatement which relate to the person, there is no necessity of laying a venue, for all such pleas are to be tried where the action is laid. Salk. 4. Carth. 363. 12 Mod. 125. 195. ‖Neale v. De Garay, 7 Term R. 243.‖

If a defendant plead matter in abatement and conclude in bar, this shall be esteemed a plea in bar, and the court will give final judgment thereupon; because by pleading to the action the writ is admitted to be good, and he puts the whole matter upon his plea. (*a*) 2 Roll. Rep. 64. Lev. 312. Mod. 214. 2 Saund 128.

(*a*) In the case of Medina and Stoughton, 1 Ld. Raym. 593. *Holt* said, that if a man plead matter which goes in bar, but *begin and conclude* his plea in abatement, it will be a plea in abatement; for it is the beginning and conclusion that make the plea. See 1 Sid. 189, 190. But if he begin in bar though he conclude in abatement, or conclude in bar though he begin in abatement, it will be a plea in bar. *Vide* also 1 Ld. Raym. 694. ‖See Godson v. Good, 6 Taunt. 587. 2 Marsh. 299. where this doctrine was confirmed.‖

So, if a man plead in bar, and conclude in abatement, this shall be esteemed a plea in bar; because he could have no writ, if he could have no action; and where there could be no action, the dispute about the writ would be insignificant. (*b*) 6 Mod. 103. Lutw. 34. 36. 10 H. 7. 11.

(*b*) See *infrà*.

A plea in abatement may be good, though it contains matter in bar; but this is to be understood of such pleas as may be pleaded either in disability or in bar; as alienage, outlawry, *&c.* Mod. 214. 10 H. 7. 11.

If a matter, which may be pleaded either in abatement or bar, be pleaded in abatement only, if the plaintiff reply or demur in bar, this will be a discontinuance (*c*); because the plaintiff does not maintain his writ, and the defendant may have other matter in bar, from which he would hereby be excluded. Salk. 177. 10 Mod. 112. Carth. 107. Salk. 218. Gilb. Hist. C. P. 259. See 2 Ventr. 179.

(*c*) But it was aided by verdict. Salk. 218. [So, the court will give leave to amend. 1 Wils. 302.]

But, if the defendant begin such a plea in bar and conclude in abatement, or begin in abatement and conclude in bar, there, the plaintiff may reply or demur to it, either as a plea in abatement or in bar; and if he demur, or plead to it as a plea in bar, then the judgment is final (*d*): for he has closed with the defendant to put the plea to the judgment of the court, as a bar to the action. Ventr. 136. Lutw. 36. 3 Mod. 281.

[(*d*) *Qu.* If in this case the plea be not imperfect, and then, though the plaintiff have discontinued he is entitled to judgment of *respondeat ouster*. Bonnar v. Hall, Ld. Raym. 339. Lug v. Godwin, *Id.* 393. Marshall v. Charleton, 1 Barnard. K. B. 468.]

But, if he demur, or reply in abatement, as he may, then the judgment is *quod defendens respondeat ouster;* for then only the writ is put in judgment before the court; and the plaintiff, by putting the writ only in judgment to the court, has waved the benefit of putting that matter in judgment to the court as a plea to the action; and if the judgment were not in abatement, it would not be pursuant to the defendant's prayer. 3 Lev. 120. 6 Mod. 103. [These cases do not warrant the doctrine in the text.]

Every

5 Mod. 132. said *arguendo*.

Every plea in abatement is either to the writ or count; if the action is brought by original, then the plea is *petit judicium de breve*, and it must conclude in the same words (*a*): if it is to the declaration, then it must be *petit judicium de billâ et narratione*, for *billâ* and *narratio* are the same. (*b*)

‖(*a*) This is so where the plea is of matter apparent on the writ; but where it is of matter *extrinsic*, it is said not to be formal to *begin* with praying judgment of the writ, but only to conclude the plea in that manner. Moor, 30. pl. 99. 1 Lutw. 11.; and see 2 W. Saund. 209. note (1).‖ [(*b*) All pleas to the jurisdiction conclude to the cognizance of the court, praying "judgment whether the court will have further cognizance of the suit:" pleas to the disability conclude to the person, by praying "judgment if the said *A.*, the plaintiff ought to be answered:" and pleas in abatement (when the suit is by original) conclude to the writ or declaration, by praying "judgment of the writ or declaration, and that the same may be quashed," *cassetur*, made void, or abated; but if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration, the bill being here the original, and the declaration only a copy of the bill. 3 Bl. Comm. 303.] ‖Where the proceedings were by bill, and the plea prayed judgment of the writ and declaration founded thereon, it was held bad on demurrer, Attwood v. Davis, 1 Barn. & A. 172. and see 2 Maule & S. 484.‖

10 Mod. 112. Show. 4. ‖1 Ventr. 155. (*c*) This is erroneous: it would be a plea in bar, and final judgment would given on it; for if the plaintiff has no cause of action, he can have no writ. See 2 W. Saund. 209. c. *notâ*.

It is said to be the conclusion of a plea, and not the matter of it, that makes a plea in abatement; so that should a man plead a plea that for the matter of it might have been pleaded in bar, and conclude *petit quod breve cassetur*, it would be but a plea in abatement (*c*), and the judgment would be no other than a *respondeat ouster*; so, *vice versâ*, a plea in abatement, pleaded in form of a plea in bar, would be a plea in bar, though an ill one. (*d*)

(*d*) And upon demurrer to it, there will be a general judgment for the plaintiff, not judgment of *respondeat ouster*. Nowlan v. Geddes, 1 East, 634. Wallis v. Savil, 1 Lutw. 41. There seems however to be this distinction between pleas in abatement and pleas in bar; that in the latter the court will give that judgment, which upon the whole record appears to be the proper judgment, though it be not that which the party has prayed for; but that in the former they will give only the particular judgment prayed for. Le Bret v. Papillon, 4 East, 502. Charnley v. Winstanley, 5 East, 271. Rex v. Samuel Shakspeare, 10 East, 83.‖

6 Mod. 236. *per Holt*.

If a dilatory plea be pleaded, and the plaintiff take issue upon it, he may conclude with a *petit judicium et damna*, because there final judgment shall be: but, if a dilatory plea be pleaded, which the plaintiff does not deny, but confess and avoid, he must conclude in maintenance of his writ; as, if the defendant plead an attainder in disability of the plaintiff, and he plead a pardon, he must not conclude with a *petit judicium et damna* (*e*), but in maintenance of his writ.

(*e*) 3 Mod. 281. S. P.

3 Lev. 120.

If there are four defendants, and after several continuances three of them plead the death of one of them in abatement, *viz.* *petunt judicium de breve et quod breve illud cassetur*; this is ill in its conclusion, and should have been *petunt judicium si curia ulterius procedere velit.*

Salk. 220. pl. 9. 6 Mod. 195. 198. [In Wimbish v. Willoughby, Pl. Comm. 75.

If the defendant demur in *abatement*, the court will give final judgment, because there can be no demurrer in *abatement*; for if the matter of *abatement* be *dehors*, it must be pleaded; if intrinsic, the court will take notice of it themselves.

there is an instance of a demurrer in abatement of a writ, for an insufficiency appearing on it, which authority is countenanced by Theol. Dig. l. 15. c. 9. § 1. Dy. 341. Lutw. 1644. This precedent from *Plowden* was cited by *Eyre* J. when the judgment in the text was given. The judgment upon the demurrer, if against the defendant, will be final.

3 Lev.

3 Lev. 299.] But a demurrer in *abatement* to an indictment for a capital offence, or appeal of death, shall not conclude the party, but he shall have leave to answer over to the offence. 2 Hawk. P. C. 334.

If there be two defendants, and they plead two several pleas in *abatement*, and there be issue to one, and demurrer to the other, if the issue be found for the defendant, the court will not proceed on the demurrer; *et sic vice versâ;* for in both cases the writ being once abated, it would be unnecessary to judge whether it ought to abate on the other's plea. Hob. 250.

Where the matter of *abatement* appears on the face of the record, the plea should begin and end with a *petit judicium de brevi;* but where the matter is *dehors*, the defendant should only end his plea with a *petit judicium*. Moor, 80. Carth. 363. 5 Mod. 136. 145. Salk. 298. ‖See 2 Will. Saund. 209.‖

On the plea in *abatement*, no advantage can be taken of the errors in the declaration (*a*); as nothing but the writ is then in question, for nothing else is pleaded to. Salk. 212. Lutw. 1592. Carth. 172.

(*a*) But it seems it may, if the matter of the plea in abatement be pleadable in bar. Lutw. 1604.

If on a plea in *abatement*, a *respondeat ouster* is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintiff, yet, if the plea in *abatement* does not appear to have been entered on the *nisi-prius* record, judgment will be arrested; for, it being entered on the plea-roll, (which was in court,) it must be mentioned in the *nisi-prius* roll, otherwise it does not appear that it was a verdict in the same cause. Carth. 447. Ld. Raym 329. 5 Mod. 399. Carth. 499.

The judgment for the defendant on a plea in abatement is *quod breve* or *narratio cassetur*, and for the plaintiff, a *respondeat ouster;* but if issue be joined on a plea in abatement, and it be found for the plaintiff, it shall be peremptory against the defendant (*b*); and the judgment shall be *quod recuperet*, because the defendant choosing to put the whole weight of his cause on this issue, when he might have had a plea in chief, it is an admission that he had no other defence. (*c*) Yelv. 112. 2 Show. 42. Stra. 532. Carth. 138. 1 Wils. 302.

(*b*) Though the tenant or demandant who joins issue, be an infant. 1 Lev. 165. But not so on indictments for capital offences. 2 Hawk. P. C. 334. [(*c*) In an action that sounds in damages, the jury who try this issue must assess the damages: their omission to do so cannot be supplied by a writ of enquiry, but a *venire facias de novo* must be awarded. Eichorn v. Le Maitre, 2 Wils. 368.]

[But on a demurrer to a plea in abatement, the judgment against the defendant shall only be *to answer over;* because, though issues in fact are within the conusance of the party, issues in law are not. Theol. Dig. l. 16. c. 11. § 12. 1 Lev. 163. ‖So, if the demurrer be to a replication to a plea in abatement. 1 East, 542.‖

And the same judgment shall be given, though the defendant join in demurrer to it, as to a plea in bar, because the fault originates with the plaintiff. Putt v. Nosworthy, 1 Ventr. 135. But see Lutw. 197. 1643. 1665. But see above, whether this be not a discontinuance?

In a plea in abatement in C. P. the plaintiff may enter a *nil capiat per breve* without leave of the court.] Osborne v. Haddock, Barnes, 257.

Where, upon a *respondeat ouster*, the defendant pleads the general issue, the plaintiff shall sign judgment, if the defendant's attorney Salk. 4. p. 11.

attorney on delivering back a copy of the issue will not pay for it; and it seems that the old course was to deliver in a copy of the whole record, *viz.* the declaration, plea in abatement, *&c.* and issue; but the court made a rule that for the future a copy of the declaration and issue should only be paid for.

Salk. 7. p. 18. Upon a *respondeat ouster*, no notice need be given of it, for the defendant is supposed to be attending his cause in the paper to maintain his plea.

Harries v. Jamieson, 5 Term R. 553. ‖If a plea in abatement profess to answer the whole declaration, and yet in truth answer only part of it, it will be bad. Thus on a writ in debt for 1066*l.* the plaintiff declared for 1000*l.* borrowed by the defendant of the plaintiff, and in a second count for 66*l.* for interest of money lent by the plaintiff to the defendant. The defendant pleaded in abatement of the writ, that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed of the plaintiff," was borrowed by the defendant and others, and not by the defendant separately. The plea was demurred to because it answered only one of the causes of action, *viz.* that mentioned in the first count; and the court held it bad for that reason.

Powell v. Fullerton and another, 2 Bos. & Pull. 428. and see 2 Wm. Saund. 210. b. c. But, if a plea in abatement contain matter which goes in part abatement of the writ only, and conclude with a prayer that the whole writ may be abated, the court may abate so much of the writ as the matter pleaded applies to.‖

[(Q) Of the Writ by Journies Accompts.]

Spencer's case, 6 Co. 10. WHEN an abatement of a suit happens without any fault imputable to the plaintiff, he is permitted to sue out a fresh writ by journies accompts; which is *quasi* a continuance of the first writ, and placeth him in the situation in which he would be supposing that he were still proceeding on that writ; for the defendant can avail himself of no matter which ariseth subsequent to the time of the first writ, and could not have been pleaded to it.

6 Co. 11. a. 1 Salk. 393. Cro. Car. 294. But this second writ is not suable at any distance of time after the abatement of the first, but must be prosecuted *per dietas computatas*, that is, recently, as soon after as reasonably may be. What is a reasonable time is a matter in the discretion of the court.

6 Co. 10. b. Lutw. 296. 1 Salk. 393. This writ being in a manner a continuance of the first, must of course be brought in the same court, and for the same matter. It ought regularly too to be between the same parties; but it may be used by another person than the original plaintiff, if there be a privity between them; as, if the original plaintiff be executor until his son come of age, the son upon coming of age may take out this writ, but not so, if he be administrator *durante minore ætate* of the son; for in that case, as they derive their titles from different persons, the one from the ordinary, the other from the testator, there can be no privity.

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If the plaintiff in *quare impedit* die pending the writ, and after the six months have elapsed, his executors are not entitled to this writ. Bro. Journ. Acc. p. 23. Qu. Imp. 160.

A judicial writ shall never be by journies accompts, because it never abates for want of form. 6 Co. 10. 2.

(R) Foreign Plea.

A FOREIGN plea (*a*) is when the defendant pleads such plea as carries the cause out of the court wherein it is laid, by shewing that the matter alleged is not as to its trial within the jurisdiction of that court. 2 Lil. Pr. Reg. 374. Carth. 402.

(*a*) Must be ingrossed on parchment, and signed by counsel. 2 Lil. Reg. 374. ‖See the form of it in Lil. Entr. 475.‖

As this plea is merely dilatory, and ousts the court of its jurisdiction, it was holden, even before the statute of 4 & 5 Ann. c. 16. that it must be on oath, and before imparlance (*b*); and if the defendant refuse to make oath of the truth of his plea, the plaintiff may sign judgment as upon a *nihil dicit*. Lit. Rep. 256. Style, 225. 435. Saund. 97. (*b*) Ventr 180.

If a defendant in a corporation court plead a foreign plea, which is collateral; as, in debt upon a bond, if he plead a release made in a place out of the jurisdiction of the court, it need not be received without oath: but, if in covenant, or debt for money to be paid at another place, he plead payment accordingly, or covenants performed in the place limited, which was out of their jurisdiction, it ought to be received without oath. Hetl. 126. Lit. Rep. 256. S. C. *verbatim*.

If there be a cause removed from *Canterbury* into *B. R.* by *habeas corpus*, and the plaintiff declare here upon a demise in *London* of a house in *Canterbury*; if the defendant plead an entry and *ouster* in *Canterbury*, so that this cannot be tried here; this is not a foreign plea, because it arises naturally upon the case: so, if matter arise within two counties, and the plaintiff lay it in one, it is not a foreign plea for the defendant to plead any matter in the other. Pasch. 26. Car. 2. in *B.R.* Browne — Mod. 118. S. C.

In real actions in *London* (*c*) if a foreign plea be pleaded, it shall be sent into the Common Pleas to be tried (*d*); but otherwise it is in personal actions. 3 H. 4. 12.

(*c*) How foreign pleas in *Wales* shall be tried, *vide* the statute 34 & 35 H. 8. c. 26. (*d*) This is within the equity of the statute of Glouc. c. 12. which *vide* expounded 2 Inst. 324, 325. which extends to real actions only wherein roucher lies, and not to personal. 2 Leon. 57. Saund. 98.

Ancient demesne, and all pleas of privilege, are pleas to the jurisdiction, but not foreign. 5 Mod. 335.

If a person be sued in an inferior court on an obligation conditioned to pay money out of the jurisdiction of such court, and the defendant plead payment according to the condition; this is not such a foreign plea as need be on oath. Style, 225. Dudney v. Collyer.

So, if in covenant brought in *London* for payment of a certain sum of money on the return of a ship, the defendant plead, that the ship returned to such a place in *Cornwall*, and thereupon the plaintiff demur, this plea is not good; for the matter being transitory, the defendant cannot oblige the plaintiff to change his Sid. 234. Collins v. Sutton.

action, but must plead to it in such place as he had laid it: and, had the matter been local, then it would have amounted to a foreign plea, which must have been put in on oath.

Ventr. 180 St. Aubin v. Cox. 1 Mod. 81. S. C.

But, where a prohibition was prayed for to the court of the Compter in *Wood Street, London*, to an action of debt there commenced, for that the defendant had pleaded before any imparlance, that the cause of action did arise at a place out of their jurisdiction, and offered to swear his plea, and they refused to accept this plea; upon this matter a prohibition was granted; for inferior courts have not cognizance of transitory things which arise in places out of their jurisdiction: but then it is not sufficient to surmise such matter for a prohibition; but a plea to that effect must be tendered in the inferior court, and that before imparlance, and it must be on oath, and then, if refused, a prohibition shall be granted, or upon such refusal a bill of exceptions may be made.

Carth. 402. Chumley v. Broom. 5 Mod. 335. S. C. 12 Mod. 123. S. C.

In debt brought in *B. R.* the plaintiff lay the *visne* in such a place within the county palatine of *Chester*, which county was also in the margin of the declaration: the defendant without imparling pleaded by attorney, that he is, and at the time of the action brought was, resident at the said place within the said county; and so prayed judgment, whether the Court of *B. R.* ought to hold plea of this matter. The plaintiff taking this to be a foreign plea rejected it, as not being on oath, and signed judgment: but *per Holt* C. J. — A foreign plea is where the action is carried out of the county where it is laid, which in this case was not done; so that this is only a plea to the jurisdiction of the court, which is never sworn; so the judgment was set aside.

6 Mod. 146. Sparks v. Wood.

In debt brought in *London*, a prohibition was moved for, and ruled *nisi*, upon suggestion, that the defendant had tendered for plea below, that the cause arose out of their jurisdiction, and offered to make oath of the truth of his plea; and it was shewn, that he tendered his plea after the court was up; whereas it should be *in propriâ personâ*, and in court; and though an

2 Lutw. 1023.

affidavit was offered in *B. R.* of the truth of his plea; and one *Turner's* case was quoted, where a prohibition had been granted upon such an *affidavit* here above without oath of it below; yet *per Powell, Gould*, and *Powis, absente Holt*, the rule was discharged; for in all pleas that oust a court of jurisdiction, whether inferior or superior, there must be oath in that very court of the truth of the plea.

1 P. Wms. 476. pl. 135.

If one be sued in an inferior court for a matter out of the jurisdiction, the defendant may either have a prohibition from one of the law courts of *Westminster-hall*; or, in regard this may happen in a vacation, when only the Chancery is open, he may move that court for a prohibition: but then it must appear by oath made that the fact arose out of the jurisdiction, and that the defendant tendered a foreign plea before imparlance, which was refused. And if a prohibition has been granted out of Chancery

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improvidè, and without these circumstances attending it, the court will grant a *supersedeas*.

If it appear on the face of the declaration, that the matter is out of the jurisdiction of the court, then a prohibition will be granted without oath of having tendered the foreign plea. And in these cases equity imitates the common law. (*a*) *Id.* 477.

(*a*) In a motion for a prohibition to an ecclesiastical court, as to more than appears on the face of the libel, there must be an affidavit of the truth of the suggestion. 2 Salk. 549.

On a rule to shew cause why an attachment should not be granted against the mayor of *Marlborough* for refusing to accept the defendant's plea in his court, it was holden that it was not sufficient for a defendant in a court below to bring his plea into court, and offer to make oath of the truth of it, but that he must tender his plea with an affidavit annexed of the truth thereof, and that this must be done before a general imparlance, but he may pray a special imparlance, and then come at the next court and plead. It was also holden, that the proper way of proceeding was not by attachment, but that a prohibition should be moved for. And so, in the principal case, the rule for an attachment was discharged. Hil. 12 G. 2. in *B. R.* Vokens v. Cull. ‖See Litt. R. 236. 1 Sid. 234. 1 Vent. 180. 2 Salk. 515.‖

ACCOMPT.

THE proceedings in this action being difficult, dilatory, and expensive (*b*), it is now seldom used, especially if the party have other remedy, as debt, covenant, case; or if the demand be of consequence, and the matter of an intricate nature; for in such case it is more advisable to resort to a court of equity, where matters of accompt are more commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled to a discovery of books, papers, and the defendant's oath; and on the other hand, the defendant being allowed to discount the sums paid or expended by him; to discharge himself of sums under forty shillings by his own oath (provided he swears positively, and not as to belief only); and if by answer or other writing he charges himself, by the same to discharge himself, which will be good, if there be no other evidence: farther, all reasonable allowances are made to him; and if, after the accompt is stated, any thing be due to him upon the balance, he is entitled to a decree in his favour. Salk. 9. Carth. 89. Chan. Ca. 249. Vern. 285. 470. 2 Vern. 176. Eq. Ca. Abr. 10. 2 Ark. 410. 2 Ves. 388.

(*b*) From the experiment made of this action in the case of Godfrey v. Saunders, 3 Wils. 94. its proceedings seem not to deserve the character here given of them. A matter which had been fruitlessly depending in Chancery upwards of twelve years, was thoroughly examined, and finally determined in this form of action in the course of two years.]

13 Ves. 276. ‖And from thus being able to afford a more easy and more complete remedy in matters of accompt, courts of equity now assume in those cases a concurrent jurisdiction with courts of law.

Dinwiddie v. Bailey, 6 Ves. 136. (a) Wells v. Cooper, *Scac.* 1791. cited *Ibid.* It is to be remembered, however, that to sustain a bill for an accompt there must be mutual demands, except in the case of dower or of a steward, which stand upon their own specialties. The case of executors (a) upon payments made to their testator may be another exception.‖

We shall, therefore, under this head, but briefly consider,

(A) Against whom, either by the Common Law, or by Statute, this Action lies.

(B) Of the Manner of bringing Accompt, with respect to the Persons against whom it is brought; and herein of charging one as Receiver when Bailiff, *et vice versâ.*

(C) The Nature of the Demands for which it may be brought.

(D) In what Cases this is the proper Action, or some other may be brought.

(E) What shall be a good Bar to this Action.

(F) Of the Auditors, and what shall be a good Discharge before them.

(G) Of the Judgment, and subsequent Proceedings.

(A) Against whom, either by the Common Law, or by Statute, this Action lies.

2 H. 4. 12. b. Co. Litt. 172. a. 90. b. F.N.B.117.E. 2 Inst. 404. 11 Co. 90. a. 2 Roll. Abr. 161. BY the common law, accompt lay only against a guardian in socage (b), bailiff, or receiver, or by one in favour of trade and commerce, naming himself merchant, against another, naming him merchant, and for the executors of a merchant; for between these there was such a privity, that the law presumed them conusant of each other's disbursements, receipts, and acquittances. (c)

[(b) The statute of *Marlebridge*, 52 H. 3. c. 17. is usually recited in the writ, as if the writ were warranted by that statute only. Mayn. 487. F. N. B. 118. (A.) But accompt lay against the guardian in socage at common law, and the statute was merely in affirmance or declaration of it. Co. Litt. 89. Cro. Car. 229. (c) By the prerogative persons could be charged as accomptants, notwithstanding a want of privity. 11 Co. 89. 2 Roll. Abr. 161.]

1 Leon. 219. Co. Litt. 89. b. (d) Before this last statute, if one joint-te- The statute of 13 Edw. 1. cap. 23. gives an action of accompt to executors; the 25 Edw. 3. st. 5. cap. 5. to executors of executors; the 31 Edw. 3. c. 11. to administrators; and by the statute of 4 Ann. c. 16. sect. 27. (d) actions of accompt may be brought against the executors and administrators of every guardian,

ian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other as bailiff (*e*) for receiving more than his share, and against his executors and administrators.

nant, or tenant in common, received all the profits, the other

could not have this action, unless he actually appointed him bailiff or receiver. Co. Litt. 172. a. 186. a. 200. b. So, if there had been two executors, and one had received all the debts of the testator; for between these there was not such a privity as the law required. Bro. tit. Accompt, 58. 39 E. 3. 28. [But, if two guardians were in common, and one took the entire profits to his own use, accompt lay, and the count was to be against him as receiver to their common use. So, of co-partners; but not so of tenants in common, for they might have an assize. F. N. B. 118. J. One joint lessee for years might have accompt against the other, if he took the issues and profits to his own use; for he would otherwise be without remedy, as he could not bring an assize. 39 E. 3. 27. b.] ‖(*e*) But one tenant in common cannot charge the other as receiver. Walker v. Holyday, Com. R. 272. And when he would charge him as bailiff, he must state in the declaration that he and the defendant are tenants in common, and that the defendant has received more than his share, else he will not bring his case within the statute. Wheeler v. Horne, Willes's R. 208. Vin. Abr. tit. Joint-tenants (R), a. pl. 4. notes, S. C.‖

Though an infant may be an executor, or may be charged in trover, being a tort; yet, if he be made factor, bailiff, or receiver, he shall not be accountable for what he does during his infancy, either in law or equity, for the same reason that other acts of his bind him not; therefore when such a one is appointed factor, his friends should give security for his accounting.

Roll. Abr. 117. F. N. B. 118. Co. Litt. 172. S. P. Abr. Ca. Eq. 6. pl. 3.

If I make *J. S.* my bailiff or receiver, and he make a deputy, I must have *accompt* against the bailiff or receiver himself, and not against the deputy, for the receipt of the deputy was to the use of his master.

F. N. B. 119. 4 Leon. 32. [*Vide* 1 Vern. 208. Potts v. Potts, where in

Chancery, on exceptions to a Master's report, it was holden sufficient for a servant or apprentice, in answer to a bill for an account, to say in general, that whatever he received was by him received, and laid out again by his master's orders. But he must disclose this matter in his answer. Vern. 136. Harrison v. Hart, Com. R. 411. Cary v. Webster, Stra. 480. But, where on a bill for an account, and discovery of money received by defendant on the behalf of one who became a bankrupt, he pleaded that he received it only as a menial servant to the bankrupt, and had accounted for it to him already, and that the commissioners had examined him on interrogatories; the plea was overruled. Wagstaff v. Bedford, Vern. 95. 2 Ventr. 358. S. C. Eq. Ca. Abr. 6. p. 5. S. C. cited with a query, whether there were not circumstances of fraud in the case, or a combination between the bankrupt and servant.] East India Company v. Henchman, 1 Ves. jun. 289.

An apprentice by the name of an apprentice, is not chargeable in *accompt*.

11 Co. 89. b. Though he is not charge-

able for the ordinary receipts upon his master's trade, yet upon collateral receipts, which concern not the ordinary trade of his master, he is chargeable as well as another. 3 Leon. 63. But then he must be charged as bailiff or receiver. 2 Inst. 379, 380. [Chancery will decree an account against the administrator of an apprentice employed as a factor. Eq. Ca. Abr. 6. p. 2.]

(B) Of the Manner of bringing Accompt, with respect to the Persons against whom it is brought; and herein of charging one as Bailiff when Receiver, *et vice versâ*.

IF the king appoints *J. S.* or he of his own head takes upon himself the charge and care of the estate of a lunatic, he is

4 Co. 127.

but in nature of a bailiff, and accountable to the lunatic, his executors or administrators.

Co. Litt. 172. (a) So. if a disseisor appoints J. S. to receive his rents, the disseisor cannot have a writ of accompt against J. S. 5 Leon. 24. Dalt. 99. S. P.

A man shall not be charged in *accompt*, as surveyor, comptroller, apprentice, reive, or heyward, nor shall a disseisor (*a*), or other wrongdoer, be so charged; for, to maintain an action of *accompt*, there must be a privity either in law or by the provision of the parties.

2 Roll. Abr. 550. (*b*) But whether he could have an action of trespass, seems to have been much controverted; for which, *vide* Roll's Abr. 554. 11 Co. 51. And. 552. Hob. 98. Roll's R 101. Godb. 388. *Vide* tit. *Ejectment*.

At common law, if a man were disseised, and his entry taken away, he could never recover, by any action, the mesne profits; but if the disseisor made a feoffment in fee, by the statute of *Gloucester*, the disseisee in an assize (*b*) might have recovered damages for the mesne profits, being a continuation of the first wrong.

(*c*) Chan. R. 32.

(*d*) *Id.* 229.

But the Chancery interposed, and at last carried the remedy farther than had been admitted at common law; for though in the case of *Owen* and *Aprice* (*c*), which was adjudged 4 Car. 1. the court left the plaintiff to his remedy at common law for the recovery of the mesne profits, and would not assist by their decree (*d*); and though in the case of *Eyre* and *Jackson*, 14 Car. 2. they refused to assess any damages for a trespass, for that was a matter determinable at common law, and to be ascertained by a jury, yet afterwards they began to make the person, who was the disseisor of the mesne profits, accountant to him who had the right. And this was first begun where lands were settled for the payment of debts; there, such trustees, and the heir of the debtor, were accountants to the creditors for whom the profits were to be received; and this was very clear and plain, because such person came in and took the profits under the trust; and this was settled in the case of *Gilpin* and *Smith*, 18 & 19 Car. 2. Afterwards they came to extend their notions; and the person that took the mesne profits by wrong, was taken as trustee for, and accountant to, him that had the right; and this was settled in the great case of *Coventry* and *Hall*, which was in the years 33, 34 & 35 Car. 2. and was this: Sir *Thomas Thynn* having treated with the Lord Keeper *Coventry* for a marriage between his son and *Catharine* the daughter of the Lord Keeper, the said Sir *Thomas* covenanted to settle lands on his son; but the conveyance was defective, because it wanted the words, *that he should stand seised:* the son recovered the lands by a decree in Chancery, notwithstanding the defect in the conveyance, against the heir at law of Sir *Thomas*, the father, and afterwards came with his bill for the mesne profits

Chan. Ca. 80, 81.

2 Chan. Ca. 71, 72. 134, 135. 2 Chan. R. 259. 261.

[It is generally true, that a court of equity will not decree an account of mesne profits where the title is merely legal, or the plaintiff is out of possession. Tilly v. Bridges, Pre. Ch. 252. Norton v. Frecker 1 Atk. 524. Sayer v. Pierce, 1 Ves. 232. But from this rule must be excepted all those cases where the plaintiff is an infant, or has been prevented from asserting his title by trust, mistake, or fraud and concealment on the part of the defendant. Duke of Bolton v. Deane, Pre. Ch. 516. Bennett v. Whitehead, 2 P. Wms. 645. Dormer v. Fortescue, 3 Atk. 130. And in such cases the court will direct the account to be taken from the time the plaintiff's title accrued, unless special circumstances require that it should commence from the time of entry, or filing the bill. *Ibid.*]

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and though the heir at law was entitled to the mesne profits at law, because the conveyance was defective, and the first decree, which set up the title under the settlement, had ordered no account for the mesne profits; yet the court, on this bill, carried back the account against the heir at law for all the profits received by him; and though it was objected, there was no agreement, nor any trust, that the heir should receive the profits for the rightful proprietor, yet the court resolved, that he should account from the original justice, which entitled the proprietor to seek an *account* against the person who had taken the profits of the land, which in equity and justice belonged to him; and though the heir had the title in law, yet since, in equity and conscience, the estate belonged to another, such heir ought to account with him for the profits he had made of what was his. And from this time equity began to make all persons account for the mesne profits they had received, to such persons as had the equitable title. But in a case where the husband sold lands for valuable consideration, and the wife, after his death, recovered her dower against the purchaser, and brought her bill in Chancery for the mesne profits from the time of the death of her husband, the Lord Chancellor *Cowper* would not relieve her; for he said that he could not alter the law of dower, which gave no damages against a purchaser under the husband; and he saw no reason in equity to introduce a different rule. (*a*)

(*a*) But equity will give relief in the case of dower beyond that which can be obtained at law, if the recovery of the demand be unconscientiously obstructed; and has in such case decreed in favour of the widow's representative, against the personal representative and devisee of the heir, an account of the mesne profits from the time of the death of the husband.

Curtis v. Curtis, 2 Bro. Chan. R. 620. The same account has been directed in favour of the representative where the widow has died before she had established her right to dower. Wakefield v. Child, cited in Fonblanque's Notes on Eq. Tr. p. 147. Wherever a widow resorts to Chancery for her dower, (as it seems she may now do in all cases,) the general course of that court is to give her an account from the time her title accrued. The mesne profits are there considered as (what they really are) the widow's subsistence, and not in the nature of vindictive damages. 2 Bro. Chan. R. 620. Dormer v. Fortescue, 3 Atk. 130, 131.]

[Courts of equity, when resorted to for the purpose of an account of mesne profits, will in many cases consult the principle of convenience; and therefore Lord *Hardwicke* held in *Townsend* v. *Ash*, 3 Atk. 386., That "though the party claiming a share in "the *New River* water-works had not established his right at "law, yet as such right appeared to the court, he ought to have "an account of the mesne profits; for though shares in water-"works are a legal estate and corporeal inheritance, yet no one "proprietor could receive the profits himself; but the company, "or their officers, are the common hand to receive the profits; "and that it would be absurd to send the plaintiffs to law; for "it would be difficult to bring ejectment for a thirty-sixth part, "and bits of land in several counties; and to bring actions of "trespass against the terre-tenants would be very extraordinary; "and therefore, in point of remedy, there could not be a "stronger case for an account of mesne profits."

Fonbl. Notes on Eq. Tr. 147.

In cases of hardship, as where an heir at law is disinherited on a nice construction of words, the courts deem it inequitable to lend their assistance if there is no infant concerned, and leave the party to his remedy at law by entry and ejectment.

Sympson v. Hornsby, Pr. Ch. 453.

Higgins v. York Buildings Company, 2 Atk. 107

Nor will they interpose in favour of judgment creditors upon a bill to set aside a fraudulent conveyance, and decree an account against the debtor and owner of the estate, of rents and profits received *pendente lite* from the filing of the bill; nor in favour of a mortgagee against a mortgagor, left in possession, for any of the years back during that possession. In the former case the plaintiffs have their legal remedy by *elegit*; and in the latter, where interest is not regularly paid, the mortgagee has a legal remedy to get possession of the estate, which, if he does not avail himself of, it is imputable to his own laches.

Gould v. Tancred, 2 Atk. 534.

But, where the mortgagee enters, and takes possession, he is subject to an account, being in the nature of a bailiff to the mortgagor.

Fonbl. 149.

The cases decreeing an account of rents and profits where the legal title is not previously established, proceed upon that respect, which, in justice, is due to the interests of persons, who, by infancy, fraud, *&c.* have been prevented from pursuing their legal right; but it must not be inferred from the extreme anxiety of courts of equity to protect such rights, that they will, at any period (*a*), or under any circumstances, act upon such indulgent disposition; for if an infant neglect to enter within six years after he comes of age, he is as much bound by the statute of limitations from bringing a bill for an account of *mesne* profits, as he is from an action of account at common law; or, if there be a verdict at law against the infant's title, courts of equity will not direct an account of *mesne* profits, but will merely retain the bill, for the purpose of giving the infant an opportunity to establish his title at law.

Lockey v. Lockey, Pre. Ch. 518. Earl of Newburgh v. Bickerstaffe, 1 Vern. 295.

(*a*) But, if plaintiff has been kept out of possession by fraud, Qu. Whether equity will not relieve at any distance of time, as no length of time will bar fraud? Cotterell v. Purchase, Ca. temp. Talbot, 63. ‖Where the plaintiff had been prevented from recovering in ejectment by a rule of the court of law, and by an injunction, both of them obtained at the instance of the occupier, who ultimately failed at law and in equity, an account was directed from the time the title accrued against executors. Pulteney v. Warren, 6 Ves. 73.‖

Ferrers v. Ferrers, Cas. temp. Talb. 2, 8.

It is very seldom, even in the most favoured cases, that interest is allowed, in taking the account of rents and profits.]

Robinson v. Cumming, 2 Atk. 409

Roll. Abr. 119.

A bailiff cannot be charged as receiver, because if he be charged as bailiff upon his account (*b*), he shall have allowance of his charges and expenses, which he is not entitled to when he is charged as a receiver: also, he is not allowed in an action brought against him as a bailiff, to plead that he was before charged as receiver.

(*b*) By bailiff is understood a servant that hath administration and charge of lands, goods, and chattels, to make the best benefit for the owner, against whom an action of accompt doth lie for the profits which he hath raised or made, his reasonable charges and expenses deducted. Co. Litt. 172. a. A receiver is one who receiveth money, and is to render an account of it, but is not allowed any charges or expenses but such as are agreed on by the parties; and in this case the plaintiff is to declare by whose hands he received it. Co. Litt. 172. a. If a bailiff be charged as receiver it seems the best way is to plead it specially, for he cannot take advantage of it after judgment, *quod computet*. 2 Lev. 126. Freem. 578. Whether a person may not in the same action be charged as bailiff and receiver, *Quære*; and *vide* 1 Roll. Abr.

Abr. 119. Cro. Car. 240. 3 Keb. 387. 435. In some cases in an action of account against one as *receptor denariorum*, he shall have allowance of his expenses, and shall account for the profit he received, or might reasonably receive. Co. Litt. 172. a.

(C) The Nature of the Demands for which it may be brought.

AN action of *accompt* lies not for a thing certain; as, if a man delivers 10*l.* to *B.* to merchandize with, he shall not have account of the 10*l.* but of the profits, which are uncertain. Bro. tit. Accompt, 35. 2 Brown. 76.

No action of *acccompt* lies for rent reserved on a lease. So, if a lessee of goods waste them, yet no action of *accompt* lies against him. Roll. Abr. 116.

If the bailee of goods to bail over waste them, or refuse to deliver them, no action of *accompt* lies, but an action of *detinue* or *trover* and *conversion*. Roll. Abr. 116. Owen, 86.

If *A.* hath a term for years in a rectory, and tythes being set forth and severed from the nine parts, *B.* without any pretence of title, carries them away and sells them, yet *A.* shall not have a writ of *accompt* against *B.* for after severance the tythes immediately vested in *A.*, and the taking by *B.* was merely wrongful, and therefore without privity. 3 Leon. 24.

(D) In what Cases this is the proper Action, or some other may be brought.

IF a man by obligation, acknowledges that he has received money *ad proficiendum et computandum*, the obligee may either sue the bond, or have an action of *accompt* at his election. Roll. Abr. 116. Dyer, 20. 118. Cro. El. 644.

So, if *A.* acknowledges by deed, that he has received 100*l.* from *B.* to be adventured to the *West Indies* and thence to *England* back again, and covenants to render a true account thereof upon his return, though *B.* may have a writ of covenant upon this deed, yet he may also have a writ of *accompt* thereupon at his election. Roll. R. 52. 2 Bulst. 256.

Assumpsit, in which the plaintiff declared, that intending to go beyond sea, he delivered a box full of goods to the defendant which he promised to dispose of, and to give the plaintiff an account thereof at his return: the defendant pleaded in *abatement*, that he was bailiff to the plaintiff, to merchandize the said goods; and that he ought to bring an action of *accompt*, and not an action on the case; and upon demurrer it was adjudged, that here being an express promise, on which the action is founded, *assumpsit* will lie as well as *accompt*; and that wherever one acts as bailiff he promises to render an account. Salk. 9. pl. 1. Wilkins v. Wilkins, Carth. 89. S. C. where it was holden, that the action would lie by three judges against *Holt*, who doubted, and who told the plaintiff, that when it came to be tried, he would not suffer him to give all the account in evidence, or to enter into the particulars thereof; but that he should direct his proof only as to the damages which he had sustained for not accounting according to the promise, for he would not travel into an account in such actions. Comberb. 149. S. C.

In

Salk. 9. pl. 2. Poulter v. Cornwall. *Vide* 2 Show. R. 501.

In *assumpsit* for money received *ad computandum*, and verdict for the plaintiff, it was moved in arrest of judgment, that this action did not lie, but *accompt*; for if a man receives money to a special purpose, as to account, or to merchandize, it is not to be demanded of the party as a duty, till he has neglected or refused to apply it according to the trust under which he received it; and the declaration must shew a misapplication or a breach of trust: but it was holden, that in this case the verdict had aided the declaration; for it must be intended there was proof to the jury that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor.

Tomkins v. Willshear, 5 Taunt. 431. 1 Marsh. 115.

‖The action of account is now seldom resorted to, and it is held that the balance of an account, however numerous the items, may be recovered in *assumpsit*.‖

Arnold v. Webb, 5 Taunt. 452.; *sed vide* Scott v. Mackintosh, 2 Camp. 238. *contrà*.

(E) What shall be a good Bar to this Action.

Roll. Abr. 121.

IN accompt against one as bailiff, it is a good plea that he was never his bailiff.

Bro. 29. Roll. Abr. 121.

In accompt against a bailiff, it is a good plea that he was the plaintiff's servant to drive his plough, and keep his cattle for the drawing of his plough, *absque hoc* that he was his bailiff in other manner, because he is not accountable for this occupation.

Roll. Abr. 123. So, if the plaintiff had released to him all the advantage and profit that he might have by the account. Roll. Abr. 123.

It is a good plea in bar to an action of *accompt*, that the plaintiff hath released to him all actions.

Cro. Car. 116. Hetl. 114.

So, it is a good plea in bar, that the plaintiff and defendant submitted to the award of *J. S.*, who awarded that the defendant ought to be acquitted against the plaintiff.

Bro. 48. Roll. Abr. 123. But the bare acceptance of an obligation would not be sufficient. *Vide* Yelv. 202. 1 Bulstr. 103.

So, it is a good plea in bar, that after the receipt of the sum of which the account is demanded, by the mediation of their friends, it was agreed between them, that the defendant should make an obligation of 100*l.* for the 100*l.* received, and the profit thence to arise, which obligation of 100*l.* he did make and deliver accordingly to the plaintiff; for the acceptance of the obligation destroys the duty, and the sum in demand is thereby as strongly released as by a release of all actions.

Roll. Abr. 123, 124. So, if the defendant pleads that the plaintiff has given him an acquittance for the sum received. Bro. tit. Account, 59. For these pleas, being matters which shew that he was once accountable, are only to be made use of before the auditors. *Vide* Dyer, 22. 145. 6 Co. Ferrer's case. 4 Leon. 61. Stile, 353. 410.

It is no good plea in bar to the action, that the defendant hath made payment of the money which he hath received to account with, or that he hath made satisfaction for the same.

49 E. 3. 10. 41 E. 3. 3. 9. 45 E. 3. 14. Lutw. 58. 3 Wils. 113.

[Nonage is a good plea in bar of this action. So is *plenè computavit*, and an account before the plaintiff would be sufficient. *Plenè computavit* and a release are the only pleas which admit the plaintiff to be accountable that can be pleaded in bar to the action; and these are allowed, because they are total extinctions of the right of action. This being a matter for the court to judge

judge of, they must be pleaded specially, and cannot be given in evidence on *ne unque receivour.*

If the plaintiff charge the defendant as receiver for a particular time, he must answer that time precisely. Southcot v. Rider, Raym. 57.

The defendant may plead the statute of limitations in this action; but, if the plaintiff reply that it was an account between merchants, the plea will not avail him. St. 21 Jac. 1. c. 16. § 3. *Vid.* Entr. 76. Pr. Ch. 518.

If the defendant plead that he has accounted before *R.* and *W.*, evidence that he accounted before *R.* only will be sufficient, for the accounting is the substance.] Bul. Ni. Pri. 127. (4th edit.)

(F) Of the Auditors, and what shall be a good Discharge before them.

IN an action of *accompt* there are two judgments; the first is *quod computet*, after which the court assigns auditors, usually two of the officers of the court, who are armed with authority to convene the parties before them *de die in diem*, at any day or place that they shall appoint, till the *account* is determined. The time by which the account is to be settled, is prefixed by the court; but, if the account be of a long and confused nature, the court, on application, will enlarge the time. (*a*) If either of the parties think the auditors do him injustice, he may apply to the court; and if the defendant denies any article, or demurs to any demand, it is to be tried and determined in court. Mod. 42. Brownl. 24. Co. Ent. 46. Lutw. 49. Rast. 14. Lutw. 50. Of auditors assigned by the parties themselves, by virtue of the statute W. 2. c. 11. *Vide* 2 Inst. 380.

Brownl. 24. [Where the auditors are not assigned by the court, the remedy for not making such allowances to the accountant as they ought to do, is by writ of *ex parte talis*, which is a commission to the treasurer and barons of the Exchequer to take the account. F. N. B. 129.] ‖Two principal officers of the Court of King's Bench were on motion appointed auditors after a judgment *quod computet.* Smith v. Smith, 2 Chitt. R. 10. Archer v. Pritchard, 3 Dow. & Ry. 596. The rule to appoint auditors is absolute in the first instance. *Ibid.*‖ [2 Inst. 381. (*a*) All articles of account, though incurred since the writ, shall be included, and the whole brought down to the time when the auditors make an end of their account; *per* Ld. *Mansfield* 2 Burr. 1086.]

Whatever may be pleaded to the action shall never be allowed of as a good discharge before the auditors; therefore, where in *accompt* the defendant pleaded *never his receiver*, &c. and this being found against him, he was adjudged to account; and before the auditors he pleaded a submission of all debts, accounts, *&c.* to *J. S.*, who awarded that the defendant should pay 10*l.* only in discharge of all debts, accounts, *&c.* which he paid accordingly: this was holden no good plea; for this award, made before the action brought, ought to have been pleaded in bar thereof; which being omitted, he hath lost the advantage thereof, and shall not plead it before auditors. Leon. 219. [3 Wils. 113. The reason is, to avoid trouble and charge to the parties. Cro. Car. 116. Taylor v. Page. Hetl. 114. S. C.]

[Nothing can be pleaded before auditors contrary to what has been pleaded to the action, and been found by verdict: where, therefore, a defendant charged as surviving bailiff of goods delivered to him and his co-bailiff to be merchandised, and to render an account, had gone to issue upon this fact, namely, whether upon Godfrey v. Saunders, 3 Wils. 114.

upon his delivering over the goods to the deceased bailiff, all his (the defendant's) concern in the trust, care, and management thereof ceased and was at an end; which issue was found against him: it was holden, that he could not plead afterwards before auditors that he delivered the goods over to the co-bailiff with the consent of the plaintiff; for this matter might have been given in evidence upon the former issue; and the consequence of admitting it to have been put in issue before auditors would have been, either two verdicts the same way, which would have been nugatory, or two contradictory verdicts, which would have entangled the court so much that they would not have known what judgment to give.

41 E. 3. 25. The defendant may plead payment to the plaintiff without shewing an acquittance.]

Roll. Abr. 124. Bro. tit. Account, 10. It is a good discharge before auditors, for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast over-board into the sea.

Co. Lit. 89. So, it is a good discharge before auditors, that he was robbed of the goods without his default or negligence. (*a*)

(*a*) Or that he put them in a warehouse from whence they were taken by an enemy. Stra. 680.

Roll. Abr. 124. It is a good discharge before auditors in *accompt* as a receiver of 10*l.* if he tenders the 10*l.* (*b*) and swears that after the time that the money was delivered him, he found that he durst not buy, for fear of loss; for he is not obliged to run any hazard himself.

(*b*) This must be understood of one who receives money to trade and merchandize therewith; for no other receiver is in any case obliged to buy or sell. Roll. Abr. 124. *Quære*, Whether such oath be necessary; and *vide* 2 Mod. 101. 1 Bulst. 104. Eq. Ca. Abr. 369. 2 Vern. 638. 3 Wms. 185. 187. 279. 10 Mod. 144. 12 Mod. 514. 602. [It seems that the defendant may, in some cases, purge himself by his own oath. The statute of 4 Ann. c. 16. § 27. gives the auditors a power in the cases there provided for, of administering an oath, and examining the parties. Fitz. Abr. Accompt, p. 40. Bro. Accompt, p. 66. 2 Mod. 101.]

Roll. Abr. 125. If a bailiff of a manor receives the rents and profits of the tenants, and retains them two or three years, yet in a writ of *accompt* he is not to account for the profits thence arising in the mean time, for he had not any warrant to merchandize with the money, or to gain or lose thereby.

2 Mod. 100. and the above authorities. If in *accompt* the defendant pleads before auditors, that the goods for which he is to account were *bona peritura*; and, notwithstanding his care in keeping them, were worse, and that they remained in his hands for want of buyers, and were in danger of growing worse, and that therefore he sold them upon credit to a man beyond sea; this is no good plea, for a factor cannot sell even *bona peritura* upon credit (*c*), without a particular commission so to do. (*d*)

(*c*) Nor pawn. 2 Stra. 1187.

(*d*) Factors now have usually such commission.

Bul. Ni. Pri. 128. [The defendant cannot in an action of account pay money into court, as he may in an *assumpsit*.

1 Lutw. 63. If the plea of *plenè computavit* be found against the defendant, he shall account before the auditors for the whole money he is charged with, for this plea admits the receipt of the whole.

(G) Of

(G) Of the Judgment, and the subsequent Proceedings.

IN this action, as is above mentioned, there are two judgments; the first is *quod computet*; and afterwards, when the account is finished, the second judgment is, that the defendant pay the plaintiff so much as he is found in arrear. (*a*) Upon the first judgment a *capias ad computandum* lies, and if a *non est inventus* be returned upon it, an *exigent* issues. It is usual to bail the defendant, if he be taken on the *capias*, though, by the rigour of the law, he is to account in prison.

1 Brownl. 24. Cro. Eliz. 806. 3 Black. Com. 163.

(*a*) Where final judgment was entered in the first instance, the Court set it aside upon motion, as irregular. Hughes v. Burgess, *B. R.* H. 394. Andr. 19. S. C.

If the defendant make default after the interlocutory judgment, at the day assigned by the auditors, final judgment shall be entered for the sum demanded by the plaintiff. So, if there be judgment on demurrer to an insufficient plea before the auditors.

Cro. Eliz. 806. 3 Wils. 117. Co. Lit. 139. b. 11. Co. 39. 27 E. 3. 87. 2 R. A. 131. p. 4.

It seems to be questionable, whether, in all cases, damages are recoverable in account; but it is clear that if the defendant resists the plaintiff's claim by pleading, or an increase is received by a receiver, *ad merchandizandum*, there shall be judgment for damages.

Jenk. 288. 1 Roll. Abr. 575. 1 Leo. 302. 2 Leo. 118. 3 Wils. 117.

It hath been holden, that the first judgment is not such as can be revived by *scire facias* upon the death of the plaintiff, before the account taken (*b*), or as a writ of error can be brought upon; and yet the plaintiff cannot be nonsuited after it.

21 E. 3. 9. 32. 41. Ass. 11. (*b*) *Vide* Danv. 233.

After final judgment, the plaintiff may pray that the defendant's body be taken in execution; or he may pray an *elegit*, if he refuses the body. See the writ to the gaoler to receive the defendant after final judgment. Reg. 137.]

Lutw. 51.

ACCORD AND SATISFACTION.

ACCORD is an agreement between two persons at least to give and accept something in satisfaction of a trespass, *&c.* done by one to the other. This agreement, when executed, may be pleaded in bar to an action for the trespass; for in all personal injuries, the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cause of complaint, and therefore present satisfaction is a good plea: but, if the wrong-doer only promise a future satisfaction, the injury continues till satisfaction is actually made, and, consequently, there is a cause of complaint in being; and if the trespass were barred by this plea, the plaintiff could have no remedy for the future satisfaction, for that supposes the injury to have continuance.

5 E. 4. 7. Plow. 5. b. Roll. Abr. 129.

(A) What

(A) What shall be deemed a good Accord and Satisfaction.

(B) To what Actions may Accord and Satisfaction be pleaded.

(C) Of the Form and Manner of pleading Accords.

(A) What shall be deemed a good Accord and Satisfaction.

9 E. 4. 19. Roll. Abr. 128. [(a) *Vide* Perk. § 749. Dy. 75. In the case of

AN *accord* must appear to be advantageous to the party (*a*), otherwise it can be no satisfaction; therefore in an action of *trespass* for taking the plaintiff's cattle, it is no good plea to say, that there was an *accord* that the plaintiff should have his cattle again; for this is not any satisfaction.

Cumber v. Wane, Stra. 426. it was said by the court, that the satisfaction must appear to them to be a reasonable one; at least, that the contrary must not appear; that consequently, payment of a less sum could never be admitted as an accord and satisfaction for a greater.] ‖So Pinnel's case, 5 Co. 117.; and Fitch v. Sutton, 5 East, 231.‖ But, if it was to drive them to a certain place, so that it would be a charge to him to do it, this would make it a good *accord*. 2 Roll. R. 96. In covenant against the executor of tenant for life, &c. he pleads an *accord* that he should quietly depart, and leave the possession, &c. and holden good; though after the death of tenant for life he had no interest, but a licence in law only to carry away his goods. Yelv. 124. *per* three judges against one.

Pinnel's case, 5 Coke R. 117. Cumber v. Wane, Stra. 426. Fitch v. Sutton, 5 East, 231.; and see 2 Barn. & C. 477.

‖Though the acceptance of a less sum is not alone a good accord and satisfaction of a greater, since there is no consideration for giving up the rest of the debt, (it makes no difference that there is a promise by the debtor to pay the residue when able) yet certain other additional advantages moving to the creditor, have been held to render the agreement on his part to accept the less sum binding.

Steinman v. Magnus, 11 East, 390. Lewis v. Jones, 4 Barn. & C. 513.; and see Boothbay v. Sowden, 3 Camp. 174. Cork v. Saunders, 1 Barn. & A. 46.

Thus, where the debtor entered into an agreement (not sealed) with his creditors, whereby they agreed to receive 20*l.* per cent. in satisfaction of their several demands, and released the remainder in consideration that *half the sum should be secured* by the acceptances of a certain *other person* also a creditor, which security was accordingly given and paid when due; it was held that such agreement was binding on the plaintiff, one of the creditors. Here the security given by the surety for half the composition was a beneficial consideration moving to the plaintiff and all the creditors, and as the surety was only induced to give it on the faith of the defendant being discharged from the remainder of the debts, the court considered it a fraud upon the surety, as well as on the other creditors, that the plaintiff should sue for the residue of the debt.

Heathcote v. Cruickshanks, 2 Term R. 24. and see 2 H. Black. 317.

So, although a mere agreement between the debtor and his creditors that they will accept a composition in satisfaction of their respective debts, is not a good accord and satisfaction pleadable to an action brought by one of the creditors, to recover his

his whole demand, yet it seems that if the debt be ascertained by the agreement and a fund provided, and all the creditors are bound to forbear, the agreement constitutes a good plea. So, also, (it seems) if the debtor assign over all his effects to a trustee for equal distribution among his creditors, for this is a good consideration for the promise of each not to sue. 2 Term R. 24. and see 3 Camp. 174.

And if all the creditors verbally agree to accept a composition, partly to be secured by acceptances of a third party, and partly by the debtor's own notes, and to execute a deed with a clause of release, and if all the creditors but one sign the deed, and the acceptances and notes are duly tendered to such one creditor, and he then refuses to receive the bills or to execute the deed, it has been held he cannot sue the debtor for his original debt. Lord *Ellenborough* held that the agreement was executed by the signing of the other creditors, and the tender of the bills, and that it was a good accord and satisfaction. Bradley v. Gregory, 2 Camp. 383. and see 1 Esp. Ca. 236. 6 Term R 263.

It has been held a good plea in *assumpsit* for goods sold, *&c.* that the defendant, being payee of a promissory note, indorsed it to the plaintiff, "for and on account of" the said debt. But if the demand exceeds the amount of the note, it can only be pleaded as to so much of the demand as is covered by the amount of the note.‖ Kearslake v. Morgan, 5 Term R. 513. Thomas v. Heathorn, 2 Barn. & C. 477.

An *accord* that each of the parties should be quit of actions against the other, is not good (*a*); because it is not any satisfaction. Roll. Abr. 128. Stile, 245. Lut. 57.

‖James v. David, 5 Term R. 14.‖ (*a*) But an *accord* that each should give the other a quart of wine in satisfaction of action, is good. Roll. Abr. 128.

In an action upon the statute of 5 Rich. 2. st. 1. c. 8. if the defendant saith, that after the entry an *accord* was made between them, that the plaintiff should re-enter into the land, and that the defendant should deliver the evidences of the plaintiff to the plaintiff, this is not any bar of the action; for the delivery of the plaintiff's own evidences can be no satisfaction of the tortious entry. (*b*) 9 E. 4. 19. Roll. Abr. 128. S. C. Cro. Eliz. 194. S. C. cited Dyer, 356. S. C. cited. (*b*) But, if he made title to the

evidence, it would be a good bar. Roll. Abr. 128. That the delivery of the deed by the feoffee to *cestui que use* is a good *accord*, because it belongs to the feoffee. Cro. Eliz. 357.

An *accord* that the defendant should endeavour to make up and adjust differences between the plaintiff and *J. S.*, that he did endeavour, and at his own costs make up such differences, is a good plea. Roll. Abr. 128.

In trespass for trampling his grass, the defendant pleads that he was amerced in the court-baron of the plaintiff for the same trespass, which was affeered to two shillings, for which he hath agreed with the plaintiff; and holden a good plea by the acceptance thereof, though the amercement in the court-baron was extortion. Bro. Trespass, 66.

In an action upon the case for scandalous words, the defendant pleads, that after the words spoken, the plaintiff sued the defendant in the military court before the lord marshal; where it was ordered by that court, with the consent of the plaintiff and defendant, in discharge of this suit, and all other differences between Roll. Abr. 128, 129.

between them, that the defendant should make a submission in writing, in a place appointed, and before certain persons, *&c.* and avers that he did so accordingly, *&c.* and on demurrer it was holden no good plea; for it being a point of honour only (*a*), could be no discharge of the damages.

(*a*) Where the defendant pleaded that it was agreed the defendant should confess to the plaintiff he had done him wrong, and should ask forgiveness on his knees, whether this was a sufficient consideration or satisfaction. 2 Roll. Rep. 96. *dubitatur. Vide* Stile, 245. Salk. 71. pl. 5. and head of *Arbitrament* and *Award.*

Debt upon an obligation dated the twenty-third of *March*, 24 Car. 2. upon condition to pay 10*l.*, the defendant pleaded an *accord* the last of *April*, 31 Car. 2. whereby it was agreed that the defendant should give the plaintiff a new security for this debt, and for another due to him by obligation likewise; and he being the executor of the obligor, and the person with whom this *accord* was made, gave security, pursuant to the *accord*, by a bill sealed by himself; the plaintiff demurred; and by the whole court judgment was given for the plaintiff; for one obligation given in satisfaction for another is no discharge, whether grounded upon an *accord* or not; for the concord does not mend the matter; and yet here the new obligation binds him *de bonis propriis*, whereas the first obligation bound him only *de bonis testatoris.*

5 Lev. 55, 56. Lobly and Gildart. Hob. 68. Lovelace v. Cocket. A. new obligation was given; and holden no satisfaction, because it appeared that the first obligation was forfeited, and then the penalty was the debt; and therefore the second being for less, could not be a satisfaction for a greater sum. Lutw. 466. *Vide* 5 Co. 117. Cro. Eliz. 727. 4 Mod. 88. 7 Mod. 17. [One simple contract debt cannot be pleaded in bar of another. Roades v. Barnes, Burr. 9. Black. R. 65. If a debt is on deed or obligation without condition, the accord and satisfaction must be by deed, and so pleaded.] ‖See 7 East, 148.‖ [If there appears a condition for payment of money, perhaps, it may be pleaded without deed in satisfaction of the money or condition. 2 Wils. 86.]

Preston v. Christmas, 2 Wils. 86.

[A release of an equity of redemption is no satisfaction, because of no value in the eye of the law.]

Qu. of this, and whether courts of law do not look at mortgages now with the same eyes as the rest of the world?

Scholey v. Mearns, 7 East, 148.

‖The satisfaction must be to the party having the legal interest in the debt, and must be so pleaded. Thus, where the sheriff declared against defendant on a bail-bond, and the defendant pleaded that the action was brought by the sheriff, as trustee for the sheriff's officer, and that the defendant paid the officer the debt and costs in the action after the return day, but before the sheriff was ruled to return the writ, and the officer accepted the money in full satisfaction and discharge of the bail-bond and fees, and that if any damage were afterwards incurred for default of defendant's appearance, it was occasioned by the officer not paying over the debt and costs to the plaintiff in the action, who would have accepted the same, *&c.*, the plea was held bad on demurrer; for it did not appear that the officer had any legal or equitable interest (even supposing the latter would have sufficed) in the bond, at the time of the supposed satisfaction recovered by such officer.‖

Roll. Abr. 129. That the accord must be executed, *vide suprà* and Plow. 5. 11. b. 9 Co. 79. b. 2 Jones, 158. 168. 2 Keb. 332. Salk. 76. T. Raym. 450. where

If an *accord* be to do two things, and the defendant do one and not the other, this is no bar of the action, because the plaintiff hath not any remedy for that which is not performed.

130. where it is said, that an *accord* may be pleaded without execution, as well as an arbitrament; but *quære*, and see Allen v. Harris, Ld. Raym. 122. Lutw. 1537. S. C. James v. David, 5 Term R. *B. R.* 141.] ‖Lynn v. Bruce, 2 H. Bl. 517. Bradley v. Gregory, 2 Camp. 383. from which cases it is clear the accord must be executed. The contrary doctrine would "overthrow all the books," according to the language of the court in Ld. Raym. 122.‖

But, if an *accord* be that the defendant shall do a certain thing at a day to come, in satisfaction of an action; if he perform it at the day, this is a good bar of the action, though it was executory at the time of the accord made, inasmuch as he hath accepted it in satisfaction. 6 H. 7. 11. b. Roll. Abr. 129. ‖See 2 Camp. 383.‖

If in *trespass* the defendant pleads a concord between himself and the plaintiff, that he should pay the plaintiff 3*l.* in hand, and should undertake to pay the plaintiff's attorney's bill, and avers that he had paid 3*l.* and was always ready to pay the attorney's bill, but he never shewed him any; this is no good plea, because the *accord* is not shewn to be fully executed. Raym. 205. Cock and Honeychurch, 2 Keb. 690. S. C.

[So, performance of part, and tender of performance of the residue, is no good plea. Lewis v. Shepherd, Sir T. Jones, 6.

Where to debt upon bond the defendant pleaded payment of part before the day on which the bond became due, *and a promise to pay the rent at a day to come*, to which the obligee had agreed; the court held it no bar, it being executory. For the same reason a plea to an action of trover that the plaintiff agreed to discharge the defendant of the trover in consideration his undertaking to pay a sum of money, was holden bad (*a*) So, a plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other. (*b*) Balston v. Baxter, Cro. Eliz. 304. (*a*) Allen v. Harris, Ld. Raym. 122. Lutw. 1537. S. C. (*b*) James v. David, 5 Term R. 141.

So, where a defendant pleaded that his several creditors, one of whom was the plaintiff, had come to an agreement to accept a composition in satisfaction of their respective debts, to be paid within a reasonable time, which he tendered and was ready to pay; it was holden that this was no plea to the action for the whole demand; for the agreement is unexecuted, and the promise a mere *nudum pactum* for want of a consideration. But per *Buller* J. — If the defendant had assigned over all his effects to a trustee in order to make an equal distribution among all his creditors, and they had been bound by the agreement to forbear, it might have been a good plea.] Heathcote v. Crookshanks, 2 Term R. 24. ‖For the other cases on this subject see *ante*. p. 46.‖

If in an *indebitatus assumpsit*, *&c.* the defendant pleads an agreement between the plaintiff and defendant, and *J. S.* the son of the defendant, that the plaintiff should deliver to the defendant certain clothes, which the plaintiff then had in his custody; and that the plaintiff should accept the said son her debtor for 9*l.* to be paid so soon as he received certain pay from the king, due to him as lieutenant of a certain ship, in full satisfaction, *&c.* and that after, so soon as the son received his said pay, he was ready and offered to pay, *&c.* and that he yet is ready; this is no good plea, for it doth not appear that there was any good consideration why the son should pay, but a bare agreement, without consideration (*c*); and admit the promise good, if not in writing, by Raym. 450. 2 Jones, 158. S. C. between Case and Barber. (*c*) *Vide* 2 Jones, 168. and tit. *Agreement*.

29 Car. 2. c. 3. no action lies thereupon; and therefore it ought to have been shewn that it was in writing; for when such agreement is pleaded in bar, it must appear to the court, that an action will lie thereupon; for the defendant shall not take away the plaintiff's present action, and not give him another upon agreement pleaded.

3 Lev. 189. Russell and Russell. If in covenant to permit the plaintiff to receive 100*l.* per ann. rent, the defendant pleads a concord between the plaintiff and defendant, that each of them should deliver his part of the indenture into the hands of a third person, to be cancelled, and that each of them should be discharged of all actions upon the indenture, and avers that he had delivered his part to the third person; yet this is no good plea, because it does not appear to be executed on both parts. *Sed. qu.* the default being the plaintiff's.

Per Heath J. 2 Taunt. 143. ‖Where a man by deed acknowledges himself to be satisfied, it is a good bar without receiving any thing.‖

(B) To what Actions may Accord with Satisfaction be pleaded.

4 Co. 1. 9 Co. 79. b. (*a*) But in detinue, for charters concerning a freehold and inheritance, an *accord* is a good plea. 7 E. 4. 35. 9 Co. 79. So, in *waste* against a lessee for years, though in the *tenet*, an *accord* is a good plea, because a chattel only is to be recovered. N. Bendl. 35. Mo. 6. 9 Co. 78. But 6 Co. 44. *contr.* So, in *ravishment de gard*, and *quare ejecit infra terminum*. 9 Co. 78. An *accord* with satisfaction is a good plea in an *ejectione firmæ*; for an ejectment includes a trespass, and they are so interwoven that they cannot be severed; and in all actions which suppose a wrong *vi et armis*, where a capias and exigent lay at common law, there an *accord* is a good plea. 9 Co. 77. Brownl. 134. S. C. 2 Brownl. 128. S. C. Godb. 149. ‖It seems that satisfaction by one *tort-feasor* discharges the others, 5 Taunt. 117.‖ In an appeal of *mayhem* an *accord* with satisfaction is a good plea, notwithstanding the writ be *felonice*. 6 Co. 44. 9 Co. 78. So, in *attaint*, 13 E. 4. 1. 6 Co. 44. Cro. 357. Dyer, 75. If an *accord* be a good plea in a *quare impedit*, — *quære*; and *vide* 11 H. 7. 13. b. 6 Co. 44. a. 2 Brownl. 128, 139. Brownl. 124.

AN *accord* with satisfaction is no good plea to an action real (*a*); for a right or title to a freehold cannot be barred by any collateral satisfaction.

6 Co. 43. Lutw. 358. S. P. Cro. Jac. 254. S. P. 2 Roll. R. 187. ‖See Scholey v. Mearns, 7 East, 148.‖ When a duty in certain accrues by the deed *tempore confectionis scripti*, as by covenant, bill, or obligation, to pay a certain sum of money; this certain duty takes its essence originally and only by writing, and therefore ought to be avoided by matter of as high a nature, though the duty be merely in the personalty.

Kaye v. Waghorn, 1 Taunt. 428. Lowe v. Egginton, 7 Price, 604.; and see Drake v. Mitchell, 5 East, 251. ‖And therefore accord and satisfaction, made *before* breach of a covenant under seal, cannot be pleaded in bar of an action on the covenant.‖

Palm. 110. All. 39. Cro. Jac. 304. Co. Entr. 117. Yelv. 125. But, if in covenant against an assignee a breach is assigned, in not repairing the house, the defendant may plead an *accord* between himself and the plaintiff, and execution thereof, *in satisfactione et exoneratione reparationum præd.*; for no certain duty

duty accrued by the deed, but the action is founded upon a tort or default subsequent, together with the deed, and damages only to be recovered, which are in the personalty. Noy, 110. Cro. Jac. 100. Wing. Max. 64. 9 Co. 79. b.

An *accord* with satisfaction generally is a good plea in all actions where damages only are to be recovered. 6 Co. 44. Dyer, 75.

‖To a *scire facias* on a bond to the crown a plea of payment after the day, and before the writ issued, and acceptance by the crown in satisfaction, is not sufficient.‖ Rex v. Ellis, 1 Price R. 23.

(C) Of the Form and Manner of pleading Accords.

THE best and safest way to plead an *accord* is to plead it by way of *satisfaction*, and not by way of *accord*; for if it is pleaded by way of *accord*, a precise execution thereof, in every part, must be pleaded; and if there be a failure in any part, the plea is insufficient; but if it is pleaded by way of *satisfaction*, the defendant need plead no more, but that he paid the plaintiff 10*s.* in full satisfaction for the action, which he received. 9 Co. 80. *Vide* Roll. Abr. 129. Danv. Abr. 241. Stra. 573.

If in *covenant*, by the heir of the reversioner against the executor of tenant for life, for not repairing, *&c.* the defendant pleads that the testator died 19th *March*, and that the 22d *March concordat. et agreat. fuit* between the plaintiff and defendant, that the defendant should quietly depart and leave the possession to the plaintiff, and that *in consideratione inde* the plaintiff did agree to discharge him of the breach *in non reparando*, and shews that the 25th *March* he did depart, *&c.* this is no good plea, because the concord is uncertain as to the time of his departure; and though he shews a departure within five days, yet he cannot help the original insufficiency of the concord, which is the foundation of all. Yelv. 124, 125. Between Sanford and Cutcliff; adjudged by *Yelverton* and *Croke*: and *Williams* said, the time being indefinite, the departure ought to have been immediately. Noy, 110. S. C. cited.

In an *assumpsit* for wares sold and delivered, the defendant pleaded that he gave and delivered unto the plaintiff a *beaver hat* in satisfaction and discharge, *&c.* and that the plaintiff accepted the said hat in full satisfaction and discharge of the promises, *&c.* The plaintiff replied *protestando* that the defendant never gave him any such hat in satisfaction and discharge of the said promises, *pro placito dicit*, that he never accepted a beaver hat in satisfaction and discharge, *&c.* On demurrer it was insisted first, that the issue ought to be upon the giving in satisfaction, and not upon the receiving in satisfaction, because every gift or payment must be directed by him who gives or pays, and not by him who receives it (*a*); but the Court held it well enough, and that the whole matter concerning the payment, as well as the acceptance in satisfaction, would be tried upon this issue; as to the objection of its being pleaded to be given in satisfaction and discharge of the promises, *&c.* when it should be pleaded in satisfaction of the money mentioned in the promises, and not of the very promises, the court held it of no weight. Young v. Rudd, Carth. 347. 5 Mod. 86. S. C. 2 Salk. 627. pl. 1. S. C. Ld. Raym. 60. S. C. (*a*) Stra. 23. 1194.

Hawkshaw v. Rawlings, Stra. 23. Paine v. Masters, *Ibid.* 573.

[It hath been since settled that this is the proper method of pleading: for there are two requisites to a discharge, namely, payment, and acceptance; and a traverse of the acceptance is an argumentative denial of the payment.]

Francis v. Crywell, 5 Barn. & A. 886.

‖Where the plaintiff declared for tythes bargained and sold, and the defendant pleaded that before the exhibiting of the plaintiff's bill the defendant paid, and the plaintiff accepted, a sum of money in discharge and satisfaction of the promises in the declaration, and the plaintiff replied a *latitat* sued out before such payment: on demurrer judgment was given against the plea; because it appeared by the replication that the plaintiff had sustained damages and costs by reason of the nonperformance of the promises, and the plea did not allege the payment to have been in discharge of such damages and costs.

Hopkinson v. Tahourdin, 2 Chitt. R. 303.; and see *Id.* 324.

Where in *assumpsit* on several promises the defendant pleaded accord and satisfaction of the *cause* of action, the plea was held bad on special demurrer, since it did not go to the whole declaration.

1 Ld. Raym. 566. 4 Esp. Ca. 181.

Accord and satisfaction may be given in evidence on the general issue, and it is not very frequently pleaded.‖

ACTIONS IN GENERAL.

THE design of entering into society being the protection of our persons and security of our property, men in civil society have a right, and indeed are obliged to apply to the public for redress when they are injured; for were they allowed to be their own carvers, or to make reprisals, which they might do in the state of nature, such permission would introduce all that inconvenience which the state of nature did endure, and which government was formed to prevent: hence, therefore, they are obliged to submit to the public the measure of their damages, and to have recourse to the law and the courts of justice, which are appointed to give them redress and ease in their affairs; and this application is what we call bringing an *action*. (*a*)

(*a*) *Actio nihil aliud est quam jus prosequendi in judicio quod sibi debetur.* Co. Lit. 285. or a legal demand of one's right. Co. Lit. 285. 2 Inst. 40. It implies a recovery of, or restitution to something, Co. Lit. 289. and differs from a writ of *error*, which is no action, but only a commission to the judges to examine the record, *&c.* Jenk. 25. 2 Inst. 40. Yelv. 209. Yet, if by writ of *error* the plaintiff therein may recover, or be restored to, any thing, it may be released by the name of an action. Co. Lit. 288. b. *Vide* for this 2 Roll. Abr. 405. The suit till judgment is properly called an action, but not after; and therefore a release of all actions is regularly no bar of an execution. Co. Lit. 289. a. Roll. Abr. 291.

Under

Under this head we shall briefly take notice,

(A) Of the different Kinds of Actions.

(B) In what Cases an Action will lie, and for whom, and against whom.

(C) In what Cases distinct Things may be laid in the same Action.

(A) Of the different Kinds of Actions.

ACTIONS are divided into criminal and civil. Co. Lit. 284. 2 Inst. 40.

Criminal are either to have judgment of death, as appeals of death, robbery, *&c.*; or only to have judgment of damages to the party, fine to the king and imprisonment, as appeals of *mayhem*, &c. 2 Wooddes. 487.

Civil actions are again divided into real, personal, and mixed. Co. Lit. 284. 2 Inst. 40.

And here it may be proper to enquire a little into the nature of those real actions which were formerly in use, and how they came to be discontinued.

Actions real, or relating unto lands, are either *droitural*, that is, of the right of the ancestor; or possessory, which complain of the violation of a right of which the parties themselves were possessed. [This is not the true distinction between *droitural* and *possessory* actions. Whether the action be *droitural* or *possessory* depends not upon whether it complain of an injury to the demandant himself or to his ancestor, but, whether it seek to recover the *property* or the *possession*. If the former, the action is *droitural*; if the latter, it is *possessory*. *Finch* has stated this correctly. "Real actions," says he, "where a freehold shall be recovered, are *possessory*, or *in the right*. *Possessory*, which are to recover a possession, as all assizes, writs of ayel, besayel, and cosinage. *In the right*, which are to recover a possession mixed with the right. And both these may either be of a possession or right in himself, or descended from his ancestors, which we call *ancestral*. Real actions in the right, are either founded on the right, or for the mere right." Finch's Law, 257, 258. *Note* — The part referred to in the first Institute in support of the doctrine of the text, viz. 1 Inst. 164. is not at all referable to it, nor is the editor aware, that it is warranted by any passage in that book.] ‖See Black. Com. b. 3. c. 10.‖

The law always distinguished between a right of entry and a naked right to the land itself; and therefore there were different remedies. To recover the naked right, the law gave only a writ of *right*; and in this action, the defendant at his election might put himself upon his country or wage battle. But, when the disseisee had a right of entry, it was presumed that the disseisin was fresh and recent; and therefore the trial was *coram paribus curtis*. But, if the disseisee did not come till the heir was seated in the possession, and had paid relief to the lord, then the entry of the disseisee was taken away, and his title became doubtful; and then they appealed to Providence in such decisions; and if any freemen would, with his own body, defend the Booth, 99. Co. Ent. 182. 1 H. 6. 7.

title of the possessor, the demandant was obliged to find a champion to enter the lists with him.

Booth, 177. 179. [See Roscoe on Real Actions.]

But to recover the right of possession, the ancient way was by writ of entry. Where the process was by *summons grand cape* before appearance, and *petit cape* afterwards, as in the writ of right, and the general issue was *disseisivit vel non disseisivit*; and this issue was tried by a jury, because when the disseisin was fresh, they did not put it upon the hazard of a battle, as they did in those cases where the long possession had made the right doubtful.

Booth, 175. 2 Inst. 289.

But in the writ of *entry* they recovered no damages; for that such writ only demanded the freehold, and was not mixed with the personalty; and therefore to recover the profits which are merely personal, they had an action of trespass, which was the proper remedy for the damages sustained.

F. N. B. 191. Booth, 175. 2 Inst. 153. 3 Black. Com. c. 10. 181.

There were anciently only three sorts of writs of *entry*; one was against the disseisor himself; the other was against his feoffee, which was called the *writ of entry in the per*; the third was after a second alienation, which was called a *writ of entry in the per and cui*; but the statute of Marlb. cap. 30. gave a writ of *entry in the post*, which did not lie at common law against an alienee at a third hand.

F. N. B. 191. 221. Booth, 175, 176. 200. 3 Black. Com. 185.

And as a man might have brought such writ of *entry* of his own disseisin, so he might have brought it for the disseisin of his father, or he might have brought it for a disseisin done to his grandfather, which was called a writ of *ayel*, or a disseisin done to his great-grandfather, which was called a writ of *besayel*, or any collateral cousins, that were more remote that brothers and sisters, uncles and aunts, nephews or nieces; and this was called a writ of *cosinage*.

Glanv. c. 7. § 17. Fleta, 214, 215. *Vide Assize.*

But because the process in a writ of *entry* became tedious when such actions were removed out of the lord's court into that of the king, and thereby the process which issued from three weeks to three weeks in the lord's court, was depending so many several terms in the king's court, therefore the assize was invented, which was in the nature of a commission to put the disseisee in possession by trial at one assizes; and this was a sudden and immediate a remedy, that the writ of *entry* became obsolete; and therefore when the assize was the usual remedy the writ of *entry* began to be called a *writ of entry in the nature of an assize*.

So the writ of *quod ei deforceat* which was given by a statute passed in the same year with the statute *de donis*, viz. 13 E. 1. c. 4. and occasioned by

There were likewise other remedies, as the *formedon in remainder and reverter*, and a *formedon in descender*, which were given by the statute *de donis*, which created estates-tail.

F. N. B. 220. *Vide* head of *Ejectment.* 3 Black. Com. c. 11. 200.

But the proceedings of these real actions being tedious and expensive, and in many cases concluding the party upon trial, a more commodious method was contrived to dispute title to lands, which began in the reign of *Henry* the Seventh this manner; by forming a term for years, and then the les

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bringing an ejectment to recover the term, and thereby to assert the title of the lessor of the plaintiff: before this time, if a termor for years, who only claimed as a bailiff to the freeholder, had been ousted of his possession, he had only a remedy to recover damages in ejectment, and could not recover the term itself (*a*); but in the reign of *Henry* the Seventh, the courts of equity having obliged such wrong-doer to a specific restitution, the courts of law likewise gave an *habere facias possessionem* to recover the term *in specie*.

Jenk. Cent. p. 67. See the Record in Rast. 252. b.

(*a*) The term itself was recoverable only by covenant against the lessor. Fitz. Eject. 2 P 6. R. 2. F. N. B. 145. M. So early as the reign of *Edward* the Fourth it was said by Fairfax in argument, that the plaintiff *in ejectione firmæ* should recover possession of his term, as he would in a *quare ejecit infra terminum*. 7 E. 4. 6. b.

Personal actions are *ex contractu*, or those founded on contract, as debt, which is to recover the thing *in numero*; or *detinue*, which is to recover the same *in specie*; or (if it cannot be had) its value, and also damages for the detention; and actions of *account*, *covenant*, *assumpsit*, *quantum meruit*, *quantum valebat*, and *annuity*.

Or *ex delicto*, as trespasses founded on force, which are trespasses *vi et armis*; or upon *fraud*, which are actions upon the case. (*b*)

‖(*b*) There are many actions on the case which are not founded on *fraud*, as actions for injuries to incorporeal hereditaments and rights, for injuries to reputation by libel and slander, for injuries arising from negligent acts of the defendant himself and of his servants, and for various breaches of legal duty. See further, as to the distinction between actions of trespass, and trespass on the case, tit. *Trespass* (A), Vol. VII.; and see next page.‖

Therefore if a man gets the goods or chattels of another by lawful means, as by bailment, borrowing, or pledging, he cannot have an action of *trespass*, but must bring *detinue* or *trover*, because the party had not violated his possession.

So, where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, *trover* does not lie, but an *assumpsit* for the money, because the property was changed by a lawful bargain.

If I borrow a horse to go to *Dover*, and go to other places, the owner may have an action on the case against me, for exceeding the purposes of the loan: for so far it is a secret and fallacious abuse of his property; but no general action of *trespass*, because it is not an open and violent invasion of it.

Roll. Rep. 128.

Where the act is lawful (*c*), as the fixing of a spout, and the consequence is injurious, the remedy is by case, and not trespass.

8 Mod. 272. 2 Ld. Raym. 1399. Forteso. 212. 1 Stra. 634.

‖(*c*) The lawfulness or unlawfulness of the act is not the criterion between the action of trespass and on the case. See 2 Black. R. 894. 3 Wils. 499. Scott v. Shepherd; where instances are put by *Blackstone* J. in which trespass lies for the consequences of a lawful act, and where case may be brought for the consequences of an unlawful one. The distinction is between *direct* or *immediate* injuries on the one hand, and *mediate* or *consequential* injuries on the other. Trespass never lay for the latter. *Ibid.* And see tit. *Trespass* (A), Vol. VII.; and the cases there.‖

(B) In what Cases an Action will lie, and for whom, and against whom.

IT is clear, that for all injuries done to a man's person, reputation, or property, he shall have an action, and that for every right he is to have a remedy; for want of right and want of remedy are the same thing.

Co. Litt. 145. Stile, 4. It is also agreed, that where a person has several remedies, he may choose which he pleases; but he cannot devise or lay hold on any but those prescribed by the laws of his country; for if this were allowed, it would be constituting as many actions as there are men, which would be highly inconvenient.

But in this the great difficulty is, when a man shall be said to have suffered an injury, or to have such a right as will entitle him to an action. And here the rules established by that society, of which he is a member, must govern; and therefore, though a man has a right, yet if he be barred by the statute of limitations, he can have no remedy.

Yelv. 196. Cro. Car. 270. Brownl. 111. 6 Co. 18 Roll. Abr. 9. So, if I promise by word only to convey lands, or to give goods without delivering possession, or, if I promise to build a house without consideration (*a*), *&c.* though by the laws of nature these promises are binding, yet no action lies; for without deed duly sealed and executed, or without consideration, no property is altered; and every such promise is esteemed, in the eye of the law, to be *nudum pactum unde non oritur actio.*

(*a*) But, if a carpenter undertakes to build a house for me, and does it ill, an *action on the case* lies against him. Keiw. 78. Roll. Abr. 9. So, if a carpenter promises to repair my house before such a day, and does not do it, by which the house falls, *an action on the case* lies. Roll. Abr. 9. but for this *vide Assumpsit* and *Action on the Case.*

Roll. Abr. 107. 2 Mod. 69. Noy, 184. So, in cases where there may be *damnum absque injuriâ*, the party can have no action; as if a school be set up in the same town where an ancient school has been time out of mind, by which the old school receives damage, yet no action lies.

11 H. 4. 47. Roll. Abr. 107. So, if I retain a master in my house to instruct my children, though this may be to the damage of the common master, yet no action lies.

Norris v. Royle, Tr. 37. Geo. 3. C. P. [If I throw out windows in my house which overlook my neighbour's house, and break in upon that privacy which he before enjoyed, yet no action lies.

The case of Cherrington v. Abney, 2 Vern. 646. was cited in the argument, but the court thought it deserved no attention. See the note to this case in Mr. Raithby's valuable edition of Vernon.

Black. Com. 28. Chorley v. Bolcot, 4 Term R. 317. 2 Atk. 332. No action lies for the fees of a counsel, or physician; they being given as a mere gratuity.

Russell v. The Men of Devon, 2 Term R. 667. (*b*) Such are the statutes of hue and cry, &c. The parties to civil suits are, individuals, who must be particularly named, bodies corporate, and persons *quasi* incorporated, rendered liable to be sued, and capable of suing by the provisions of particular acts of parliament. (*b*) The inhabitants of a county or district, unless so embodied, cannot be called upon to answer *civiliter* for an injury sustained in consequence of any breach

breach of their public duty; for collectively, and *qua* inhabitants, they are not otherwise objects of civil jurisdiction.]

As the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their crimes or their country; as men attainted of treason or felony, popish recusants, persons outlawed or excommunicated, convict in a *præmunire*, or alien enemies. Co. Litt. 128.

A man that hath a special and limited property in goods, as a carrier that hath goods delivered to him, a sheriff who hath levied goods, a bailee who hath goods in his keeping, *&c.* shall have actions against strangers who take them away, because they are answerable in damages to the absolute owner. 2 Bulst. 311. Sid. 438. Mod. 80. 2 Sand. 47. 2 Keb. 588. Yelv. 44. 2 Term R. 594.

‖See tit. *Trespass* (C), *Trover* (C), Vol. VII.‖

So, a man who has cause of action against two, may bring it against which he pleases: as, if *A.* takes the goods of *C.*, and *B.* takes them from *A.*, *C.* shall have his action against *A.* or *B.* at his election, because both damnified *C.* in their taking. Cro. Jac. 75.

So, if two of the sheep of *A.* have been lost, and one of them is found again, and the shepherd of *A.* affirms it to be one of them, whereupon *A.* pays for the feeding of it, and causes it to be shorn and marked with his own mark, and after the shepherd, knowing this to be the sheep of *A.*, falsely and fraudulently affirms to the bailiff of the manor, to which waif and stray belong, that the said sheep is a stray, whereupon the said bailiff seizes it, *&c.*, *A.* may have an action against his shepherd, for that by his false practice he hath created a trouble, disgrace, and damage to him; and though he hath good cause of action against the bailiff, yet this will not excuse the shepherd. Alleyn, 3. Newman and Zachary, Roll. Abr. 101. S. C.

‖So, if *A.* positively state to the commander of a pressgang that *B.* is liable to the impress service, who in truth is not so, and *B.* in consequence is impressed, *A.* may be sued in trespass and false imprisonment by *B.* *Aliter*, it seems, if *A.* had only said he *believed* *B.* was liable.‖ Flewster v. Royle, 1 Camp. 187.; and see 6 Term R. 315.

So, if one slander my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, yet I may have an action against him who caused the disturbance. Alleyn, 3. ‖But in Vicars v. Wilcocks, 8 East, 1. it was held that it is not sufficient to prove a mere *wrongful* act of a third party as the consequence of the slander; for the plaintiff may have his remedy against him. The damage must be the legal and natural consequence of the slander; and see Cro. Jac. 471. 2 Bos. & Pull. 284.; and tit. *Slander* (C), Vol. VII., where see the cases as to slander of title.‖

If there are several proprietors of a ship which hath usually transported goods for hire, and a master placed therein by the part-owners, who hath 60*l.* wages for every voyage from *London* to *T.*, and *J. S.* without making any contract with the part-owners, and none of them being present, delivers certain goods on board to the master, to be carried for hire from *London* to *T.* and the ship safely arrives there, but the goods are spoiled through the neglect of the master, an action lies against the part- Carth. 58. Boson and Standford, 2 Salk. 440. pl. 1. 5 Lew. 258. 3 Mod. 321. S. C. Show. 29. Vern. 297, 298. 465.

2 Vern. 645. 8 Mod. 89. 12 Mod. 446. Stra. 505.

part-owners; for though the master is chargeable in respect of his wages, so are the proprietors in respect of the freight, at the election of the plaintiff.

But *Quære* whether all the part-owners are not to be sued; but clearly if they are not, it must be pleaded in abatement. Stra. 553. 822. 2 Black. R. 947. ‖It is settled that if the action in such case be brought in *assumpsit*, all the part-owners must be joined, or the non-joinder may be pleaded in abatement, but it cannot be otherwise objected to. If the action be shaped in *tort* against the defendants as common carriers, according to the custom of the realm, then it seems the non-joinder of some parties cannot be objected to at all. See 2 New R. 454. 12 East, 89. 452. 2 Marsh. 485. 3 Brod. & Bing. 54. But if the defendants are not common carriers, and the action is, in fact, founded on the contract to convey the goods, then, though the form of action be in *tort*, still it is substantially an action of contract, and the non-joinder of some parties may be pleaded in abatement. *Ibid.*; and see *antè*, *Abatement*, and Abbott on Shipping, 95. (5th edit.)‖

Macdonald's case, Fost.

‖An attainted person is liable to civil suits; but he ought not to be charged without leave of the court, or of a judge.‖

Cr. L. 61. Co. Entr. 246. a. b. Cro. Eliz. 516. Co. Entr. 248. 2 Anders. 58. Moor. 753. 5 Inst. 215.

(C) In what Cases distinct Things may be laid in the same Action.

8 Co. 87. but for this *vide* F. N. B. 209. Owen, 11. Kelw. 105. Dyer, 145. 2 Brownl. 274.

THE distinction herein, with respect to real actions, depends on the different kinds of writs; for all original writs are of two sorts, *viz. breve nominatum et innominatum*. The first contains the time, place, and demand, very particularly; and therefore in such writ several lands by several titles cannot be demanded in the same writ. The other contains only a general complaint, without expressing time, damages, *&c.* as the writ of trespass *quare clausum freight*, *&c.* and therefore several lands coming to the demandant by several titles, may be demanded in such writ.

Cro. Car. 20. 316. Vent 366. Keb. 847. Bro. Joinder in Action, 97. Register, 95. 139. (a) The true reason why actions may or may not be joined, is not the difference of the defendant's pleas; for if that were the reason, debt upon an obligation, to which the plea is *non est factum*, and on a *mutuatus*, *nil debet*, could not be joined: therefore the true reason arises from the difference of the process, and the fines paid on taking out the original; for in debt the old process was summons, attachment, and distress, and on taking out the original a fine was paid to the king, which was in proportion to the sum demanded; but in trespass the process was a *capias*, because the man that had committed a *tort* might be supposed to fly from justice; and in this action the court set a fine on him in proportion to his offence, and levied it by a *capiatur*. Gilb. Hist. C. P. 6.

As to personal actions, the difference arises from the above-mentioned division of personal actions, *viz.* such as are *ex contractu*, and such as are *ex delicto*, or founded on a *tort*; therefore debt on an obligation and on a *mutuatus* may be joined, because the writ is general, and the declaration upon both will be warranted by the authority given by the general words of the writ. So, debt and detinue may be joined in the same writ, because there are writs in the register, in which they are both comprised in the same writ. So, debt upon a lease and for clothes, they being in the words of the same writ. But debt and account, or debt and trespass (a) cannot be joined.

8 Co. 87. Jenk. 211. 3 Lev. 93. Raym. 255.

In personal actions several wrongs or trespasses may be joined, because they may be comprised in the same writ, and so may several actions, on the case, where the case is of the same kind;

as

as an action for a fraud on the delivery of the goods, and on the warranty of the same goods, being both on the contract. So, against a common carrier on the custom of the realm, and *trover* may be joined, because both on the *tort*, it being a violation of the custom not to deliver the charge. (*a*)

[(*a*) The difficulty as to what counts may be joined in the some declaration

hath at length met with an easy solution: *any counts that admit of the same plea, and are followed by the same judgment, may be included in the same declaration;* but counts which require a *different* plea, or receive a *different* judgment, cannot be joined; and yet the cause of action comprized in such counts may in both cases be the same. Thus, a count against a carrier on the custom of the realm and one in trover may be joined, because the plea and the judgment proper to both are the same; but, instead of the count upon the custom of the realm, let a count in *assumpsit* be substituted against the carrier, and trover cannot be joined with it; because the plea to each is different. Brown v. Dixon, 1 Term R. 576. Mast v. Goodson, 3 Wils. 354. Dickon v. Clifton, 2 Wils. 319.] ‖In extending the rule beyond what the cases cited warrant, the above note is not accurate, for there are cases where counts may be joined, although the plea is different; thus, debt on bond and on a *mutuatus*, and debt on bond and on judgment, may clearly be joined. And even taken only affirmatively, the rule is not universally true, that where the plea is the same and the judgment the same the actions may be joined; for this is the case with the actions of trespass, and trespass on the case: the plea is the same, and the judgment in each is for damages and costs; and though in general the judgment in trespass is *quod capiatur*, and in case, *quod sit in misericordia*, yet sometimes there is an entry of a *capiatur* in case as well as in trespass. See Tidd. Prac. 11. And yet they cannot, in general, be joined. 2 Will. Saund. 117. c.; and note (*c*) by the last learned editors.‖

But actions founded upon a *tort* and upon a contract cannot be joined, as *assumpsit* and trover against a carrier; for though these come under the general head of actions on the case, yet they are more distinct cases than debt and account (*b*), which cannot be joined.

5 Lev. 101. 103. Keb. 59. 1 Sid. 244. 12 Mod. 75. See Ld. Raym. 58. Salk. 10. 5 Salk. 204.

5 Mod. 85. Comb. 332. (*b*) Bro. Joinder in Action, 97. ‖But if the carrier be sued in *case* upon the custom of the realm a count in trover may be joined. Brown v. Dixon, 1 Term R. 277.‖

If trover and *assumpsit* are joined in one action, and upon and guilty the jury *quoad* the trover find for the defendant, and *quoad* the *assumpsit* for the plaintiff, yet he shall not have judgment; for these cannot be joined in the same action, and the severance by the jury will not help it, the declaration being naught at first.

3 Lev. 99. Bage and Bromwell.

One action will lie for entering the house of the plaintiff, breaking his chests, and carrying away his goods, and for beating his servant *per quod servitium amisit.*

Alleyn, 9. Stile, 45. 202. Ld. Raym. 274. Stra. 635.; & S. 436. *acc.*

‖and see Ditcham v. Bond, 2 Maul.‖

‖And so also for entering his house and debauching his daughter *per quod servitium amisit.*‖

Worsland v. Walton, 2 New R. 476.

If in an action upon the case the plaintiff declares, that whereas *accommodassit* to the defendant a gelding *ad equitand. ab L. usque E., et ibidem salvo deliberand.* to the plaintiff, the defendant intending to deceive the plaintiff, rid upon the said gelding from *L.* to *E.* and *E.* unto *L.* again, and by that riding so much abused the said horse, that he became of little value; and though the plaintiff at *E.* demanded a re-delivery of the said gelding, yet the defendant refused, and yet doth refuse to deliver him, and hath converted the said gelding to his own use; this declaration is not good (*c*), because it contains distinct matters, for part is founded

Cro. Car. 20. White and Risden.

(*c*) But the plaintiff had judgment, being after verdict; but *per Hobart*, the defendant might have demurred for the doubleness

of the declaration. founded upon the contract, and part upon the *tort*, which are several causes of action.

Orton v. Butler, 5 Barn. & A. 652.; and see 1 New R. 43. 6 East, 335. Brill v. Neele, 3 Barn. & A. 208. ‖And so where a count stated that the defendant had received to plaintiff's use a certain sum of money to be paid by defendant to plaintiff on request, and that the defendant did not pay on request, and converted the money to his own use, the count was held bad on demurrer, it not being, either in form or substance, a count in trover. A count stating that defendant was indebted to plaintiff for work and labour, and being indebted, that he undertook and promised to pay, *&c.* whereby an action hath accrued, *&c.* is not a good count in debt, and cannot be joined with counts in debt.‖

Hob. 249. Brownl. 235. S. C., and *Winch* held the writ naught, but the damages being found severally, the plaintiff released those for the battery, and had judgment for the ejectment. An ejectment and assault and battery were joined in one writ, and not guilty pleaded, and a verdict and entire damages given for the plaintiff; and it seems to have been aided after verdict.

Yelv. 63. Champernoon v. Hill, Brownl. 86. Cro. Jac. 68. Moor, 914. Noy, 3. S. C. Where one hath a right to recover in the same kind of action, though he derives his right from different titles, yet being conjoined in him, he may recover in one action: as if in debt upon 2 & 3 E. 6. c. 13. for not setting forth tythes, though the plaintiff shews, that by prescription the rector of *A.* hath had two parts, and the vicar of *A.* the third part of the tythes there, and that the said rector and vicar, by several leases, did demise to the plaintiff, whereby he became *proprietarius* of the said tythes, and the defendant sowed, *&c.* this action is well brought; for though the vicar and parson could not join, because they claim severally by divided rights, yet when both titles are conjoined in one person, the matter of the title is also conjoined; and this being a personal action and founded upon a wrong, it is sufficient to shew generally, that the plaintiff is *firmarius* or *proprietarius* of the tithes, without saying by what title.

Poph. 24, 25. Haydock v. Warnford, Cro. Eliz. 290. Owen, 11. S. C. If *A.* being seised of a third part of a messuage, *&c.* in fee, demises the same to *B.* for years, who assigns to *C.*, and *A.* by bargain and sale enrolled conveys his reversion to *D.* and his heirs, who was then seised of another third part in fee, and afterwards the said *D.* leases his third part also to the said *C.* for years, and dies; and his heir by bargain and sale enrolled conveys the reversion of the said two third parts to *E.* and his heirs, after which waste is done; *E.* (*a*) may bring one action of waste upon these several leases, for that the interest neither of the terms nor of the inheritance was severed or divided to several, but was in one person at the time when the waste was done.

(*a*) And the rather because the assignment of waste is in one and the same thing.

Per Popham Ch. Just. *Vide* head of *Waste.*

Cro. Jac. 329. Pyot and Lady St. John. Ley. 110. S. C. cited. If in covenant the plaintiff shews that *A.* was seised in fee of one messuage, and possessed of another for a certain term of years yet enduring, and let both to the defendant for a less term of years, and that the defendant did covenant to repair, *&c.*, and shews that *A.* by one deed did grant to the plaintiff the reversion in fee, and by another the reversion for years, *&c.*, and that after the

the houses were out of repair, *&c.* this action is well brought; for as upon several leases or upon several grants of a reversion one action of waste lies, so for the same reason one writ of covenant will lie.

But one cannot in the same action join a demand against one in his own right, and a demand on him as representative of another; as if in *assumpsit* against an administrator, the plaintiff declares upon a sale of goods to the intestate for 200*l.* and upon another sale to the defendant himself for 27*l.*, and that upon account the defendant was found indebted to the plaintiff in these sums, and promised, *&c.* the declaration is naught, for the charge being in several manors, *viz.* in his own right, and as administrator, it ought to have been by several actions. Hob. 88. Herrenden and Palmer. And. 358. S. P. For this *vide* head of *Executors and Administrators* (O).

[Where the same persons are assignees of two bankrupts, under separate commissions, they cannot join in the same action a joint debt due to both the bankrupts, with separate debts due to each. Hancock and others, assignees, v. Hayward, 3 Term R. 433.

But where the same persons were assignees of *A.* and *B.* and likewise assignees of *C.*, and they declared as *such* for a joint demand due to all the bankrupts, such declaration was holden good upon a motion in arrest of judgment.] Streatfield and others, assignees, v. Halliday, 3 Term R. 779.

‖But if *A. B.* and *C.* are appointed assignees under three separate commissions against three bankrupts, they cannot sue as if they were joint assignees of the three bankrupts, or it is a ground of nonsuit. Ray v. Davies, 2 Moo. 3.

Assignees under a joint commission against *A.* and *B.*, in suing on a separate contract made with *A.* may describe themselves generally as the assignees of *A.*, without naming *B.*‖ Stonehouse v. De Silva, 5 Camp. 399. Harvey v. Morgan, 2 Stark. 17.

Several persons may join in an action where their interest is joint; as if the several cattle of *A.* and *B.* are distrained, and *C.*, in consideration of 10*l.* to him paid by *A.* and *B.*, assumes and promises to them to procure the cattle to be re-delivered to them, if they are not re-delivered accordingly, one joint action lies, for the consideration is entire and cannot be divided. For this *vide* head of *Joint-tenants*. Stile, 156. Roll. Abr. 31. S. C.

So, if *A.* hath one mill and *B.* another in the same manor, which they have used to repair, and time out of mind all the grain which was ground and spent in the houses of the tenants of the said manor, and was not ground at one of the said mills, hath always, and ought to be ground at the other, and *C.* a tenant of the said manor, grinds at another mill, *&c.* *A.* and *B.* may join in one action against *C.*, for the damage is entire to both their mills. 2 Lev. 27. Litheley and Coryton. 2 Keb. 631. 2 Saund. 115. Vent. 167. S. C. agreed *per totam curiam*; but because the plaintiffs had declared that all the grain ought to be ground at those two mills, or one of them, which might be, if all ought to be ground at one of the mills and nothing at the other, for their expedition they prayed a *nil cap. per billam.*

‖So also certain persons, dippers of the wells at *Tonbridge*, duly chosen by the homage of the Court Baron, and approved by the lords according to the terms of a private act of parliament, were held entitled to maintain a joint action against Weller v. Baker, 2 Wils. 423. ‖ and see 1 Will.

Saund. 125. 2 *Id.* 116. against the defendant for exercising the business of a dipper, not being duly chosen and approved according to the act; for though each dipper received gratuities for his separate use, yet they were all jointly concerned in interest as against a stranger disturbing them in their employment.

Townsend v. Neal, 2 Camp. 190. So a herald and a pursuivant at arms may maintain a joint action for work and labour in making out a pedigree, both having been on duty when the order was given, although one of them was applied to by the defendant.

Smith v. Taylor, 2 Chitt. 142. But where two parties agreed with defendant to assist him with their horses, and they were to give in their accounts separately, and each assisted him with three horses, it was held that the contracts were separate, and the parties could not sue jointly. ‖

3 Lev. 362. Ward *et al.* v. Brampston. If within the parish of *A.* there is a custom for the parishioners yearly to elect two persons to be churchwardens there, and according to the said custom *B.* and *C.* are elected, but the surrogate of the bishop refuses to admit and swear them into the said office; upon which they bring a *mandamus*, and he falsely returns a custom for the vicar to choose one churchwarden, and that therefore he cannot admit both the said parties, but is ready to admit one of them; they may join in an action for this false return, for the *mandamus* and whole prosecution thereof was joint, and this is no office of profit, nor action brought for that, but for the unjust return.

3 Lev. 363. *Vide* 12 Mod. 349. 371. So, if the registrar of the bishop refuses to register a licence of a chapel for a conventicle, according to 1 W. & M. c. 18. and upon a *mandamus* to do it makes a false return, several of the inhabitants may join in one action against him.

Dyer, 19. Gouldsb. 76. S. P. Cro. Car. 512. S. P. But, if one man calls two other men thieves, and shews in certain of what, *&c.* they shall not (*a*) join in one action against him; for the wrong doer to one is no wrong to the other.

(*a*) So in false imprisonment. Dyer, 19.

Kelw. 52. Fitz. Joinder in Action, 17. Reg. 105. Owen, 106. So, in assault and battery; for the battery done to one cannot be the same as that done to the other; and one battery may hurt more than the other.

Cooke v. Batchelor, 3 Bos. & Pull. 150. ‖However, if slander is spoken of two partners respecting their joint trade, they may have a joint action.; and see 2 Will. Saund. 116. a. 116. b.

Barratt v. Collins, 10 Moo. R. 446. Where two plaintiffs jointly sued the defendant for a malicious arrest, alleging as special damage a joint injury from the wrongful imprisonment, and also a joint expense thereby incurred by both, the court ordered the judgment to be arrested, since the injury from wrongful imprisonment could not be a joint damage. But it seems that on the court observing that the jury had only found damages for the joint expense, they ordered the *postea* to be amended. ‖

Dyer, 351. Q. If a man holds several lands of several lords by heriot custom, and to defraud them of their heriots makes a fraudulent gift of all his

his beasts heriotable, all the lords may join in one action upon the 13 Eliz. c. 5.

If two joint owners of a sum of money are robbed upon the highway, they may join in one action against the hundred in which, *&c.* otherwise, if the sums are several, and several properties. Dyer, 370.

‖*A. B.* and *C.* having been appointed assignees of a bankrupt, and acted as such, *A.* and *B.* pay each half of the solicitor's bill. *A.* and *B.* cannot maintain a joint action against *C.* for his proportion of the sum paid; each must sue him separately. Brand v. Boulcott, 3 Bos. & Pull. 235.; and see Graham v. Robertson, 2 Term R. 282. Kelby v. Steel, 5 Esp. Ca. 194.

But where *A. B.* and *C.* having dissolved partnership, and *C.* after such dissolution drew bills in the partnership name in favour of *D.*; upon which *D.* brought his action against *A. B.* and *C.*, and *C.* having pleaded his bankruptcy, *D.* entered a *nolle prosequi* as to him, and recovered judgment against *A.* and *B.*, which judgment was satisfied by their attorney, who advanced part of the money for them on their *joint credit*, and borrowed the rest on their *joint credit*, it was held that the sum so paid in satisfaction of the judgment might be recovered by *A.* and *B.* in a joint action against *C.* It would have been otherwise if each had contributed his share to the attorney to pay the demand. Osborne v. Harper, 5 East, 225.; and see 10 East, 418. 1 Carr. & P. 44. 2 Barn. & C. 271.

The several members of a club associated for the purpose of buying coals and dividing them in proportions amongst themselves, cannot maintain separate actions for penalties against the seller.‖ Everett v. Tindall, 5 Esp. 169.

If *A.* delivers goods to *B.* to deliver over to *C.*, and *B.* does not deliver them over accordingly, but converts them to his own use, either *A.* or *C.* may have an action against *B.*, but both shall not have an action; but he who first begins his action shall go on with the same. 1 Bulst. 68. Hard. 321. S. P. and there said that they could not both join.

If *A.* is seised in fee of the reversion of a close expectant upon a term for years, and *B.* is possessed of another close adjoining thereto, between which closes there runs a rivulet, and *B.* stops it, *per quod* the close of *A.* is surrounded, so that the timber-trees, *&c.* become rotten; *A.* in respect of the prejudice to the reversion, may have one action, and the termor in respect of the possession, and of the shade, shelter, *&c.* may have another action, and a satisfaction given to the one is no bar to the other. 3 Lev. 209. Bidlesford and Onslow. 4 Burr. 2141. *acc.* Jesser v. Gifford. ‖See Knight v. Legh, 4 Bing. 589.‖

One action will not lie against several men for speaking the same words; for the words of the one are not the words of the other, and can no more produce a joint action, than their words and tongues can be said to be one. Palm. 313. Adjudged upon motion after a verdict for plaintiff.

Cro. Jac. 647. S. C. adjudged. Style, 244. S. P. 2 Burr. 984. S. P. 1 Bulst. 15. S. P. but there said, that it was otherwise in the spiritual court, for that one libel may be against several persons. ‖Action against husband and wife, for words spoken by wife, and action against husband only for words spoken by him, cannot be consolidated. Swithen v. Vincent, 2 Wils. 227.; and see 1 Chitty on Plead. 64. 204., and Vol. I. tit. *Baron and Feme.*‖

But, if two men procure another to be indicted falsely for a common barretor, he may have an action upon the case against them Latch. 262. So, if two conspire to main-

tain a suit, and one only gives money. Bro. Joinder in Action, 47. Fitz. Error, 31. Fitz. Maintenance, 15. So in trespass. Latch, 262. *Vide* head of *Trespass.* So, one *decies tantum* lies against all the jurors who take money, for they all give but one verdict, and are but one jury. Bro. Joinder in Action, 5. 47. 100. 108. Fitz. *Decies tantum*, 1. 4. 6. (*a*) It is in the nature of a *conspiracy.* It is one *joint, entire* act.

them both; though in strictness the procurement of one is not the procurement of the other. (*a*)

Schuldam v. Bunniss, Cowp. 192.

[Where there are two or more bailiffs, *&c.* of a borough, a joint action will lie against them under the stat. of 3 Geo. 3. c. 15. for refusing inspection of the books and papers wherein is entered the admission of freemen, though the words of the statute are in the singular number, " mayor, or bailiff, *&c.*" for the breach of trust in one is a breach of trust in both, they being in law but one officer.]

Exall v. Partridge, 8 Term R. 308. S. C. 3 Esp. 8.

‖Where a landlord demised to three persons jointly, and two of them without his assent assigned their interest to the third, and the plaintiff's goods being on the premises were distrained by the landlord for rent; it was held, that the plaintiff might sue the three persons jointly for money paid by him to redeem the goods from the distress, for all the three were liable to the landlord by covenant to pay the rent.‖

Freem. 191.

[One action, it seems, will lie against all the coroners of a county for a false return to a *capias utlagatum.*

Byers v. Dobey, 1 H. Blac. 236.

Where two partners contract to pay a certain sum of money *equally* out of *their private cash* to a third person, they must be jointly sued upon this contract, for it is joint.]

Wathen v. Sandys, 2 Camp. 640.

‖Two candidates at a county election are jointly liable to the sheriff for the expenses of the election, if they have jointly promised to pay; but if they have not jointly promised, they must be sued separately under the stat. 18 Geo. 2. c. 18. § 7.

Forster v. Taylor, 5 Camp. 49. Browne v. Doyle, 5 Camp. 51. n.

Where a party of several persons dine together at a tavern they are jointly liable for the whole expense, and not merely each for his own share. But the officers of a regimental mess are only separately liable, each for his own share.

Shaw v. Hislop, 4 Dow. & Ry. 241.; and see 8 Moo. 20. 1 Bing. 201. 6 Dow. & Ry. 122.

Where goods were ordered by one of two chapelwardens, for the use of the chapel, it was held that the chapelwarden giving the order might be sued separately without joining his brother warden.

Carne v. Legh, 6 Barn. & C. 124.

Where several actions were brought against several members of a mining partnership for the same debt, the defendant in one action having paid the debt and costs in that action, the court stayed the procedings in the other actions without costs.

Morris v. Robinson, 5 Barn. & C. 196. 5 Dow. & Ry. 55.

The same plaintiff may bring several actions against several parties, all liable to him in respect of the same injury, where he does not obtain adequate redress in the action against the party first sued.‖

Stile, 155. adjudged. ‖And see Aron v. Alexander, 3 Camp. 35.‖

A man cannot declare against one defendant for an assault and battery, and against the other for taking away his goods; because the trespasses are of several natures, and against several persons. (*b*)

(*b*) And are several distinct causes of action.

If

If *A.* leases for years to *B.* and *C.* rendering rent, and *C.* assigns his moiety to *D.* and after rent is arrear, *A.* may bring one action of debt for the rent against *B.* and *D.* for the reversion remains entire. Palm, 985.

ACTIONS LOCAL AND TRANSITORY.

ORIGINALLY all actions were tried in the proper counties in which they arose, pursuant to the maxim, *vicini vicinorum facta præsumuntur scire:* this created no inconveniency, for all men being anciently *in decenna*, they were easily come at, the *decenna* being responsible for their appearance. But, when the custom of the *decennary* began to wear off, men used to fly from their creditors, and this begot the distinction between *local and transitory actions;* the first relating to lands, which must be tried where the lands lie; the other, a debt or duty adhering to the person wherever he fled. Hence men omitted to date their contracts from any certain place, and began their obligations with *noverint universi.* When this distinction was established, the licence it gave was soon abused to a great degree; for plaintiffs would lay their actions far from the place where the fact was done; and the defendants, for fear of being outlawed, where necessitated to carry their witnesses into that county, how far soever remote from the place where the cause of action arose. 7 Co. 1. Gilb. Hist. C. P. 89.

To redress this abuse, and to compel the suing out of all writs arising upon contract in the very county where the contract arose, it was ordained by the statute of 6 R. 2. c. 2. that if the writ was of one county, and the plaintiff *declared* of another, the writ should be quashed. But, this not expressly forbidding the writ to be sued in a foreign county, the statute of 4 H. 4. c. 18. directed all attornies to be sworn that they would make no suit in a "foreign county." And the court rules of 15 Eliz. and A. D. 1630. made it highly penal for attornies to transgress this statute. Black. R. 1032.

Soon after the statute of H. 4. a practice began of pleading in abatement of the writ the impropriety of its venue, even before the plaintiff had declared. At first in the reign of H. 5. the courts examined the plaintiff on oath as to the truth of his venue: but soon after they allowed the defendant to traverse the venue, and to try the traverse by the country. But this practice being subject to much delay, the judges introduced the present method of changing the venue upon motion, upon the equity of the statutes of *R. 2.* and H. 4. Which Lord *Holt* says began in the time of *James* I. And among the fees of the King's Bench found Rastall tit. Debt, 184. b. Fitzh. Abr. tit. Briefe, 18. Salk. 670.

by a jury under the king's commission 1630, one is, "for every "rule to alter a *visne*." *Tyre's* Jus. Filiz. 231. The form of the rule and affidavit are also stated in *Styl.* Pr. Reg. (edit. 1657.) 331., as established in 23 Car. 1.

An affidavit was necessary, because the motion succeeded, and was equivalent, to a plea in abatement; and these are called the *common* rule and *common* affidavit in 16 Car. 2. 1 Sid. 185.; though the practice did not universally prevail till after the statute of jeofails 16 & 17 Car. 2. c. 8. Before that it was usual to wait till after trial and verdict, and then arrest the judgment for want of a proper *venue*. But the statute having abolished that practice, the mode of changing the *venue* by motion and affidavit began universally to prevail.

Yet as it would be hard to conclude the plaintiff by the single affidavit of the defendant, he is at liberty to aver that the cause of action arose in the county where the *venue* is laid, and to go to trial on that fact at the same time that the merits are tried by undertaking to give material evidence in that county. This is equivalent to joining issue, (as in *Fitzherbert* before cited,) that the cause of action arose in the first county. And if the plaintiff fails in proving it, he must be nonsuited at the trial; which has in this case the same effect as quashing the writ by a judgment on a plea in abatement.‖

Gilb. H. C. P. c. 7.

And here we shall consider,

(A) What Actions are Local and Transitory.

(B) In what Cases the Court will change the Venue.

(A) What Actions are Local or Transitory.

That all actions on penal statutes must be laid

ALL actions real or mixed, as *trespasses, quare clausum fregit, ejectment, waste, &c.* must be laid in the county where the lands lie. (*a*)

in the proper county, *vide* ACTION *qui tam*, letter (C). Co. Lit. 282. 6 Mod. 222. (*a*) If not laid so, it is cause of demurrer. 2 Black. R. 1070. ‖But advantage can be taken of it only by demurrer; for it is aided after verdict by the statute of 16 & 17 Car. 2. c. 8. Mayor, &c. of London v. Cole, 7 Term R. 585., and see Willes, 431. Not, however, in the case of an ejectment, for the sheriff of one county cannot deliver the possession of land in another. If the declaration do not set out the parcels (as is now often the case), it is necessary to set out the indenture on *oyer* in order to raise the objection.‖

Cro. Car. 185. Jones, 43. Thrale v. Cornwall, 1 Wils. 165.

So, an action of debt for rent, ‖or covenant for rent or not repairing, *&c.*,‖ against an assignee of a term on the privity of estate is local, and will lie nowhere but in that county where the lands are.

‖Carth. 182, 185. Stevenson v. Lambard, 2 East, 580.‖

3 Mod. 337. 1 Show. 199. Carth. 182. 1 Salk. 80. 5 Rep. 17. a.

‖So, also, the assignee of the reversion must sue the assignee of the term in the county where the land lies. And so also, as to the assignee of the term suing the assignee of the reversion; for

for the statute transfers the privity of contract to the assignee of the term, in the same manner as the lessor had it; and the lessor must sue in such case where the land lies, and be sued there.‖

So, where *A.* granted a rent-charge to *B.* and *C.* for their lives, and the lands out of which it issued came to the defendant after the death of *A.*, and the plaintiff, as executor of the survivor of the grantees, brought debt for arrears incurred in their life-time, and laid his action in the county where the lands lay; on application of the defendants to have it tried elsewhere, suggesting the plaintiff's power and interest in that county; it was holden a local action, and not triable elsewhere. Hob. 37. Pine v. Countess of Leicester.

A., as assignee of a reversion, brought covenant against the assignee of the lessee, on an express covenant between the lessor and the lessee, for payment of rent reserved out of lands which lay in *Ireland*, and which was made payable in *London*. On plea to the jurisdiction of the court, it was held, that though such action may be maintained here by the lessor against the lessee (*a*), yet that by the assignment the privity of contract was destroyed; and there being nothing but a privity of estate between the two assignees, it made the action local. Carth. 182 Damer and Barker. Salk. 80. pl. 1. 3 Mod. 336. Show. 191. S. C. 6 Mod. 194. S. C. cited, and admitted to be good law,

there being no privity of contract remaining; and there is no difference between debt and covenant where the action is by lessor against lessee, &c. (*a*) The assignee of the reversion may maintain debt or covenant upon the statute 32 H. 8. cap. 34. against the lessee; *per Holt* C. J. 6 Mod. 194. for the privity of contract is transferred to the grantee by the statute. Carth. 183. 1 Saund. 238. S. P. 240. S. P. ‖See the notes to this case in Will. Saunders, 5th ed.‖ 3 Lev. 154. 1 Wils. 165. ‖So also may the lessee bring covenant against the assignee of the reversion in any county by virtue of the statute. Thursby v. Plant, 1 Will. Saund. 238.‖

‖Whenever the action is brought upon the contract itself it is transitory; therefore the lessor may bring debt or covenant against the lessee, and the lessee covenant against the lessor in any county. Bulwer's case 7 Rep. 2. a. 1 Will. Saund. 241. e.

An action of debt for use and occupation is not local.‖ Egler v. Marsdon, 5 Taunt. 25.

But where the lessor brought debt against the lessee, and declared on a demise of lands which lay in *Jamaica*, on plea to the jurisdiction of the court, and objection, that if the defendant had any good local plea, he was hereby deprived of it; the court held, that this being on the privity of contract, was a transitory action (*b*), and might be laid any where; and that if a foreign issue arose which was local, it might be tried where the action was laid; and for that purpose there may be a suggestion entered on the roll, that such a place in such a county is next adjacent (*c*); and it may be tried here by a jury from that place, according to the laws of that country: and upon *nil debet* pleaded, the laws of that country may be given in evidence. 6 Mod. 194. Way and Yally. 2 Salk. 651. p. 31. S. C. (*b*) 2 Stra. 776. S. P. 2 Vin. Ab. 82. pl. 19. (*c*) For this *vide* 6 Co. 48. 7 Co. 26. Vent. 59.

If a declaration contains matters lying in two counties that join, it shall be tried by both counties, on a *venire* directed to the sheriffs of both counties, who are to summon six of each county. Cro. Eliz. 646. ‖As to an assize *in confinio comitatûs*, see St. 7. R. 2. c. 10. Co. Litt. 154 a. F. N. B. 180 a., and 55 H. 6. 30. a.‖

Bulwer's case, 7 Co. 2. a. Scott v. Brest, 2 Term R. 241. Mayor, &c. of London v. Cole, 7 Term R. 583. Pope v. Davis, 2 Taunt. 252.; and see Cro. Eliz. 646. *Sed vide* 3 Barn. & C. 700. 4 Barn. & A. 179.

‖Where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action; there the plaintiff may bring his action in which of the counties he will.‖

Latch. 262. 271. 3 Co. 24. ‖(*a*) Covenant or debt in the *detinet* against an executor for rent accrued in his own time may also be laid any where; for he is charged on the privity of contract, and is only liable to the extent of assets. 1 Sid. 266. 2 Lev. 80. 1 Will. Saund. 1. note 1. and 241. c. notes, and cases there cited.‖

An action of *debt* against the executor of a lessee, in the *detinet* for arrears in the testator's lifetime, may be brought any where; but where it is in the *debet* and *detinet* for rent accrued in the executor's time, it must be where the land lies. (*a*)

Co. Lit. 282. *Debitum et contractus sunt nullius loci.* 2. Inst. 231. 7 Co. 3.

All personal actions, as *debt*, *detinue*, *assault*, *deceit*, *trover* and *conversion*, *account*, *&c.* may be brought in any county, and laid in any place; and the defendant cannot traverse it, or be allowed to say, that the cause of action accrued in another county or different place, except in the case of an officer of justice, who may plead a special justification.

Griffith v. Walker, 1 Wils. 356.

[An action against the sheriff for a false return is transitory; for that which is false is universally so.

Gregson v. Heather, 2 Str. 727. Ld. Raym. 1455. S. C.

The assignee of a bail-bond may bring an action upon it, either in the county where it is taken, or in that where it is assigned.

Mayor of Berwick v. Ewart, 2 Black. R. 1068.

An action for breach of customs of a town is local; the averment of an immaterial fact will not in such case warrant the laying the *venue* out of the proper county.]

Co. Litt. 261. b. 6 Mod. 228. 2 Ld. Raym. 1043. 2 Salk. 659. pl. 5. 10 Mod. 255. 2 Ld. Raym. 1212. 11 Mod. 51. pl. 21. Cowp. 177.

An action may be brought on a contract or matter which arose beyond sea; as, if *A.* enters into a bond to *B.* in any foreign country, and the bond bears date in no place, *B.* may bring his action where he pleases, and allege that the bond was made in any place in *England*; but if there be a place mentioned as *Bourdeaux* in *France*, then shall he allege that the bond was made *in quodam loco vocat. Bourdeaux* in *France*, (to wit) in *Islington* in the county of *Middlesex*, and from thence the jury shall come.

Bayley on Bills, 175. (3d. ed.) Houriet v. Morris, 3 Camp. 304.; see 2 Barn. & A. 501. 1 Barn. & C. 16.

‖In declaring on foreign bills, though it is usual to state that they were drawn at the place where they bear date, adding the *venue* under a *videlicet*, yet this does not seem necessary.‖

Dutch W. I. Company v. Moses, 1 Str. 612. 2 Ld. Raym. 1352. S. C.

[An action may be maintained in *England*, to recover money borrowed at *Amsterdam*, and covenanted to be paid in bank there.

Mostyn v. Fabrigas, Cowp. 161.

Trespass and false imprisonment will lie in this country for an injury of that nature, committed abroad in an *English* settlement.

Cowp. 180.

It was formerly thought that an action arising abroad, though

in its nature local, as trespass *quare clausum fregit*, might be maintained in this country, if *the satisfaction sought were merely personal and for damages, and there would be otherwise a failure of justice*: but that opinion hath been over-ruled, being found to be inconsistent with the settled and acknowledged distinctions between actions local and transitory.] Doulson v. Matthews, 4, Term R. 503. See too, 1 Stra. 646.

‖Although an action for diverting the water of a navigation be in its nature confessedly local, yet it is not necessary to give a local description to the nuisance; and, therefore, if it be doubtful whether the place where the navigation is stated to lie be laid in the declaration as a *venue* or as local description, it will be referred merely to *venue*, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county.‖ Company of Proprietors of the Mersey and Irwell Navigation v. Douglas, 2 East, 497.

(B) In what Cases the Court will change the *Venue*.

THE defendant cannot by his plea oblige the plaintiff to lay his action in a different county from that in which he brought it, unless the matter pleaded be local (*a*); for in transitory actions he must move the court on affidavit (*b*), that if the plaintiff hath any cause of action, such cause accrued in the county of, &c. and not where the plaintiff hath laid it, &c. and such motion must be made before issue joined (*c*), for by joining issue, he agrees with the plaintiff as to the manner of bringing the action: and though the court seldom refuse on such affidavit to change the *venue*, yet if, before or after the motion made, the plaintiff will enter into a rule to offer no evidence but what arises in the county where he has laid his action (*d*), the cause will be tried there.

(*a*) Lutw. 1437. Co. Lit. 282.

(*b*) The affidavit is necessary, because the motion succeeded, and was equivalent to a plea in abatement. 2 Black. R. 1033. It must state *positively* that "the cause of action (if any) arose in A. (the county to which it is prayed to "change the *venue*) and not in B. (the county where it is laid in the declaration) or elsewhere out of A." This is the established form with which the courts exact a strict compliance. Cole v. Goring, Barnes, 477. Belshaw v. Porter, *Ibid.* 478. 4 Burr. 2452. Allen v. Griffiths, 5 Term R. 495. ‖And by a late rule of *B. R.* it must be drawn up "on reading "the declaration," 11 East, 273. 1 Marsh. 243. 1 Chitt. R. 57. 334.‖ It hath been questioned, though it is frequently done, whether the *venue* can properly be changed into *Wales*: certain it is, from the terms of the affidavit, that it cannot be directly changed into the next *English* county, though the process may be afterwards awarded into it. 4 Burr. 2452. Dougl. 262. ‖But now since the *latitat* is holden to run into *Wales*, it has become the common practice to change the *venue* from an *English* to a *Welsh* county. 2 Stra. 1270. 2 Black R. 962. 6 East, 355.‖ In the case of a libel dispersed in several counties, the *venue* cannot be changed, because the affidavit cannot be made in the prescribed form, the publication of the libel being co-extensive with its circulation. Pinkney v. Collins, 1 Term R. 571. Clissold v. Clissold, *Id.* 647. S. P. ‖1 Brod. & B. 299.‖ But if the printing and publishing were both in the same *English* county, or if the libel were written here, and sent abroad, there is then only *one English county* in which the cause of action arose. Freeman v. Norris, 3 Term R. 700. Metcalfe v. Markham, *Id.* 652. One only of several defendants may make the affidavit. Box v. Reed. Barnes, 482. Where it appears on the face of the declaration, that the cause of action is *local*, no affidavit is necessary. Mayor of Leicester v. Green, *Id.* 492. *supra* (A).

(*c*) It has been received afterwards, 1 Term R. 781. It may be changed after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead, upon the terms of pleading issuably, and taking short notice of trial at the first sittings in *London or Middlesex*, because *there* a trial would be lost. Petyt v. Berkley, Cowp. 519. Hunter v. *Gray*, Barnes, 493. S. P. ‖Shipley v. Cooper, 7 Term R. 698. Wilson v. Harris, 5 Bos. & Pull. 320. Tallmash v. Pannel, 5 Bos. & Pull. 12. It cannot be changed at the instance

instance of the defendant after plea pleaded, even though he afterwards obtain leave to withdraw his plea, and plead it *de novo* with a notice of set-off. Palmer v. Turner, Tidd's Pr. 528. Ed. 2.‖ A judge's order for an imparlance is no bar to it. Blackstock v. Payne, Barnes, 487. Nor is the putting in a plea after a rule to shew cause any waver of it. Herbert v. Flower, *Id.* 492. (*d*) Or undertake to give *material* evidence in the county where laid. Sid. 404. 442. [But such undertaking is indispensable.] ‖Guard v. Hodge, 10 East, 32. Clarke v. Reed, 1 N. R. 310.‖ [The want of it cannot be supplied by an affidavit that the cause of action arose where laid. French v. Coppinger, 1 H. Black. R. 216. The undertaking, however, is satisfied by very slight local evidence, or by proof that the cause of action arose abroad. Watkins v. Towers, 2 Term R. 275. Gerard v. De Roebuck, 1 H. Black R. 280.] ‖M'Clare v. M'Keand, 2 Taunt. 197. The performance of it may indeed be dispensed with where the plea and issue joined are such as to render the evidence irrelevant; for it does not apply to collateral issues, but is confined to the matters stated in the declaration. Cockerell v. Chamberlayne, 1 Taunt. 518. Soulsby, Assignee, &c. v. Lea, 3 Taunt. 86. If the plaintiff can shew that part of the cause of action arose in another county than that where originally laid, the rule for changing it will be discharged. Cailland v. Champion, 7 Term R. 205. Collins v. Jacob, 3 Bos. & Pull. 579. Hope v. Bennett, 2 New R. 597. But, where the cause of action substantially arose in a county at a great distance from that in which the *venue* was laid, and all the witnesses resided in that county; the court changed the *venue* to it on the defendant's agreeing to admit a fact, which in point of form arose in the original county. Holmes v. Wainwright, 3 East, 329.‖ [Evidence merely that the plaintiff's witnesses reside in the county where he has laid the action is not sufficient. 2 Black. R. 1031. After the *venue* hath been changed, the court have refused to bring it back upon an affidavit that the witnesses live in *Scotland*, and will not come farther than *Carlisle*. Fogoe v. Gale, 1 Wils. 162.]

2 Mod. 215. Gilb. Hist. C. P. 90. See 2 Ld. Raym. 954. 11 Mod. 9. 12 Mod. 121. 401. 420.

But though the court, on application, seldom refuse to change the *venue*, yet there are cases in which the judges have refused; as where a peer of the realm brings an action of *scandalum magnatum*, the court will not change the *venue*, because a scandal raised on a peer reflects on him through the whole kingdom.

Barnes, 543. 2 Stra. 807. 2 Ld. Raym. 1418. Andr. 198, Barnardist. K. B. 60. 1 Lev. 56. S. P. For the king himself is party to the suit; but in my Lord *Shaftsbury*'s case, who brought *scandalum magnatum*, and laid it in *London*, the venue was changed. Vent. 364. 2 Jones, 192. But *note* that was by reason of the great influence he had in the city; and the established doctrine is, that the venue cannot be changed in an action of *scandalum magnatum*. 2 Salk. 668. pl. 3. 1 Vern. 459. It was refused by *B. R.* in Ld. *Sandwich* and *Miller*, in *Easter* Term 1773.

Vide head of *Privilege*. 2 Salk. 668. pl. 1. 670. pl. 9. 2 Show. R. 176. pl. 172.

A serjeant at law, barrister, attorney, or other privileged person, whose attendance is necessary at *Westminster-hall*, may lay his action in *Middlesex*, though the cause of action accrued in another county; and the court, on the usual affidavit, will not change the *venue*.

242. pl. 239. S. P. Though the plaintiff, who was a barrister, had discontinued his practice for some time before. [But *Quære* of this? On motion by Mr. Spelman to re-change the venue to *Middlesex* on the ground of his being a barrister, the court obliged him to make affidavit that Mr. Spelman the plaintiff and Mr. Spelman the barrister were the same person. 2 Black. R. 1067. 1 Black. R. 19. An attorney does not lose his privilege to change or retain the venue by residing in the country. 2 Black. R. 1065.]

Carth. 126. 2 Ld. Raym. 1053. Bisse v. Harcourt.

But, if a privileged person be sued, and the action brought against him in the right county, his privilege will not entitle him to have it tried in *Middlesex*.

2 Salk. 668. pl. 1. Andr. 381. 4 Burr. 2027. 5 Term R. 573. *Contr.* 2 Stra. 1049. *Dolben* J remembered a cause where the *venue* was altered, though an attorney was plaintiff, because the matter arose, and all the witnesses lived, in remote parts. Carth. 126. So, where the plaintiff was an attorney, but had not declared in person, but by N. C. his attorney. Barnes 479. So, where plaintiff sued defendant by *capias*, and not by attachment of privilege. Pract Reg. C. P. 419. Rep. & Cas. Pract. C. P. 132. So, where he sued by original. Barnes, 484 Rep. & Cas. Pract. C. P. 145. Pract. Reg. C. P. 420.

‖An

‖And if the privileged person lay his *venue* in *London*, or any other county than *Middlesex*, he has no privilege to retain it. 2 Salk. 668. 7 Taunt. 146.

And the privilege does not extend to actions by an attorney *in auter droit*.‖ Tidd. 606. (9th ed.)

So, if an attorney lays his action in *London*, the court will change the *venue* on the usual affidavit; for by not laying it in *Middlesex* (*a*), he seems regardless of his privilege, and is to be considered as a person at large. Vent. 47. Cas. Temp. Holt, 712. pl. 5.

(*a*) In order to prove the venue was not laid in *Middlesex*, a copy of the declaration was produced, by which it was said, it appeared the *venue* was laid in *London*; but the court said an affidavit ought to be annexed, that it may appear to be a true copy, and that they did not require this affidavit but in the case of an attorney.

‖The *venue* will not be changed to any of the four northern counties, previously to the spring circuit, because the assizes there are holden only once a-year at the time of the summer circuit. 3 Black. Com. 294. 1 Wils. 138. *Sed quæ.* now?

Nor will it be changed into a county palatine but on the terms of *not assigning error on the want of an original*; and therefore, in C. B., one of several defendants cannot be permitted to remove it thither, because it is not competent to the court in that case to lay the other defendants under those terms.‖ Braddely and others v. Rippon, 5 Taunt. 87.; and see 2 Chitt. R. 417. 7 Taunt. 466. 4 Maul. & S. 235.

If material evidence may be given in two counties, the plaintiff may elect to bring his action in which he pleases; as, if *A.* draws a bill of exchange in *Bristol*, payable in *London*, the action accrues by the refusal to pay the money in *London*, and therefore the plaintiff not obliged to change the *venue*. 2 Salk. 669. pl. 4. Comb. 84. Lutw. 215. 7 Co. Bulwer's case. [10 East, 34.

The like law in penal actions. 2 Term R. 238.]

‖So, where the *venue* had been changed by the defendant from *London* to *Staffordshire*, on the usual affidavit that the cause of action arose in the latter county, and not elsewhere, the Court of King's Bench would not bring it back to *London* on an affidavit that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and on the plaintiff's undertaking to give material evidence in one or other of those counties, particularly as no special facts were stated to shew that the defendant's affidavit was not correct. And mere hardship and delay in being obliged to try a cause at *Lancaster*, when all the plaintiff's witnesses reside in *London*, is no ground for bringing back the *venue* to the latter place, unless the defendant be under terms to take short notice of trial in *London*, and has undertaken not to assign for error the want of an original writ.‖ 2 Barn. & A. 618. 1 Chitt. R. 377. 1 Chitt. R. 691.

So, where an *assumpsit* was brought for goods sold and delivered, and the action laid in *London*, and a motion was made to change the *venue* upon affidavit that the sale was in *Kent*; but it appearing that the delivery was in *London*, the court held that where the matter consists of two parts in several counties, the plaintiff shall have his election. Vent. 344.

So, an action against a lighterman for not delivering goods was laid in *London*, whither they were to be carried; it was moved to change the *venue*, because the damages and neglect were in *Kent*. *Sed non allocatur*; for the neglect is transitory, and 2 Salk. 670. pl. 8. Not the course to change the venue in an

action of escape; *per Holt* C. J.

and not material where it was; and the court will never change a *venue* for a carrier, which is the same case.

10 East, 32.; and see 2 Chitt. R. 417.

‖The *venue* may be changed in an action of *crim. con.* on the usual affidavit.

Ibid.

So in an action of assault.

6 Taunt. 754. *Sed vide* 1 Sid. 287.

So in the C. B. in a penal action.

4 Taunt. 729.

So, in case for overturning the plaintiff in a stage coach, it may be changed to the county where the accident happened.‖

Shirley v. Collis, 2 Black. R. 940.

[But where the cause of action arises in two counties, the court will not change it to a third.]

2 Mod. 228. That the court will not change the *venue* in an action of covenant. Lev. 307. ‖See 2 Chitt. 419. 1 M'Clel. & Y. 212. Nor in *assumpsit* on an award. 2 Bos. & Pull. 355. 3 Barn. & C. 9. 11. Or charter-party of affreightment. 7 Taunt. 306. 1 Moo. 54. *Sed vide.* 4 Bing. 39. Unless some special ground be laid. See Tidd. 604. (9th edit.)‖

If the action be grounded on a specialty, the court will not change the *venue*; for not being dated at any particular place, it may be presumed to be omitted, that it may charge the defendant at any place.

Duplessis v. Chalk, Stra. 678. Fitzgib. 166.

[Nor will they change the *venue* in debt for rent on a parol demise of lands in one county, and the action laid in another.

Meritt's case, 1 Freem. 260.

But where an action of debt for rent by the lessor against the original lessee was brought in *London*, and the lands lay in *Gloucestershire*; on affidavit made that the defendant would plead a special plea, whereby the title of the estate would come in question, the court ordered the *venue* to be changed into *Gloucestershire*.

Foster v. Taylor, 1 Term R. 781.

It is a general rule not to change the *venue* in actions upon specialties; yet it has been done upon certain terms imposed upon the defendant, on a suggestion that both the plaintiff's and defendant's witnesses resided in the county to which it was prayed it might be changed; but several similar applications have been rejected.]

6 East, 268.; but see 2 Chitt. R. 419.

‖In covenant on a lease for diverting water from the mill, a view being proper to be had the *venue* was changed to the county where the premises lay, though most of the plaintiff's witnesses resided in the county where the *venue* was laid.

Watt v. Daniel, 1 Bos. & Pull. 425.

And in a late case the Court of Common Pleas refused to change the *venue* in an action on a deed to the county where it was executed, on the ground of the defendant's witnesses living there; it not appearing from the pleadings to be necessary to produce many witnesses from that county, and there being reason to suppose that a fair trial could not be had there.‖

Barnes, 480. 483. 485. 487. 2 Black. R.

[The Court of Common Pleas refuse to change the *venue* in an action on a bill of exchange or promissory note (*a*), where the cause of action is confined to the bill or note only; but the practice

practice of the Court of King's Bench in this respect seems to be different. (*b*)

993. 1 Wils. 41. Say R. 7.

Andr. 65. ‖They have however done it where the defendant's affidavit disclosed the number of witnesses, and shewed that a serious inconvenience would arise from bringing them into the county where the *venue* was laid: a mere statement that *all* the defendant's witnesses live in the county to which it is moved to change it will not suffice. Evans v. Weaver, 1 Bos. & Pull. 20. And where a view was necessary, they have done it, though most of the plaintiff's witnesses resided in the county where the *venue* was laid. Hodinott v. Cox, 8 East, 267.‖ (*a*) They consider these in the nature of specialties. ‖(*b*) It should seem to be the same where the note is not negotiable. Orme v. Almay, cited in 2 Bos. & Pull. 355. And the practice of the Court of King's Bench seems now to be the same. See Tidd. 604. (9th edit.); and 2 Chitt. R. 418.‖

‖It would seem that the courts will neither change the *venue* in an action on an award, even though the declaration contains the common counts, nor oblige the plaintiff to undertake to confine his evidence to the count upon the award.‖

Whitburn v. Staines, 2 Bos. & Pull. 355.

[Though the plaintiff cannot regularly move to change the *venue*, yet he may do it in effect by moving to amend, and striking out the name of the one county, and inserting that of the other; and as he may make this motion at any time, therefore where the *venue* has been changed by the defendant, the court will permit him at any time to bring it back on the usual undertaking.]

Stroud v. Tilly, Stra. 1162. Hallet v. Hallet, 1 Wils. 173. Bruckshaw v. Hopkins, Cowp. 409.

ACTIONS *QUI TAM*.

ACTIONS *qui tam* are (*a*) such as are given by acts of parliament, which impose a penalty, and create a forfeiture for the neglect of some duty, or commission of some crime, to be recovered by action or information, at the suit of him who prosecutes as well in the king's name as in his own. As most penal statutes direct, that the penalty may be recovered by action or information, we will consider both matters together, and therefore we shall shew,

3 Black. Com. 160. (*a*) It is called sometimes a popular action, when the penalty, or part of it, is given to any one who will sue for the same.

In these actions or informations, the party who prosecutes has, by commencing his suit, such an interest in the penalty, that the king cannot discharge or suspend the suit, as to the part the plaintiff is entitled to. *Vide* 2 Hawk. P. C. 592. and head of *Prerogative*. [Penal actions, though the judgment may in some cases be followed by legal disabilities, are considered as civil proceedings. They are founded upon the implied contract which every one is under by the fundamental constitution of government, to obey the directions of the legislature, and to pay the forfeiture incurred by his disobedience to such persons as the law requires. 3 Black. Com. 159. Therefore the affirmation of a Quaker is admissible in them; Cowp. 342. and a new trial may be had after a verdict for the defendant. Wilson v. Rastall, 4 Term R. 753.]

(A) In what Cases they lie.

(B) What ought to be the Form of them.

(C) In what Courts they may be brought, and where laid.

(D) Of

(D) Of the Proceedings and Pleadings in such Actions or Informations.

(E) Of the Judgment on such Actions or Informations.

(F) In what Cases there shall be Costs.

(G) Whether the Penalty of a Penal Statute may be compounded or granted over.

Within what time the prosecution must be on a penal statute, *vide* head of "LIMITATION OF ACTIONS."

(A) In what Cases they lie.

Co. Ent. 375. Lutw. 133. 138. Dyer, 95. 346. And. 139.

WHEREVER a statute prohibits a thing, as being an immediate offence against the public good in general, under a certain penalty, and the penalty, or part of it, is (*b*) given to him who will sue for it, any person may bring such action or information, and lay his demand *tam pro domino rege quam pro seipso.*

(*b*) But without such penalty be given, no private person can sue, for the whole penalty goes to the king. 2 And. 127. 2 Jones, 234. 2 Hawk. P. C. 377. [It hath been determined, however, that where an informer entitled to no part of the penalty, sues for the king and himself, the information is not void, but the whole shall be adjudged to the king. Parker, 105. Hardr. 185. But an act which gives a remedy only to the party grieved, is not to be considered as a penal act; Cas. Temp. Hardw. 412. Andr. 115. S. C. Vin. Abr. tit. Robbery (U), p. 2. S. C. 2 Term R. 148. for the king cannot discharge it, or proceed in it after the death of the party. Wood's Inst. 535.]

Vide 2 Hawk. P. C. 377. 4 Co. 13.

So, where a statute prohibits or commands a thing, the doing or omission whereof is both an immediate damage to the party, and also highly concerns the good of the public, the honour of the king, *&c.* the party grieved may, and, as some say, ought to bring his action on such statute *tam pro domino rege quam pro seipso.* especially if the king be entitled to a fine.

(B) What ought to be the Form of them.

5 H. 7. 17. b. Plow. 79. 4 Co. 48. Cro. Eliz. 236. Cro. Car. 229. Dy. 346. b. Show. 337. 2 Hawk. P. C. c. 25. § 100.

IT is agreed, that an action or information on a public statute need not recite the statute on which it is grounded; whether the offence be such only because prohibited, or be an evil in its own nature; and whether it be prohibited by more than one statute, or by one only; for the judges are bound *ex officio* to take notice of all public statutes.

For this *vide* 2 Hawk. P. C. c. 25. § 101.

But, if the prosecutor take upon him to recite the statute, and materially vary from a substantial part thereof (*a*), this is fatal, because it does not judicially appear to the court that there is such a foundation for the prosecution, as that whereon it is expressly grounded.

‖(*a*) Not being bound to recite the statute, a *literal* variance will be fatal. Dougl. 97. *Sed vide* 9 G. 4. c. 15. and tit. *Pleas and Pleading* (B).‖

But,

But, if an information contain several offences against a statute, and be well laid as to some, and defective as to others, the informer may have judgment for what is well laid; as, where the words of the statute are fully pursued in the description of some of the offences, and not of others; or, where the time is in part certain, and in part uncertain. Cro. Jac. 104. 529. Cro. El. 835.

Also, an action or information *qui tam* need not conclude *contra pacem*, or *in contemptum domini regis*; as an indictment must. 2 Hawk. P. C. c. 26. § 18.

He who brings an action on a penal statute, which gives one moiety of the forfeiture to the king, and the other to the informer, may either have a writ against the defendant *quod reddat domino regi et* A. B. *qui tam, &c. quas eis debet,* or *quod reddat* A. B. *qui tam, &c. quas ei debet*; and in either case the writ is well pursued by a declaration in the name of the plaintiff only. Jones, 261. Cro. Car. 256. Plow. 77. Dyer, 95. 3 Lev. 374. Dal. 66.

But it seems doubtful whether there be any necessity that either the writ or count, in any such action, do express that it is brought by or for the king as well as the party. (*a*) *Quære, Vide* 2 Hawk. P. C. c. 26. § 20.

(*a*) The usual form of declaring is, that the party sues as well for the king as for himself. It is the safest method, and perhaps is necessary.

But it seems agreed, that every information must be in this form, *viz.* that the informer *tam pro domino rege quam pro seipso sequitur*, even where it is brought upon a statute which gives one third of the penalty to a third person. But there is great variety in the form of such informations in other respects; for sometimes they say, that the action accrues to the informer, to demand the forfeiture for the king and himself; sometimes that it accrues to the king and to the informer; sometimes that it accrues to the king and to the informer and to *J. S. viz.* where it is divided into three parts; sometimes they have no clause at all of this kind; sometimes a process is prayed to bring in the defendant to answer the informer; sometimes to answer as well the king as the informer; and sometimes to answer concerning the premises, without saying to whom. *Vide* Hawk. P. C. c. 26. § 20. and the other authorities there cited.

Such information may demand what is due to the informer, without mentioning what is due to the king. Also, if the *quantum* depend on what shall be found by the jury, a blank (*b*) may be left for the sum; but if it demand more or less for the party than his due (*c*), it is insufficient as to him; but even in such case it may be sufficient as to the king's share. 2 Hawk. P. C. c. 26. § 20.

(*b*) *Qu.* As to the blank, if it would not be bad?

(*c*) Hob. 245. Bull. Ni. Pri. 196.

If the action be popular, *i. e.* such as any person may bring, it may conclude *ad grave damnum*, without adding, of the plaintiff; because every offence, for which such action is brought, is supposed to be a general grievance to every body. Bro. Action Popular, 2. 2 Hawk. P. C. c. 26. 21.

It is said that the fact is sufficiently alleged after a *quod cum* in an action on a statute, but not in an information. (*d*) Show. 337.

(*d*) *Qu.* If this rule will hold universally? And if it must rather depend on the particular circumstances of each case? ‖See Carth. 216. *Pleas and Pleading* (B).‖

Where the penalty is given for continuing such a practice for a cer- Lutw. 162.

a certain time, or for not doing such an act within such a time, the information must be very particular in bringing the offence within the time prescribed. (*a*)

(*a*) The King v. Taylor, Lent assizes for *Surry* 1776. before Mr. J. *Blackstone*, an information against the defendant for following the business of a tanner, not having served an apprenticeship. The evidence did not specify the time as laid in the information; and the prosecutor having closed his case, the judge refused to let him supply the defect; it being a prosecution that was not to be encouraged; and directed the jury to acquit the defendant.

2 Hawk. P. C. c. 26. § 22. (*b*) Made perpetual by 27 Eliz. c. 10. and 31 Eliz. c. 5. [The latter cases support this doctrine. See Leigh v. Kent, 3 Term R. 565. n. a.]

By the 18 Eliz. cap. 5. (*b*) *None shall pursue against any person on a penal statute, but by way of information, or original action, except where the penalty is limited to a certain person,* &c.; yet popular actions in the King's Bench or Exchequer seem not within the meaning of this statute; for it doth not restrain the suit to original writs, but only to original actions, and such actions by bill are properly original ones in the courts in which they are commenced; and therefore it seems a reasonable construction, that the meaning of the statute was only to restrain suits commenced in inferior courts, and afterwards removed into superior.

(C) In what Courts they may be brought, and where laid.

31 Eliz. c. 5. § 2.

BY 31 Eliz. c. 5. § 2. in any declaration or information the offence against any penal statute shall not be laid to be done in any other county but where the contract or other matter alleged to be the offence was in truth done; and every defendant in such action or information may traverse and allege that the offence was not committed in the county where it is alleged, which being tried for the defendant, or if the plaintiff be thereupon nonsuit, then the plaintiff shall be barred in that action or information.

Com. Dig. tit. Action (N), B. N. P. 195. 3 Term R. 338. 2 Bos. & Pull. 381.

This statute is still in force, and is held to extend to all actions or informations brought by common informers upon penal statutes, *whether made before or after* 31 Eliz. And hence the venue in all such actions and informations must be laid in the county where the offence was committed.

4 East, 385. 9 East, 296. 5 Taunt. 754. 3 Maul. & S. 429.

Whitehead v. Wynn, 5 M. & S. 427.

This statute extends to offences of omission as well as commission.

Bun. 256. 261. Parker, 182. 3 Anst. 871.

There is an exception, however, in the statute that it shall not extend to any such officers of record as had in respect of their offices theretofore lawfully used to exhibit informations and sue upon penal laws, which exception extends to informations by the Attorney-General in the Court of Exchequer.

21 Ja. 1. c. 4.

By the statute 21 Ja. 1. cap. 4. all offences against penal statutes, for which any common informer may ground any popular action, bill, plaint, suit, or information, before justices of assize, or *nisi prius*, or of general gaol-delivery, or of *oyer*, *&c.* or of peace, *&c.* (except offences concerning recusancy or maintenance,

nance, or the king's customs, or transporting gold, or silver, or munition, or wool, or leather, *&c.*) shall be commenced, sued, prosecuted, tried, recovered, and determined by way of action, plaint, bill, information, or indictment, before the justices of assize, of *nisi prius*, of *oyer*, *&c.* or of gaol-delivery, or before justices of peace, of every county, city, borough or town corporate, or liberty, having power to enquire of, hear, and determine the same, within this realm of *England* and dominion of *Wales*, wherein such offences shall be committed, in any of the courts, places of judicature, or liberties aforesaid respectively, only at the choice of the parties which shall commence suit or prosecute for the same, and not elsewhere, save only in the said counties or places usual for those counties, or any of them; and the like process in every popular action, bill, plaint, information, or suit, shall be as in actions of *trespass vi et armis* at common law; and all informations, actions, bills, plaints, and suits whatsoever, either by the attorney-general, or by any other officer whatsoever, in any of the courts of *Westminster*, for or concerning any the offences aforesaid, shall be void.

And in all suits on penal statutes, the offence shall be laid in the county where it was in truth committed; and if, on the general issue, the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty.

And no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration, on the said statutes, which by this act are appointed to be heard and determined in their proper counties, till the informer or relator hath taken an oath before a judge of the court, that the offence was not committed in any other county than where, by the information, *&c.* the same is supposed to have been committed, *&c.* the same oath to be there entered of record. (*a*)

(*a*) This section of the statute seems now to be disregarded. See *infrà*.

In the construction of this statute it hath been holden, that no action of *debt* or *information*, or other suit whatever (*b*), can be brought on any penal statute made before 21 Jac. 1. in any of the courts of *Westminster-hall*, for an offence not excepted by the statute, and for which the offender may be prosecuted in the country (*c*), unless such offence shall be committed in the same county in which such court shall sit. And as to the objection, that by this restraint of suits on penal statutes to the said courts, the offence would become dispunishable by the offender's removing from the county; it may be (*d*) answered, that he may be sued to an outlawry in the same manner as in an action of trespass.

2 Hawk. P. C. c. 26. § 54.

(*b*) Salk. 372. pl. 13. Carth. 465. 5 Mod. 425. 2 Lev. 204. 3 Inst. 192. adjudged *cont.* Vent. 8. Lev. 249. 5 Lev. 91. 2 Keb. 491. 447. Sid. 303. 400. and *vide* Wille's R. 654.

Vent. 304. 2 Lev. 204. Lateb. 192. Sid. 359. Ld. Raym. 370. Stra. 415.

(*c*) Lon. 195.

(*d*) Salk. 373. pl. 24. Salk. 372. pl. 13.

That the statute does not extend to offences created by subsequent statutes.

1 Salk. 372. Bull. N. P. 195. 3 Maul & S. 438.

Neither this statute nor the 31 Eliz. c. 5. extends to actions by the party grieved.

1 Show. 354. Bull. N. P. 195.

That where a subsequent statute gives an action of debt, or any

But *per Holt*,

it comes within the equity of the statute. [(*a*) The king v. Gaul.

any other remedy, for the recovery of a penalty in any court of record generally, it so far impliedly repeals the restraint of 21 Jac. 1., and, consequently, leaves the informer at his liberty to sue in the courts of *Westminster-hall*. (*a*)

1 Salk. 373. Ld. Raym. 370. S. C. Hick's case. 1 Salk. 373. But this was merely the private opinion of *Holt*; and the cases here referred to have been confirmed by a subsequent case of Harris v. Reyney, B. R. P. 1734, cited in Parker, 186.; and the reason of the judgment, as there stated, is, that the preamble speaks of offences against divers and sundry penal laws and statutes of the realm; and the enacting clause of or concerning offences committed or to be committed against any penal statute, must relate to a statute in being, for there can be no offence against a statute which does not exist. However, the offence must be laid within the proper county. 1 Salk. 373.]

Cro. Car. 119. Lit. Rep. 163. Hut. 98. Vent. 8. 2 Str. 1103. (*b*) It is only where there is

That the statute gives no jurisdiction to the courts therein mentioned over any offences in relation to which they had none before; and, therefore, that suits for such offences must be brought into the courts of *Westminster* in the same manner as before. (*b*)

a concurrency of jurisdiction in the superior and inferior courts, both as to *the subject matter, and as to the mode of proceeding*, that the statute excludes the jurisdiction of the former. Therefore a suit may be maintained in the courts at *Westminster* for the recovery of penalties incurred against the statute of 1 Jac. 1. c. 22. notwithstanding a subsequent clause of that statute, which authorizes justices of assize, of gaol-delivery, and of the peace, to enquire of the premises, and to hear and determine the same; the mode of proceeding under that clause being merely by indictment or presentment. Shipman v. Henbest, 4 Term R. 109.] ‖See 1 Will. Saund, 312. a. b.‖

Keb. 106. Jones, 193. 2 Hawk. P. C. c. 26. § 37.

That the statute hinders not the removal of any cause into the King's Bench by *certiorari*, after which it may be either tried there or in the county by *nisi prius*. (*c*)

Rex. v. Martel. Bull. Ni. Pri. 196. 4th edit. (*c*) [It is now settled, though formerly doubted, that an appeal lies from the King's Bench to the Exchequer Chamber in a *qui tam* action of debt. This question was determined by the Exchequer Chamber, the courts of King's Bench and Chancery having previously refused to entertain it. Lloyd v. Skutt. Dougl. 353. n.]

2 Andr. 127. Cro. Jac. 178. 2 Hawk. P. C. c. 26. § 25. Parker, 182.

Also, where a statute limits suits by an informer *qui tam* to other courts, yet any one may, by construction of law, exhibit an information in the Exchequer for the whole penalty for the use of the king.

Cro. Car. 316. *vide* 4 Inst. 272. 2 Inst. 193. But *quære* Whether

That on the last clause of the statute it cannot be assigned for error, that an information, *&c.* was filed without such previous oath as the statute requires, for it was only directory to the officer. (*d*)

for want of such an oath, the court will not, on motion, set aside the process. Salk. 367. pl. 19. Ld. Raym. 426. Carth. 503. [(*d*) This oath is not necessary where the action is in the superior courts, the statute not extending to any actions which may be brought in those courts. Leigh *qui tam* v. Kent, 3 Term R. 362. Balls *qui tam* v. Atwood, 1 H. Black R. 546.]

Show. 354.

That no suit by a party grieved is within the restraint of the statute.

Cates *qui tam* v. Knight, 3 Term R. 442.

[Where an offence is created by a statute under a penalty, the penalty may be sued for in the superior courts; for the jurisdiction of those courts is not to be taken away but by express words or necessary implication. But the statute of 25 G. 3. c. 51. having imposed penalties of 50*l.* and of 10*l.* and having enacted that the former should be sued for in any of the courts of *Westminster*, but having provided that it should be lawful for justices of

of the peace, *&c.* to hear and determine the latter, with a power to mitigate the penalties; it was holden, that such proviso ousted the jurisdiction of the superior courts as to the penalties of 10*l.*]

(D) Of the Proceedings and Pleadings in such Actions and Informations.

BY the 18 Eliz. c. 5. every informer on any penal statute shall exhibit his suit in proper person, and pursue the same either by himself, or by his attorney in court, and shall not use any deputy. (*a*)

18 Eliz. c. 5. 2 Hawk. P. C. 2. 26. § 53. [(*a*) Therefore an infant cannot be a common informer, for he must sue by guardian; Maggs v. Ellis, M. 25 G. 2. Bull. Ni. Pri. 196. (4th edit.) and he cannot be an attorney, because he must be sworn. March 92.]

Any informer *qui tam* (*b*), or plaintiff in a popular action (*c*), may be nonsuit, and thereby determine the suit, as to himself at least; and though the king cannot be nonsuit, the attorney-general may enter a *nolle prosequi* to an information by the king only.

(*b*) Co. Litt. 139. Bro. Nonsuit, 68. (*c*) Bro. Nonsuit, 35. *Vide* Sid. 420. Salk. 21. pl. 11. [Moulton *qui tam* v. Bingham. 2 Term R. 511. n. a. But the act of 14 G. 2. c. 17. for judgment as in case of a nonsuit, does not extend to an information *qui tam* for the king and party. Parker, 92.] ‖It extends to *qui tam* actions as well as others. Barnes, 315. 1 Wils. 325. 7 Term R. 178. 1 East, 554.‖

[Where the moiety of a penalty is given by a statute to the treasurer of a county, riding, or *division*, the word *division* does not apply to any small districts, or to any arbitrary divisions of the county made for the convenience of the magistrates, and to which separate treasurers are appointed, but must be taken in its legal sense, and therefore an action cannot be supported in the name of the treasurer of such districts, *&c.*]

4 Term R. K.B. 224. 459.

By the 29 Eliz. c. 5. and 31 Eliz. c. 10. if any natural-born subject or denizen, shall be sued on any penal law in the *Queen's Bench*, *Common Pleas*, or the *Exchequer*, where he is bailable, or by form of the court may appear by attorney, in every such case he may, at the time contained in the first process, appear by attorney, and not be urged to personal appearance, or to put in bail.

29 Eliz. c. 5. and 31 Eliz. c. 10.

If the defendant plead a special plea, he must take care to set it forth with all convenient certainty, and to answer the whole time laid in the information; and if he plead the general issue, he must depend upon it, for he cannot plead together with it a special plea, either to the whole, or to part of the charge. (*a*)

Roll. Rep. 49. 134. Bridg. 115. that he cannot wage his law, or take advantage of a protection 2 Hawk. P. C. 390. [(*d*) The stat. 4 Ann. c. 16. does not extend to penal actions; see § 7. 2 Stra. 1044. 2 Wils. 21. 4 Term R. K. B. 701. ‖1 Bos. & Pull. 222.‖ A *qui tam* information cannot be quashed upon motion. Stra. 953.]

If the defendant plead *nil debet*, it is safest to say expressly that he owes nothing to the informer, nor to the king; for if he only plead that he owes nothing to the informer, it may be objected that the whole declaration is not answered.

Co. Ent. 165. Hob. 327. Vent. 122. 3 Lev. 375. *Vide* Cro. Car. 10, 11.

If there be more than one defendant, they ought not to plead jointly,

2 Hawk. P. C. c. 26. § 67.

jointly, that they are not guilty, but severally, that neither they nor any of them are guilty, *&c.*

Hob. 218. 1 Term R. 462. ‖See 3 Bos. & Pull. 111.‖

[It seems that either *nil debet*, or not guilty, is a good plea.]

2 Hawk. P. C. c. 26. § 68.

If the suit be grounded on the breach of a statute appearing by matter of record, *nil debet* is not a good plea.

Cro. Eliz. 261. Roll. Rep. 49. 154. Hob. 209. 138. (*a*) When the suit shall be said to be pending, *vide* 2 Hawk. P. C. c. 26. § 63. and *quære* Whether from the time of the purchase or return of the writ. Salk. 89. From the time of the purchase of the writ [The day of suing it forth is the commencement of the suit. 3 Burr. 1423. Combe v. Pitt. ‖Notice of action has been held no commencement of it. 2 Black. R. 781.‖ The plea *must* aver the priority of the suit, and the very hour of its commencement may be shewn, if necessary. Jackson v. Gisling, Stra. 1169. 3 Burr. 1423.]

Wherever a suit on a penal statute may be said to be (*a*) depending, it may be pleaded in bar of a subsequent prosecution, being expressly averred to be for the same offence, as it may, though it be laid on a day different from that in the former; and it is said, that a mistake in such a plea of the day whereon such prior suit was commenced, will not be fatal on the issue of *nul tiel record*, if it appear in truth to have been prior, *&c.* and if two informations be exhibited on the same day, they may mutually abate one another, because there is no priority to attach the right of suit in one informer more than in the other.

Breden *qui tam* v. Harman, 1 Str. 701. Bull. Ni. Pri. 197. (4th ed.)

[The record of a recovery in another action cannot be given in evidence on *nil debet*; for if it be pleaded, the plaintiff may reply *nul tiel record*, or that the recovery was by fraud to defeat a real prosecutor, which he cannot be prepared to shew upon the general issue.

If the defendant plead a prior recovery, and the plaintiff reply *per fraudem*, and such recovery be found to be fraudulent, the defendant is liable to two years' imprisonment by 4 H. 7. c. 20.] (*a*)

‖(*a*) This statute does not extend to cases where the penalty is given to the party grieved. 1 Salk. 30. 2 Hawk. P. C. 279.‖

2 Roll. Abr. 683. *Vide* 2 Hawk. P. C. c. 26. § 69. that he may take advantage of it by virtue of the statute, without pleading it specially; but as to those matters to which the statute doth not extend, *quære.* ‖If the same act that imposes the penalty contains the proviso of exemption, it is clear this may be shewn on the general issue. 4 Burr. 2284. 2469. And it seems the same if a subsequent act contain the exempting clause. 1 Black. 230.; and see 5 Camp. 222.‖ [The defendant cannot avail himself under the general issue of any matter that goes to the jurisdiction of the Court. 4 Term R. 109.]

If the defendant be within the *proviso* of a penal statute, he may take advantage of such *proviso* on the general issue, in a suit on such statute; but it hath been holden (even since the statute of 21 Jac. 1. c. 4.) that if he have matter in his discharge depending on a subsequent statute, he must plead it specially.

2 Hawk. P. C. c. 26. § 72.

As to replications to special pleas to informations *qui tam* in the courts of *Westminster-hall*, they are properly made in the name of the attorney-general only; and such replications in suits at assizes are proper in the name of the clerk of assize only: also, replications to general issues, on such informations in the King's Bench or Exchequer, may be in the name of the attorney-general only; but, generally, the plaintiff only replies in actions *qui tam*; and a demurrer to a plea in bar to an information *qui tam* in the informer's name only has been received.

Where-

Wherever a plaintiff may declare *tam pro domino rege quam pro seipso*, he may continue the same form of words both in the joining of issue and in the *venire*; but is not bound to do it unless the king be entitled to part of the penalty. (*a*)

2 Hawk. P. C. c. 26. § 73. (*a*) Hawkins leaves it a *quære*. Whether he be bound to do it in this case; for there are precedents to the contrary. The usual form in the plaintiff's replication is, "*and the plaintiff who sues as aforesaid*, doth so likewise, "*&c.*" where defendant offers issue. If the plaintiff, then, "*and of this the said* A. *who sues* "*as aforesaid, puts himself on the country, &c.*"

Where several persons are jointly charged for an offence against a statute, which in its own nature may be committed by a single person, without the concurrence of any other, some of them may be acquitted and others found guilty; for though the words of the information be joint, yet in judgment of law the charge is several against each defendant; but, if one only be informed against, as having offended oftener, or, in a higher degree than is proved, as for having been absent from church ten months, where he has been absent but eight; or for having ingrossed 1000 quarters of wheat, where he has ingrossed but 100; he may be found guilty as to what is proved, and not guilty as to the residue, for such offences are in the nature of trespasses, which it is sufficient to prove for any part; but, if the offence consist in making a contract contrary to the purview of a statute, as in the case of usury, it must be proved as it is laid.

2 Roll. Abr. 707. Lane, 19. 59.

[Where an offence made penal by statute is in its nature *single*, and cannot be severed, there, the penalty shall be only single, though several persons may join in committing the offence. But, where the offence is in its nature *several*, there every offender is separately liable to the penalty. Thus, impounding a distress in a wrong place, against the statute of 1 & 2 P. & M. c. 12. though done by many, is but *one* act, and shall be satisfied by *one* forfeiture. So, under the statute 5 Ann. c. 14. killing a hare, though several be concerned in it, is but one offence. But the offence against the 8 Geo. 1. c. 18. § 25. of obstructing a custom-house officer in the execution of his duty, is *several*; and every offender is *separately* liable to the penalties which the act imposes.]

Rex v. Clarke, Cowp. 610. Cro. Eliz. 480. Moor, 453. Noy, 62. ‖See Reeve v. Pool, 4 Barn. & C. 155.‖

‖The plaintiff in declaring on a penal statute must expressly negative the exceptions or exemptions contained in the enacting clause which gives the penalty, and also those contained in any other clause to which the enacting clause refers; but not those contained in a subsequent proviso, to which the enacting clause does not refer, nor those contained in a subsequent statute: in these last cases it is for the defendant to bring himself within the exempting proviso.‖

Spieres v. Parker, 1 Term R. 141. Rex v. Pratten, 6 Term R. 559. Steel v. Smith, 1 Barn. & A. 94.

(E) Of the Judgment on such Actions or Informations.

WHERE by statute the offender is to forfeit such a sum, to be divided into three parts, whereof one shall go to the king, one to the informer, and the other to the poor, and to be com-

Andr. 139. Stile, 329. 2 Roll. Abr. 102. 2 Keb.

820. 2 Andr. 128. Parker, 105. Where a statute distributing one moiety of the penalty to the informer, and the other to the poor, directs that the informer shall recover, a judgment that the informer and the poor shall recover is good. 4 Burr. 2018.

committed if he do not pay it within such a time, the judgment may be general, that the king and informer shall recover the whole, without mentioning how it shall be distributed, or that the party be committed for nonpayment. But, if it mention only that the informer shall recover, without saying any thing of the king, it is erroneous; yet, if on such an information, as it is laid, the informer appear to have no right to any part, but the king ought to have the whole, and the judgment be, that the defendant forfeit the whole, and that the king shall have one part, and the informer another, *&c.* it is erroneous only as to such last clause, which distributes the forfeiture, but shall stand for the first clause, that the defendant shall forfeit the whole. (*a*) Also, if there be no clause at all concerning the forfeiture, in a conviction on a penal statute, but only a judgment *quod convictus est*, it is sufficient, for the forfeiture is implied.

(*a*) 2 Hawk. P. C. c. 26. § 76. Adjudged Mich. 3 G. 1. [Wherever the act expresses the amount of the penalty, or leaves it to the discretion of the magistrate, there must be a judgment of forfeiture as well as a conviction. Rex v. Hawks, Stra. 858. Fitzgib. 124. Barnard. K. B. 212. But where the act, as 9 Ann. c. 14. says, "*That the offender shall forfeit five times* "*the value*," &c. all the judgment the court can give is, *quod convictus est*, and a new action must be brought upon that judgment for the forfeiture. In recusancy there is no other judgment. Rex v. Luckup, Stra. 1048.

4 Burr. 2018. Frederick v. Lookup. *qui tam.*

[A judgment in a popular action may be affirmed as to one part, and reversed as to the other; as, where damages and costs were given on 9 Ann. c. 14., it was reversed as to the damages and costs, and affirmed as to the debt.

5 Term R. 448.

If the jury find a general verdict with one penalty for the plaintiff, and he apply it to one count, he shall not be permitted afterwards to apply it to another count, though the former were bad in law, and the evidence would have warranted the application of it to any other count.]

Willan v. Taylor, 7 Barn. & C. 111.

‖Where the plaintiff in an action on the 9 Ann. c. 14. § 2. recovered treble the value of money lost at play, the loser not having sued within the time prescribed by the statute, and a writ of error was brought by the defendant, and judgment was affirmed without costs; it was held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs.‖

(F) In what Cases there shall be Costs.

2 Keb. 781. Roll. Abr. 574. Lutw. 200. Vent. 153. Salk. 206. pl. 4 *cont.* Moor, 65. 3 Lev. 374. 2 Inst. 288.

AN informer on a popular statute shall in no case whatsoever have his costs, unless they be expressly given him by such statute, for the common law gives costs in no cases; and the statute of *Gloucester* gives the demandant costs only in cases wherein he shall recover his damages, which supposes some damage to have been done to the demandant in particular, which cannot be said in any popular action.

2 Hawk. P. C. c. 26. § 67. *Vide* the au-

But, wherever a statute gives a certain penalty to the party grieved, he is entitled to his costs by the statute of *Gloucester*, which gives the demandant his costs in all cases wherein he shall

shall recover his damages (*a*); for otherwise it would be in vain for him to sue, since in many cases the costs would exceed the penalty.

thorities *supra*. 1 Term R. 71. ‖1 H. Black. 10. 7 Term R. 267.‖

(*a*) Also, where a statute, introductive of a new law, gives a remedy in a point not remediable at the common law, but no certain penalty, the jury may consider the costs, so as to give damages accordingly. 2 Hawk. P. C. *ibid.*

By the 18 Eliz. c. 5. made perpetual by 27 Eliz. c. 10. if any informer or plaintiff (*b*), on a penal statute, shall willingly delay his suit, or discontinue, or be nonsuit, or shall have the trial or matter passed against himself therein by verdict or judgment of law, he shall pay to the defendant his costs, charges, and damages, to be assigned by the court in which the suit shall be attempted, *&c.* (*c*)

(*b*) Extends only to a common informer, and not to a party grieved; yet if a party grieved brings his action, and such action be for any offence or wrong personal, immediately supposed to be done to the plaintiff, or plaintiffs; or whatsoever the nature of the action may be, if the plaintiff might have costs in case judgment should be given for him, he shall pay them on a nonsuit, or verdict against him, by virtue of 23 H. 8. c. 15. and 4 Jac. 1. c. 3. *Vide* 2 Hawk. P. C. c. 26. § 59. and the authorities there cited. ‖Mayor of Plymouth v. Werring, Willes, 440. College of Physicians v. Harrison, 9 Barn. & C. 526. *acc.*‖ [For this reason the costs of a nonsuit were awarded to the defendant in an action by the party grieved, on the statute of 9 G. 1. c. 22. Greetham v. the Inhabitants of the Hundred of Thrale, 3 Burr. 1725. That the plaintiff is in such case entitled to costs, see Witham v. Hill, 2 Wills. 91. and Jackson v. the Inhabitants of Calesworth, 1 Term R. 71. ‖6 Term R. 355. 7 Term R. 267.‖ though denied by *Aston* J. in giving judgment in the case of Wilkinson *qui tam* v. Allott, Cowp. 566.] (*c*) And it is no objection against paying the costs, that the court had no jurisdiction of the cause, or that the statute on which it is grounded is discontinued. 2 Keb. 106. *Vide* Hutt. 35.

[There is a *proviso* in this act, that it shall not extend to any officers who are used to exhibit informations; but it must appear on record that they are such officers, else they will be considered as common informers, and affidavits to the contrary will not be admitted.

2 Ld. Raym. 1333. Bull. Ni. Pri. 334. ‖7 Term R. 367.‖

If a prosecutor *qui tam* for killing game does not reply, defendant shall have costs, for this statute extends to informers on penal statutes.]

Law *qui tam* v. Worrell, 1 Wills. 177. ‖It extends to subsequent statutes. Willes, 392. 440.‖

‖It does not extend to give costs to one of several defendants, who has been acquitted where a verdict has been given against his co-defendants.‖

1 Carr. & P. 439. 446.

[A prosecutor not going on to trial shall pay costs.

Cas. Temp. Hardw. 159. 3 Burr. 1304.

In an action *qui tam* on the 5 Eliz. c. 4. the plaintiff shall pay costs.

Elde *qui tam* v. Stevens, Ld. Raym. 1333. Jeynes *qui tam* v. Stephenson, Barnes, 124.

Where there is any reason to suspect that the defendant may lose his costs, if the plaintiff should fail in the suit, he will be permitted to pay the issue money into court to abide the event. Whether the plaintiff can in such case be compelled to give security for the costs, is a point not yet settled, there being a difference of opinion in this respect between the courts of *Westminster-hall*; the Courts of Common Pleas and Exchequer holding the negative, whilst the affirmative is maintained by the Court of King's Bench.

Parker *qui tam* v. Macfarlane, 3 Term R. 137. Field *qui tam* v. Carran, 2 H. Black. 27. *Vide* tit. *Costs, infrà*; ‖and see Tidd. 985. (9th edit.)‖

English *qui tam* v. Cox, Cowp. 822.

The courts have refused to stay proceedings in an action for usury, till the costs of a *nonpros* in a former action by a different plaintiff against the same defendant were paid.]

‖See the next head (G).‖

(G) Whether the Penalty of a Penal Statute may be compounded or granted over.

18 Eliz. c. 5. (*a*) Extends only to common informers. [But it extends equally to those who sue for the whole penalty, as to *qui tam* informers. Cowp. 366.] 2 Hawk. P. C. c. 26. § 77. (*b*) Extends as well to subsequent penal statutes as to those which were in being when it was made. Hutt. 55. Also, it extends to the compounding of suits commenced in courts which have no jurisdiction, as much as if they had a jurisdiction Keb. 106. Sid. 311.

BY the 18 Eliz. c. 5. no informer or plaintiff shall compound or agree with any that shall offend (*a*), or shall be surmised to offend against any penal statute (*b*), for such offence committed, or pretended to be committed, but after answer made in court to the suit, nor after answer, but by consent of the court in which the information or suit shall be depending; on pain, that whoever shall offend contrary to the true intent of this statute, or shall by colour or pretence of process, or without process, on colour of any offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without consent of some of his majesty's courts at *Westminster*, and shall be thereof convict, shall stand in the pillory, *&c.* by the space of two hours, and shall be disabled to sue on any popular or penal statute, and shall forfeit 10*l. &c.*

4 H. 7. c. 20.

‖By 4 Hen. 7. c. 20. actions popular prosecuted by collusion shall be no bar to those which are prosecuted with good faith and the defendant being lawfully condemned or attainted of covin or collusion shall suffer imprisonment for two years.‖

21 Jac. 1. c. 3. That this statute is in affirmance of the common law, *vide* 2 Hawk. P. C. c. 26. § 80. (*c*) Such justices by such warrant can make such composition for the use of the king only; *per* Ld. *Coke*, 3 Inst. 178. But by the 18 Eliz. *supra*, they may give leave to an informer to compound with a defend-

By the 21 Jac. 1. c. 3. it is declared, That all monopolies, and all commissions, grants, licences, charters, or letters patent, of or for the sole buying, selling, *&c.* or of any other monopolies, or of power, liberty, or faculty, to dispense with, or to give licence or toleration to do any thing against the tenor or purport of any law, or to give or make any warrant for any such dispensation *&c.* or to agree or compound for any forfeitures limited by any statute; or of any grant or promise of the benefit of any such forfeiture, before judgment thereupon, and all proclamations, *&* tending to the furtherance of the same, are contrary to law, and void: *And it is enacted*, That monopolies, and all such commissions, *&c.* shall be examined, heard, tried, and determined by and according to the common laws of this realm, and not otherwise; *but it is provided that this act shall not extend* (*c*) to any warrant or privy seal from the king to the justices of either bench, or the Exchequer, or of assize, or of *oyer* or *terminer* and gaol-delivery, or peace, or other justices having power to hear and determine offences against any penal statute, to compound for the forfeitures of any penal statutes depending in suit before the

them, after plea pleaded: *Also it is further provided*, That the said act shall not extend to any grants, *&c.* that had been granted concerning the licensing of taverns, or selling, uttering, or retailing wines to be spent in the house of the party selling the same, or concerning the making of compositions for such licences, so as the benefit thereof be reserved to the use of the king, *&c.*

ant after plea pleaded. 2 Hawk. P. C. c. 26. § 82. [It is the rule of the Court of King's Bench, that where they give leave to compound, the king's half of the composition shall be paid into the hands of the master of the crown office for the use of his majesty. 4 Burr. 1929. The giving leave to compound is discretional in the courts. 1 Stra. 167. 1 Wils. 79. 130. It hath been given after verdict for the plaintiff. 5 Term R. 98.] ‖In a later case, however, the Court of C. P. seemed to doubt their power to give leave after verdict without the consent of the attorney-general. In all events, they said, it was not a matter of course; circumstances must be laid before them to satisfy them that the defendant was entitled to such an indulgence. 1 Bos. & Pull. 18.‖ [If a defendant obtain a rule to stay proceedings upon payment of a sum agreed upon between him and the plaintiff, the court will enforce the payment of that sum by attachment. 5 Term R. 257.]

‖The application for leave to compound a penal action must be made to the court in bank, and not at *Nisi Prius* on the trial of the cause. 1 Chitt. R. 381.

In one case where the defendant was in execution, the Court of King's Bench, on an affidavit of his poverty, gave the plaintiff leave to compound with him. 1 Stra. 167.

But in the C. B. where part of the penalty goes to the king, the consent of the crown must be obtained before the motion for leave to compound can be granted, whether a verdict has passed for the plaintiff or not. 1 Taunt. 103. 5 Taunt. 268.

It is discretionary in the courts to give or withhold leave; and they refused it in an action on the 25 G. 2. c. 36. for keeping a disorderly house. Tidd, 557. (9th edit.) 2 Black. R. 1157.; and see 2 Smith, 195.

On a *bonâ fide* composition, though not on a collusive one, the plaintiff may be allowed a reasonable sum for his costs; and in compounding a penal action on the post-horse act, which gives costs to the prosecutor, the Court of Common Pleas allowed him to receive the deficient duties not amounting to 40*s.*, and full costs of suit, though exceeding together the 40*s.* paid to the crown. 1 Bos. & Pull. 51.

But where no costs are given to the plaintiff, as in an action on the statute of usury, the crown is entitled to a moiety of the sum agreed to be paid to the plaintiff for his costs; for whatever the defendant may pay under the name of costs is considered, in fact, as an addition to the penalty. 2 Taunt. 213.

When leave is given to compound a *qui tam* action, it is a general rule that the king's half of the composition shall be paid into the hands of the master of the crown office in the King's Bench(*a*), or one of the prothonotaries of the Common Pleas (*b*), for the use of his majesty, which is now usually done before the rule is drawn up. And where the defendant in a *qui tam* action obtained a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, the Court of King's Bench considered it an undertaking by him to pay that sum; and for the nonpayment

(*a*) R. M. 7 G. 3. K. B. 4 Burr. 1929.; and see 2 Black. R. 1154.

(*b*) 2 Black. R. 1154. 1157.

5 Durn. & East, 257.

nonpayment of it granted an attachment. But for preventing any doubt in future, an order was made, that "every rule to be drawn up for compounding any *qui tam* action, do express that the defendant doth undertake to pay the sum for which the court has given him leave to compound such action."

R. E. 33 G. 3. K. B.

7 Taunt. 43. 2 Marsh. 358. S. C.

So, in the Common Pleas, where a defendant, in a penal action, obtains a rule to stay proceedings on payment of part of the penalties, the court will grant an attachment against him for nonpayment. And in that court it is a rule, on compounding informations on penal statutes, that "if the defendant, after "composition made with the informer, do not voluntarily come "in to answer unto the king for his fine, to be taxed and assessed "by the justices of this court for his majesty's use, then a *capias* "*ad satisfaciendum finem* shall be awarded against him to compel "him thereunto; whereupon the fine being set and assessed, "shall be presently paid in: and satisfaction being thereupon "made, and entered by the prothonotary upon the roll of the "said information, shall be for ever a full and final discharge of "the defendant for the same offence."

R. M. 12 Jac. 1. C. P.

5 Taunt. 850.

The plaintiff, in compounding a penal action by consent, having by mistake abandoned a good cause of action, the Court of Common Pleas refused to interfere and rescind the order made thereon.‖

ACTIONS ON THE CASE.

Co. Lit. 56. a. 6 Mod. 53. 54.

IT has been observed, that for every right, and for every injury done a man in his person, reputation, or property, the party hath a remedy. But this remedy he must take according to the methods laid down and rules prescribed by the law; for which purpose there are writs framed, and settled actions, to which he must apply; as debt upon a contract, trespass on a manifest and open invasion of his property, *&c.* But, where the law has made no provision, or, rather, where no general action could well be framed before-hand, (the ways of injuring, and methods of deceiving being so various,) every person is (*a*) allowed both by the common law and the st. *Westm.* 2. 13 E. 1. c. 24., to bring a special action on his own case, which is a liberal action. (*b*)

(*a*) Nor is it any objection that such action was never brought before; as, where the lessor coming to view the lands, to see if any waste was committed, being hindered by a stranger from entering the premises, brought an action on the case against him; and it was holden to lie, though such action had never been brought before. Cro. Jac. 478. Roll. Abr. 108, 109. 2 Roll. R. 311. *Vide* 6 Mod. 53., and Litt. § 108. where *per Littleton*, no action having been brought on the statute of *Merton*, it is to be presumed no action will lie; and Co. Litt. 81. b. *per* Ld. *Coke*, non-usage is a good interpreter of a law. ‖See Le Caux v. Eden, Doug. 594., and 1 Term R. 517.‖ But, *per Holt* C. J., wherever an act of parliament gives a right, the common law gives a remedy; so, where the common law gives a right, or makes a thing an injury, the same law gives a remedy or action. Salk. 20, 21. 6 Mod. 54. See note (2) to Co. Litt. 81. b. (13th edit.) (*b*) 2 Burr. R. 906. 1011, 1012.

These

These actions are founded on some fraud or deceit in contracts, or some secret injury to a man's right or property, and are said to arise from a non-feasance, male-feasance, or mis-feasance. But as this division seems too general, I shall choose the following, as more proper to include the most material cases that fall under this head, referring to others for a more full discussion of several particulars relating to them.

[They arise simply from tort or wrong, where no breach of any contract is suggested, and no forcible violence imputed to the defendant. 3 Wooddes. 167.] ‖And that they lie in many cases for breaches of duty arising out of contract, or *ex quasi contractu*, see Carth. 62. 2 New R. 365. 3 East, 62. 12 East, 452. 2 Marsh. 485. 3 Brod. & B. 54.‖

(A) What Persons, with respect to the Injury, may bring an Action on the Case.

(B) Against whom such Action lies.

(C) For what Injuries an Action on the Case will lie; and herein of those Cases where a Man may be said to suffer *Damnum absque injuriâ.*

(D) At what Time the Right of Action shall be said to have accrued.

(E) Of Actions on the Case for Fraud and Deceit in Contracts, on an implied or express Warranty.

(F) Of Actions on the Case for Injuries to a Man's Person, Property, Right or Privilege: And herein,

1. *Where an Action on the Case will lie against Officers and Ministers of Justice.*
2. *Where Case will lie for Torts and Injuries committed by Persons contrary to the Duty of their Trades and Callings.*

(G) Where an Action on the Case will lie for a Nuisance, and therein of the Inconvenience of multiplying Actions.

(H) Where an Action on the Case will lie for a Conspiracy, and oppressive Proceedings in Prosecutions and Suits at Law.

(I) Where Case will lie though the Party injured has another Remedy.

(K) Where Case will lie though the Wrongdoer be punishable criminally.

(A) What Persons, with respect to the Injury, may bring an Action on the Case.

Bulst. 68. Hardr. 521. S. P. and said they could not join.

IF *A.* delivers goods to *B.* to deliver over to *C.*, and *B.* does not deliver them over accordingly, but converts them to his own use, either *A.* or *C.* may have an action against *B.* but both shall not have an action, but he that first begins his action shall go on with the same.

3 Lev. 209. *Vide* 2 Roll. Abr. 55. 4 Burr. 2141. *acc.* (*a*) So, if *A.* leases a house to *B.* for years, and this is burnt down through

If *A.* is seised in fee of the reversion of a close, expectant upon a term for years, and *B.* is possessed of another close adjoining thereto, between which closes there runs a rivulet, and *B.* stops it, *per quod* the close of *A.* is surrounded, so that the timber-trees, *&c.* become rotten, *A.* in respect of the prejudice to the reversion, and the termor, in respect of the possession, and of the shade, shelter, *&c.* may each (*a*) have an action; and satisfaction given to one is no bar to the other.

the neglect of a neighbour, *A.* may have an action for the damage to his inheritance, and *B.* for that to his possession. 3 Lev. 360. But see 6 Ann. c. 31. §6. made perpetual by 10 Ann. c. 14. § 1. by which this remedy is taken away.

Provost, &c. of Queen's College, Oxford v. Hallet, 14 East, 489.

‖If the tenant, or a stranger, do a present injury to the estate of the reversioner, the reversioner may have this action against him pending the term.‖

‖Jackson v. Pesked, 1 Maule & S. 235. Peyton v. Mayor of London, 9 Barn. & C. 725.; and see 10 Barn. & C. 145. 1 Moo. & Malk. 350.‖

Salk. 10. pl. 4. Ld. Raym. 558. Pitts and Gaince.

If a master of a ship brings an action on the case, and declares that the ship was laden with corn in such a harbour, ready to sail for *Dantzic*, and that the defendant entered and seized the ship, and detained her, *per quod impeditus et obstructus fuit in viagio*; this action well lies, for the master has not the property of the ship, but the owners; and he is only a particular officer, and can only recover for his particular loss: yet he might have brought trespass, as a bailiff of goods may, and then as bailiff he could only have declared on his possession, which is sufficient to maintain trespass.

Roll. Abr. 98. Cro. Jac. 223. So, if a surgeon, in consideration of a sum of money, undertakes to cure my servant of a hurt, and he applies unwholesome medicines thereto, on purpose to make the wound worse, by which I lose the service of my servant for a long time, I may have an action on the case against the surgeon. Roll. Abr. 98. Roll. R. 124. S. C. *adjorn.* 2 Bulst. 332. S. C., and *quoad* the point of law, the court inclined for the plaintiff, but for default in the pleadings adjourned. And after it was ended by composition. Roll. Abr. 88. ‖See tit. *Master and Servant* (I), and (O).‖

If a servant is cosened of his master's money, the master may have an action on the case against the cosener.

Roll. Abr. 97, 98. Cro. Eliz. 349. S. P. admitted *per cur.* (*a*) But, if such a prisoner taken by a bailiff of a franchise, escape from the bailiff, the sheriff shall not have an action upon the case against him, because he is not chargeable over: but the bailiff only is chargeable. For this *vide* Roll. Abr. 97, 98, 99. Cro. Eliz. 26. 349. Moor 432. and tit. *Escape in Civil Cases.*

If a bailiff errant takes *J. S.* in execution upon a *capias ad satisfaciendum*, at the suit of *J. D.* and after *J. S.* escapes by a rescue of himself, the sheriff may have an action upon the case against him for this escape, for he is thereby chargeable (*b*) over for this to *J. D.* and this escape made from his bailiff was an escape from himself.

If

If a man gives money to his servant to carry to such a place, and he is robbed, the master cannot bring case against him, for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence.

Vide head of *Master and Servant* (M), Vol. V.

But, if *A.* is employed by *B.* to sail from *England* to the *Indies*, and *A.* covenants, that he or his servants will not thence import any *calicoes, &c.* and *A.* retains *C.* as his servant in this voyage, and acquaints him with the covenant, and notwithstanding *C.* falsely and fraudulently brings thence certain *calicoes, &c. A.* shall have an action against *C.*; for though no action lies by a master for the bare breach of his command, yet, if a servant does any thing falsely and fraudulently to the damage of his master, an action will lie.

Sid. 298. Hussey and Pacey. Lev. 188. 2 Keb. 88. S. C. Roll. Abr. 105. S. P.

[An action on the case for goods lost may be maintained against a carrier either by the consignor or consignee; and it may be brought by the former, notwithstanding a private agreement between him and the consignee, that the carriage should be paid by the latter; for the carrier is liable upon his agreement.]

Davis v. Jordan, 5 Burr. 2680. Moor v. Wilson, 1 Term R. 659. ‖The doctrine that the action may be brought either by the consignee or the consignor seems unsound. The question is governed by the consideration in whom the property of the goods is vested; and it is now settled that if the goods were ordered to be delivered to a carrier, whether a particular carrier be named or not, they vest in the vendee by delivery to the carrier, and the action against the carrier for their loss must be in the name of the vendee. Dawes v. Peck, 8 Term R. 330. Dutton v. Solomonson, 3 Bos. & Pull. 582; and see Jacobs v. Neilson, 3 Taunt. 423. And though the consignor pay for the booking of the goods, or be liable for the carriage to the carrier, these circumstances have been held to make no difference. 8 Term R. 330. King v. Meredith, 2 Camp. 639.; and see Brown v. Hodgson, 2 Camp. 36.; but see *contrà* the cases above referred to. 5 Burr. 2680. 1 Term R. 659., and 3 Camp. 320. But if the vendor is induced by a fraud of a swindler to deliver goods to a carrier for him, and the carrier by negligence lets him get possession of them, the vendor may sue the carrier in his own name; for no property in such case passes out of the vendor. Duff v. Budd, 3 Bro. & Bing. 177. 6 Moo. 469.‖

(B) Against whom such Action lies.

IF the servant of a taverner sells wine to another which is corrupted, an action upon the case lies against the master (*a*), though he did not command the servant to sell it to any particular person. (*b*)

9 H. 6. 53. b. Roll. Abr. 95. S. C. (*a*) But no action lies against the servant. Roll. Abr. 95. So, if an attorney in an action of debt, knows of, and was a witness to, a release of the debt made before the action brought for it, yet no action lies against the attorney, for he acted only as a servant, and in the way of his calling. 1 Mod. 209. *per curiam.* *Vide* 2 Black. R. 869. (*b*) If a servant sells an unsound horse, or other merchandize in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6. 53. Roll. Abr. 95. S. C. Poph. 143. S. C. cited. 2 Roll. R. 6. S. C. cited. But, if by the command and covin of the master he sells to a particular person, an action lies against the master, for it is then his own sale. 9 H. 6. 53. Fitz. Action sur le Case, 5. S. C. Roll. Abr. 95. Bridgm. 128. S. C. cited. *Sed qu.* In the former case, if the servant warrant a horse sound when he is unsound, and receive a sound price of the buyer, whether the master is not bound by the warranty of the servant, and liable to an action? ‖It is now held, that if a servant is employed by his master to sell a horse, he has an *implied* authority to warrant it, and the master is bound by his warranty. Alexander v. Gibson, 2 Camp. 555.; and see 5 Esp. Ca. 72. 1 Dow. P. C. 45. 3 Term R. 761. 15 East, 45., and tit. *Master and Servant* (K), Vol. V. The doctrine that a sound price given implies a warranty is now exploded. 2 East, 322.‖

So, if a goldsmith makes plate, wherein he mingles dross, so that it is not according to the standard, and by his servant sells it;

Vide Cro. Jac. 471. 2 Roll. R. 28. S. C.

spenser, in which it was decided that the post-master was liable only for actual personal neglect or misconduct. Cowp. 754. And case lies against a deputy post-master for a personal misfeasance. Rowning v. Goodchild, 3 Wils. 443. 2 Black. R. 906. S. C.] ‖See Gidley v. Lord Palmerston, 3 Brod. & B. 275.‖

Cheetham v. Hampson, 4 Term R. 318.

[An action for not repairing fences, whereby a party is damnified, cannot be brought against the owner of the fee, who is not in possession, but lies only against the occupier.]

Alleyn, 5. *per Hale.* ‖*Sed vide* Vicars v. Wilcocks, 8 East, 1. 2 Bos. & Pull. 284., and Cro. Jac. 471.‖

If one slanders my title, whereby I am wrongfully disturbed in my possession, though I have a remedy against the trespassor, yet I may have an action against him that caused the disturbance.

Roll. Abr. 90. So, if I deliver goods to *A.* who delivers them to *B.* to keep to the use of *A.*, and *B.* wastes them, I may have an *action upon the case* against *B.* though I did not deliver them to him. Roll. Abr. 90.

If I deliver my horse to a smith to shoe, and he delivers him to another smith, who pricks him, I may have an *action on the case* against him, though I did not deliver the horse to him.

Schinotti v. Bumsted, 6 Term R. 646.

[An action on the case will lie against the commissioners of the lottery, for not adjudging a prize to the person entitled to receive it.

Blake v. Lanyon, 6 Term R. 222. ‖See tit. *Master and Servant* (O).‖

It will lie against a person who receives or continues to employ the servant of another after notice, though he did not originally entice him away.]

Sutton v. Clarke, 6 Taunt. 29.; and see Harman v. Tappenden, 1 East, 555.

‖A person acting in a public function which he is compellable to execute gratuitously, using his best skill and diligence, and acting without malice, is not liable for consequential damages occasioned by his act.‖

(C) For what Injuries an Action on the Case will lie; and herein of those Cases wherein a Man may be said to suffer *Damnum absque injuriâ.*

UNDER this division various cases may be comprehended; but, as several of them fall under others, I shall here only observe, that though in some cases an injury happens to a man in his property, by the neglect of another, yet if by law he was not obliged to be more careful, no action will lie.

Leon. 223. Owen, 141.

As, if a man finds butter, and by his negligent keeping it putrifies, yet no action will lie.

Cro. Eliz. 219.

Or, if a man finds garments, and by negligent keeping they are moth-eaten, no action lies.

Id. ibid.

So, if a man finds goods, and loses them again; or if he finds a horse, and gives him no sustenance, no action lies; for in these cases the law has laid no duty on the finder: for it would be too rigorous to oblige him to be charitable in behalf of a careless owner.

Roll. Abr. 5. 1 Leon. 224.

But, if he makes gain and advantage of the things he finds; as if he rides the horse, or if he abuses the things; as by putting paper

paper into water; or if he kills sheep, *&c.* he shall answer for them. Cro. Eliz. 219. Goul. 155. Stile, 261.

If *A.* hires *B.* to carry a load of timber from one town to another to be unloaded there, at such a place as *A.* shall appoint, and *B.* gives notice to *A.* that he will bring it such a day, and requests him to appoint a place where he shall lay it, and he brings it accordingly, but *A.* will not appoint any place where it shall be laid, so that the horses of *B.* are kept so long in the cart, that being hot they catch cold and die; yet *B.* shall have no action against *A.* for he might have taken his horses out of the cart and walked them, or put them in a stable, or if *A.* would not have appointed a place, as soon as he came there, he might have unloaded in any convenient place, so that the injury the horses received was through his own default. 2 Lev. 196. Virtue and Bride, Vent. 310. S. C. 3 Keb. 766. S.C. adjudged.

‖The being delayed four hours by an obstruction in a highway, and the being thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle the plaintiff to sue the obstructor. Greasly v. Colling, 2 Bing. 263.; and see Rose v. Miles, 4 Maule & S. 101.

If the proximate cause of the injury to the plaintiff be his own unskilfulness or want of care, he cannot sue the defendant, though the primary cause be the defendant's wrongful act; thus where the plaintiff was riding violently and without ordinary care, and rode against an illegal obstruction in the highway, it was held he could not maintain an action. Butterfield v. Forrester, 11 East, 60. Flower v. Adam, 2 Taunt. 314.

An action on the case will not lie against a person suing out a writ, if he neglect to countermand it after payment of the debt, unless malice be averred. Without an averment of malice, it should seem that courts will scarcely subject a party to damages for mere non-feasance. Scheibel v. Fairbain, 1 Bos. & Pull. 388. Page v. Whiple, 3 East, 314.

Gibson v. Chaters, 2 Bos. & Pull. 129.; and see 1 Moo. 92. 5 Price, 1.

But if an execution creditor refuse to accept from the debtor who is in custody the debt and costs when tendered, and to sign an authority to the sheriff to discharge the debtor, an action on the case lies for maliciously refusing, and the refusal to sign the discharge, is evidence of malice in the absence of circumstances to rebut the presumption.‖ Crozer v. Pilling, 4 Barn. & C. 25.

If it be *damnum absque injuriâ*, no *action on the case* lies (*a*); as if a school be set up in the same town where an ancient school has been time out of mind, by which the old school receives damage, yet no action upon the case lies, because it is lawful for a man to teach where he pleases; and this is for the ease of the people. (*a*) *Damnum absque injuriâ*, or *vice versâ*, will not bear an action. 6 Mod. 46. *per Gould* J. 3 Bulst. 95.

11 H. 4. 47. 22 H. 6. 14. b. Fitz. Action sur le Case, 98. S. C. Bro. 42. S. C. Noy, 184. S. C. cited Roll. Abr. 107. Mod. 69. S. P. *per Twisden arguendo.* Noy, 184. S.C.

So, if I retain a master in my house to instruct my children, though this be to the damage of the common master, yet no action lies. 11 H. 4. 47. Roll. Abr. 107. S.C.

So,

Roll. Abr. 107. Hardr. 162. Brownl. 57. Noy, 184. (a) But, if I

So, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him; for every one (*a*) may lawfully erect a mill on his own ground.

have had a mill by prescription in my own land, if another erects a new mill upon his own land, if this draws away the stream from my mill, or stops it, or makes too great a quantity of water run to my mill, by which I receive damage, so that my mill cannot grind as much as it was used to do, I shall have an *action on the case* against him. 22 H. 6. 14. Dyer, 248. Roll. Abr. 107.

22 H. 6. 14. b. Roll. Abr. 107. But if I had a house

If a man hath a house upon his own ground by prescription, yet, if I build a house upon my own ground next adjoining, no action lies against me.

by prescription upon my ground, another cannot erect a house upon his own ground, so near to it as to stop the light of my house. 22 H. 6. 15. 9 Co. 59. Bland's case, Bulst. 115. Hut. 136. Roll. Abr. 107. 2 Roll. Abr. 143. 3 Leon. 93.

22 H. 6. 14. Noy. 184. Roll. Abr. 107.

If I have 100 acres of pasture in a town, and before this time no man hath ever had any pasture within the same town, and those of the town have used to agist their cattle in my pasture, and another that has freehold within the town, converts his arable land into pasture, so that those of the town agist their cattle there, *per quod* this is a damage to me, yet I cannot have any remedy against him; for it is lawful for him to make the best advantage he can of his own land.

Governor, &c. of the British Cast Plate-glass Manufactory v. Meredith, 4 Term R. 794.

[If I sustain an injury by the act of commissioners appointed by an act of parliament, without any excess of their jurisdiction, no action lies either against the commissioners or the persons acting under them.]

‖See Harris v. Baker, 4 Maule & S. 27. Hall v. Smith, 2 Bing. 156. Boulton v. Crowther, 2 Barn. & C. 703.; and see Jones v. Bird, 5 Barn. & A. 837.‖

(D) At what Time the Right of Action shall be said to have accrued.

Roll. Abr. 98. Cro. Jac. 474. S. C. 3 Term R. 57.

IF *A.* sells sheep to *B.* affirming them to be his own, whereas they belong to *C.*, *B.* may have an action against *A.* for his deceit, before *C.* hath seized the sheep, or interrupted him; because they are things transitory, and therefore the action lies before interruption: for if he should stay till *C.* interrupted him, he may be dead before, or other disadvantage may happen.

Cro. Eliz. 53. adjudged. *Id.* 123. S. P. adjudged.

If *A.* recovers in debt against *B.* and thereupon a *capias ad satisfaciendum* is directed to *C.* the sheriff of *N.* to take *B.* in execution, which is accordingly done, and after *B.* rescues himself, *per quod C.* becomes liable to answer for the debt; now *C.* may have an action against *B.* before *A.* sues *C.*; for the rescue and escape was a wrong to *C.*, and he is always chargeable to *A.* for it; and if *C.* must stay till sued by *A.*, *B.* may die in the interim, or fly his country.

Raym. 194. Goodyar and Banks, 2 Keb. 688. S. C. adjourn. 2 Keb.

A. brings an action against *B.* in which *C.* is attorney for *A.*, and after verdict for *A.*, *C.* enters judgment before the rules (according to the course of the court) are out, *per quod B.* is prevented from moving an arrest of judgment, and whether *B.* may

may have an action against *C.* was doubted; and *Twisden* thought it hard the attorney should be sued after the judgment is set aside, But *note*, it does not appear in the case, as reported by *Raymond*, otherwise than from what *Twisden* said, that the judgment was set aside before the action brought. 716. S. C. adjourn, it appearing that the judgment was set aside before *B.* brought his action. — An action brought against the plaintiff's attorney, for entering judgment against the defendant, when the court ordered a *non pros.* Hut. 125. and yet it appears the judgment was set aside before the action brought.

If a man forges a bond in my name, it is possible I may be damnified by it, but till it be put in suit against me I cannot bring an action against the forger. Hob. 267. 6 Mod. 46. S. C. cited, where by the plaintiff's own shewing he had no right of action at the time of bringing it. *Vide* Carth. 113. and tit. *Error*.

‖The cause of action accrues at the time when the tortious act is done by the defendant, so that the statute of limitations then begins to run, although the plaintiff may not in fact know of the act till long after; unless indeed the defendant is guilty of fraud in concealing the act from the plaintiff's knowledge, in which case the cause of action would seem to be complete only on the plaintiff's knowledge. Where an act is done not in itself tortious, and some time after consequential damage arises to the plaintiff from it, the cause of action does not accrue (*a*) till the damage happens.‖ Granger v. George, 5 Barn. & C. 149.; and see Short v. M'Carthy. 3 Barn. & A. 626. Brown v. Howard, 2 Bro. & B. 73.; and see 3 Barn. & A. 288. (*a*) Roberts v. Read, 16 East, 215. Gillon v. Boddington, 1 R. & Moo. 161.; and see 3 Barn. & A. 448.

(E) Of Actions on the Case for Fraud and Deceit in Contracts on an express or implied Warranty.

‖(See Addenda to tit. FRAUD.)‖

1. *On an implied Warranty in Law.*

IF there be a communication between *A.* and *B.* for the buying of certain sheep, and *B.* the vendor (*a*), says they are his own sheep, when in truth they are the sheep of another; whereupon *A.* buys them of *B.* though *B.* made not any express warranty of the sheep, yet an *action upon the case*, in nature of deceit, lies against him. Roll. Abr. 90. Cro. Jac. 474. S. C. 4 B. & C. 108. 2 East, 314. (*a*) In an action for fraudulently selling to the plaintiff a horse that was not the defendant's own horse, the plaintiff must prove that the defendant knew him not to be his own horse. Allen, 91. Keb. 525. but, *quære; et vide* Carth. 90. and Salk. 210., that the having possession of any personal chattel, and affirming it to be his, amounts to warranty; and an action lies on the affirmation. *Per Holt* C. J. See *acc.* 3 Term R. 37.

‖The law raises an implied promise on the part of a sheriff selling goods seized in execution, that he does not know that he has no title to the goods.‖ Peto v. Blades, 5 Taunt. 657.

So, if the vendor affirms that the goods are the goods of a stranger, his friend, and that he had an authority from him to sell them, and thereupon *B.* buys them, when in truth they are the goods of another; yet, if he sold them fraudulently and falsely, upon this pretence of authority, though he did not warrant them, and though it is not averred that he sold them, knowing Roll. Abr. 91.

ing them to be the goods of a stranger, yet *B.* shall have an *action upon the case* for this deceit.

Roll. Abr. 91. Stile, 310. S. C. Keb. 523. S. C. cited.

In an *action upon the case* by *A.* against *B.* if the plaintiff declares that the defendant craftily intended, *&c.* and offering to sell a gelding to the plaintiff, affirmed that he brought up that gelding from a colt, and that the said gelding was then his own, which the plaintiff believing, afterwards, that is to say, upon the same day and year, and at the place aforesaid, did buy the said gelding, *&c.* the action lies upon this declaration, though there was no warranty upon the sale; for this was an apparent deceit, contrary to his own knowledge; and though it is not averred that he sold the gelding at the same time when he affirmed he bred him up from a colt, but that the plaintiff *postea* the same day and place bought him, giving credit thereunto, this shall be intended immediately after the speaking of the words; for all the words could not be spoken together.

Carth. 90. Crosse and Gardner. 3 Mod. 261. S. C. Comb. 142. S. C. Show. 68. S.C.

So in *case*, in which the plaintiff declared, that there being a *colloquium* between him and the defendant, concerning the buying and selling of two oxen, which the defendant then had in his possession, that he (the defendant) *adtunc et ibidem falsè et malitiose affirmabat*, that these oxen where his; to which the plaintiff giving credit, bought them of the defendant for so much money; when in truth the said oxen were the proper goods of *J. S.* and that he the said *J. S. postea, &c.* lawfully recovered the said oxen from the plaintiff, *&c.* it was holden after verdict, that the action lay on the bare affirmation, without an express warranty; and though objected, that it was not set forth that he (*a*) *sciens* that the oxen were the oxen of *J. S.* nor that he did it *deceptivè*.

(*a*) *Falsè et fraudulentèr vendidit, &c.* after verdict, imports that it was *scientèr*, and supplies the want thereof. Stile, 310. 3 Keb. 807. *vide* Keb. 309. — So *sciens, &c.* implies that it was *fraudulentèr*. Sid. 146. — So where the plaintiff declares *quod improvidè et incautè absque consideratione ineptitudinis loci*, he drove his horses over the plaintiff; though not said *sciens* that they were unruly. 2 Lev. 172.

Salk. 210. pl. 2. Medina v. Stoughton, for selling false bills of credit. [This case is reported by Ld. Raymond, 593. and the distinction here made between the seller being in possession and out of possession is not mentioned by him. See Mr. J. *Buller's* observations upon it, 3 Term R. 58.]

So, where the plaintiff declared, that the defendant being possessed of a certain lottery-ticket, sold it to him, affirming it to be his own, whereas in truth it was not his, but another's; defendant pleaded, he bought it *bonâ fide*, and so sold it: on demurrer, *Holt* Ch. Just. held, where one having possession of any personal chattel, sells it, the bare affirming it to be his, amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title can be made out; *alitèr*, where the seller is out of possession; for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty, or a good title: so it is in the case of lands, whether the seller be in or out of possession; for the seller cannot have them without a title, and the buyer is at his peril to see to it.

Vide Stile, 343. 346. Cro. Jac. 197.

Cro. Jac. 196. Rolwell and Vaughan. Moor, 467. S. C

If the plaintiff declares, that whereas Queen *Elizabeth* was seised in fee of the advowson of the *vicarage* of *S.* whereto the tithes in *S.* did belong, and that the defendant, upon the ninth of *June*, did affirm himself to be lawful incumbent thereof, and that

that he had right to the tythes from the death of *J. N.* and after, upon the sixteenth of *June*, the plaintiff having a communication with the defendant about his buying of the defendant the said tythes till *Michaelmas* following, the defendant *adtunc sciens* that he had no right thereto (the defendant not having been instituted, *&c.*) *yet falsè et deceptivè* sold them to the plaintiff for 30*l.* and alleges *in facto*, that *J. N.* was after presented, *&c.* and took the tythes, *&c.* the action does not lie; for there was no warranty that the plaintiff should enjoy them; and this affirmation also was in time precedent to the sale.

So, if the plaintiff declares, that upon a communication between the plaintiff and the defendant, for the purchase of a certain term of years, which the defendant then had in certain lands, the defendant *asseruit* to the plaintiff, that the said term was worth 150*l.* to be sold; to which the said plaintiff *fidem adhibens* did give the defendant 150*l.* for the same, and that after, the plaintiff offering the said term to sale, could not get so much for the same; the action does not lie; for here was only a naked affirmation of the defendant, that the term was worth so much; and it was the plaintiff's folly to believe him. Yelv. 20. Harvey and Young. See 3 Term R. 57.

But if, on a treaty for the purchase of a house, the defendant affirms the rent to be 30*l.* per annum, whereas in truth it is but 20*l.*, and thereby the plaintiff is induced to give so much more than the house is worth, the action lies (*a*); for the value of the rent is matter that lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. (*b*) Salk. 211. pl. 3. Risney and Selbey. Ld. Raym. 1118. S. C. (*a*) Lev. 102. Sid. 146. Keb. 510. 518. 522. S. P. resolved.

(*b*) But if *A.* possessed of a term of years, offers to sell it to *B.*, and says that a stranger would have given him 20*l.* for this term, by which means *B.* buys it, though in truth *A.* was never offered 20*l.* no *action on the case* lies, though *B.* is hereby deceived in the value. Roll. Abr. 91. 101. Sid. 146. S. P.

‖Where an action is brought for a false representation by defendant knowingly made, and by which the plaintiff has sustained damage, it is not necessary to shew that the defendant *intended* to injure the plaintiff.‖ Foster v. Charles, 7 Bing. 105.

2. *Where Case will lie for a Fraud on an express Warranty.*

If *A.* being a goldsmith, and having skill in jewels and precious stones, hath a stone which he affirms to be a Bezoar-stone, and sells it to *B.* for 100*l.*, when in fact it was no Bezoar-stone, no action lies against *A.*; for every one in selling his wares will affirm that his goods are good, or that the horse which he sells is sound; and yet if he does not warrant them so (*c*), if false, no action lies. (*d*) Cro. Jac. 4. Adjudged between Chandler and Lopus upon a writ of error in *cam. scacc.* and the first judgment reversed accordingly by all the justices and barons, cont. *Anderson.* *Vide* Dyer, 75. in margin, S. C. cited, as adjudged in *B. R.* and they said, that the opinion of *Popham* was, that if I have any commodity which is corrupt, and knowing it to be so, sell it for good, and affirm it to be so, an action lies for this deceit; but, though it be corrupted, if I know it not, though I affirm it to be good, yet no action lies, unless I warrant it to be so. Cro. Jac. 469. S. C. cited, as adjudged in *B. R.* 2 Roll. Rep. 5. S. C. cited, and said that the judgment was reversed, because it was not pleaded that he knew it to be false at the time of the sale. ‖So Springwell

Springwell v. Allen, Aleyn 91. Paget v. Wilkinson, Tr. 8 W. 3. 2 East, 448. in not. and Dowding v. Mortimer, *Ibid.* 453. in not. (*c*) If therefore he warrants them, in an action on the case for a breach of that warranty, the *scienter* need not be charged, nor if charged need it be proved. Williamson v. Allison, 2 East, 446. Lofft. 146.‖ (*d*) [An affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended. 3 Term R. 57. *suprà*, (E.)] ‖As to *implied* warranties of the quality of goods &c. sold, see Parkinson v. Lee, 2 East, 314. Gray v. Cox, 4 Barn. & C. 108. Laing v. Fidgeon, 6 Taunt. 108. 4 Camp. 169. 144. Jones v. Bright, 5 Bing. 533.‖

Jeudwine v. Slade, 2 Esp. Ca. 572.

‖It has been held that the setting the name of an old master against a picture in a sale catalogue is no warranty, but merely a representation of the seller's opinion.

Hall v. Gray, 1 Stark. 434.

But if the agent of the vendor of a picture, knowing the vendee labours under a delusion with respect to a picture, which materially influences his judgment, permits him to make the purchase without removing the delusion, the sale is void.‖

11 H. 6. 18. F. N. B. 94. S. P. Poph. 143. S. P. cited.

If a man sells a tun of wine (*a*), and warrants it to be sound, and not corrupted, if it be corrupted an *action upon the case* lies.

A. sells sheep, and warrants that they are sound, and shall continue so for a year after, this is good, and shall bind him. ‖See Joliffe v. Bendell, 1 Ry. & Moo. 136.‖ *Vide* Danv. Abr. 96. 188. (*a*) This action lies, though he hath not paid for it; for the other may have debt for his money. Bro. Guarranty, 59.

(*b*) 11 H. 6. 18. 1 Roll. Abr. 96. S. C. (*c*) But

So, if a man sells a horse (*b*), and warrants him to be sound of his wind and limbs (*c*), if he be not an *action upon the case* lies.

without such warranty no action lies. 20 H. 6. 35. F. N. B. 94. S. P. Bridg. 127. S. P. Roll. Abr. 90. S. P. [If sold at the price of a sound horse, case in the nature of deceit would lie. Delancey v. Dymock, sittings after Easter term 1789, *coram* Lord *Kenyon*. See too 3 Wooddes. 199.] ‖But a sound price given does not raise an implied warranty. 2 East, 322. Douglas, 20.‖

Dunlop v. Waugh, Peake Ca. 123.

‖If the seller sell the horse as of the age stated in a written pedigree, this is a warranty, though the seller declare he knows nothing of the horse except what he has learned from the pedigree.‖

Roll. Abr. 96. (*d*) But *quære*, for it is a general rule, that the warranty must be made

If a man, knowing his horse to be lame and foundered, offers him to me to buy, and warrants him to be sound, *&c.* relying upon which I buy him, by which I am deceived; though the warranty here was before the sale, yet because this was the cause of the sale, an *action upon the case* lies thereupon. (*d*)

at the time of the sale. *Vide* Cro. Jac. 4. 196, 197. 630., nor can it be made after; *per Bridgman* 127. Godb. 31. *Vide* Salk. 211. pl. 4. [Where a treaty for the sale of a commodity had been entirely broken off, a warranty made at the time of such sale was holden not to extend to a subsequent sale ofthe same commodity at a reduced price. Anon. Stra. 414.]

Roll. Abr. 97. adjudged. 2 Roll. R. 188. S. C. adjudged. (*e*) But *quære* of the warranty of a horse that

If *A.* sells a horse to *B.* and warrants him to be sound of wind and limb, and clean of legs, whereas he well knows that he is shoulder-pitched, and has splints upon his legs, an action lies against him upon this warranty (*e*); for these imperfections are not subject to the view of an unskilful person.

is blind. 2 Roll. R. 5. Bridg. 128. Diversity where he has no eye, and where a counterfeit, false, and bright eye; and *vide* Cro. Jac. 587. 3 Bulst. 95. 3 Keb. 101. Bro. Deceit, 29. Fitz. Deceit, 23. F. N. B. 94. note (*c*). 2 Wooddes. 415. ‖See Liddard v. Kain, 2 Bing. 183. 9 Moo. 356.‖

Salk. 211. pl. 4. Butterfield v. Burroughs.

The plaintiff declared, that the defendant sold him a horse such a day and place, *et adtunc et ibidem warrantizavit equum prædict.* to be sound wind and limb, whereupon he paid his money,

money, and avers the horse had but one eye, *&c.* on plea *non warrantizavit*, the plaintiff had a verdict: and it was objected in arrest of judgment, 1. That the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities; but to this it was answered and resolved by the court, that this might be so, and must be found to be so, since the jury have found that the defendant did warrant. 2. As the warranty is here set forth, it might be at a time after the sale, whereas it ought to be part of the very contract; and therefore it is always alleged *warrantizando vendidit; sed non allocatur;* for the payment was afterwards, and it was that which completed the bargain, which was imperfect without it.

[If there be an express warranty not respecting the soundness of horses merely, but some distinct matter, as their age; and it be a condition of sale, that the horses, if conceived to be unsound, shall be returned in a limited time; an action may be maintained by the buyer if the horses are not of the age they are warranted to be, though they are not returned till after such time has elapsed; for the condition of sale applies only to the unsoundness; nor does the buyer lose his remedy, though, upon the seller's refusing to take them back, he sells them again to a third person. (*a*)

Buchanan v. Parnshaw, 2 Term R. 745. ‖(*a*) See Poulton v. Lattimore, 9 Barn. & C. 259.‖

Although on the sale of a horse there is an *express* warranty by the seller, that the horse is sound, free from vice, *&c.* yet, if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase-money, if *on trial* he shall be found to have any of the defects mentioned in the warranty; the buyer must return the horse as soon as he discovers any of those defects, else he cannot maintain an action upon the warranty. For the term *trial* in such case means a *reasonable* trial.

Adam v. Richards, 2 H. Black. 573.

It has been determined by the Court of Common Pleas, that the seller of an unsound horse warranted sound, if it can be clearly proved that the horse was unsound at the time of the sale, is liable to an action on the warranty, without notice or return.]

Fielder v. Starkin, 1 H. Black. R. 17. ‖See Curtis v. Hannay, 3 Esp. 82. Poulton v. Lattimore, 9 Barn. & C. 259.‖

‖A temporary lameness which renders a horse less fit for service is a breach of warranty of soundness.

Elton v. Brogden, 4 Camp. 281.; *sed vide* 2 Esp. Ca. 573.

Roaring is unsoundness, if it is shewn to proceed from some disease or organic defect.

Bassett v. Collis, 2 Camp. 523. Onslow v. Eames, 2 Stark. 81.

A nerved horse is unsound.

Best v. Osborne, 1 Ry. & Moo. 290.

Crib-biting is not a breach of a general warranty of soundness.

Brennenburgh v. Haycock, Holt Ca. 630.

A cough, unless proved to be of a temporary nature, is unsoundness.

Shillitoe v. Claridge, 2 Chitt. R. 425.; and see *Ibid.* 416.

If a horse is sold with a warranty that he is a good drawer,

Coltherd v.

Puncheon, 2 Dow. & Ryan, 10.

and pulls quiet in harness, both parts of the warranty must be shewn by the seller to be true.

Richardson v. Brown, 1 Bing. 344.

A warranty as follows, "To be sold, a black gelding, five years old, has been continually driven in the plough, warranted," applies to nothing more than soundness, and not to having been driven continually in the plough.

Geddes v. Pennington, 5 Dow. & R. 164.

Where a horse is sold with a warranty of soundness, but there is a misrepresentation at the sale as to the place from whence the horse came, if the warranty is complied with, the misrepresentation will not vitiate the sale.

Caswell v. Coare, 1 Taunt. 566. 2 Camp. 82.

Upon the breach of a warranty of a horse, the measure of damages, if the horse is returned, is the price paid for him; if the horse is not returned, the measure of damages is the difference between the real value and the price paid. If the horse is not tendered to the defendant, the plaintiff can recover nothing for the expense of his keep.

Symonds v. Carr, 1 Camp. 361.

Where two persons severally employed a dealer to sell their horses, and he sold them for an entire price, and warranted them sound; it was held that the purchaser could not sever the contract, and bring an action on the warranty against one of the sellers, in respect of the unsoundness of his horse.

Payne v. Whale, 7 East, 274.

Where the seller warranted a horse sound, and in a conversation subsequently said, that if the horse were unsound (which he denied), he would take it again, and return the money; it was held that this was no abandonment of the original contract, and the vendee's remedy was upon the warranty.‖

(F) Of Actions on the Case for Injuries to a Man's Person, Property, Right, or Privilege.

Vent. 295. 2 Lev. 172. 3 Keb. 650. S. C. and several cases cited of actions brought for injuries done to a man's person by wild and ungovernable animals.

IF *A.* rides an unruly horse in *Lincoln's-Inn Fields*, (being a place much frequented by the king's subjects, and unfit for such purpose,) to break and tame him, and the horse breaks from *A.* and runs over *B.* and grievously hurts him, *&c. B.* shall have an action against *A.*: for though the mischief was done against the will of *A.*, yet since it was his fault to bring a wild horse into such a place, where mischief probably might ensue, *A.* must answer for the consequence of so ill an act.

An action for keeping a mad bull which gored the plaintiff, &c. Lutw. 90. [But in such case it must be alleged in the declaration that the defendant *knew* that the bull was mad. *Ibid.* In all cases where the mischief is done by animals *mansuetæ naturæ*, the owner must be shewn to have had notice of their viciousness before he can be charged, and such notice must be set out in the declaration; but as to animals *feræ naturæ*, the person who keeps them is liable for any damage they may do, *without notice*. Ld. Raym. 606. 1583. 2 Salk. 662.] ‖If the plaintiff allege in his declaration that the defendant *knowingly* kept a dog accustomed to bite sheep or to bite mankind, this allegation must be strictly proved; but it seems that the declaration would be good if it alleged generally that the defendant negligently kept a dog of a ferocious and savage disposition. Judge v. Cox, 1 Stark. 286. Hartley v. Halliwell, 2 Stark. 212.‖

Roll. Abr. 88.

So, if a man lays logs of wood cross a highway, though a person may with care ride safely by(*a*), yet if by means thereof my horse stumbles,

‖(*a*) If there

stumbles, and thereby I am wounded or hurt, I shall have *action on the case.*

be a want of ordinary care, in such case

the action will not lie. Butterfield v. Forrester, 11 East, 60. Though the primary cause of the damage may be the misfeasance of the defendant, yet if the proximate cause be the plaintiff's unskilfulness, he cannot recover. Flower v. Adam, 2 Taunt. 314.‖

For an injury accruing to a man in his (*a*) real estate of freehold or inheritance, case will lie; as, if *A.* levies a fine, suffers a recovery, acknowledges a judgment, recognizances, statute merchant, or staple, in my name, I may have an action.

Roll. Abr. 100. (*a*) If my feoffee in trust for me refuses to execute the trust, I have

no remedy but in chancery; but, if he enfeoffs another, *an action on the case* lies. Roll. Abr. 108. 2 Vent. 27. So, if the officer refuses to enrol a bargain and sale. Sid. 209. 2 Bulst. 356.

If a parishioner sets out his tythes of hay duly, and requires the parson to carry them off his land, but he does not carry them off in a convenient time, *per quod* the grass where the hay lies is impaired by the hay's lying upon it, an *action upon the case* lies against the parson,

Roll. Abr. 109 5 Burr. 1891. ‖See Williams v. Ladner, 8 Term R. 72. and tit. *Tythes* (G g), Vol. VIII.‖ [The parson is not obliged to take tythe of grass the day it is cut, but may let it lie there long enough to make it into hay. Stra. 845.]

If a man who ought to enclose against my land does not enclose, *per quod* the cattle of his tenants enter into my land and do damage to me, I may have an *action on the case* against him. (*b*)

Roll. Abr. 105. (*b*) Or the cattle of any other person. [The action can be

brought only against the tenant in possession. 4 Term R. 318. *Supra*, (B).] ‖Unless it can be shewn that the landlord is actually bound to repair. Payne v. Rogers, 2 H. Black. 350.; and see 4 Taunt. 649. A person who has suffered loss in consequence of the decay of sea walls, which a corporation is directed to repair under a grant from the crown, may sue the corporation for damages. Henly v. Mayor &c. of Lyme, 5 Bing. 91.‖

‖If *A.* sends his horse to *B.* for the night, and *B.* turns it out after dark into his field, separated from a field of *C.* by a fence, which *C.* is bound to repair, and the horse, from the bad state of the fence, falls from one field into the other and is killed, *B.* may maintain an action against *C.*, and recover the value of the horse, and this although *B.* is a gratuitous bailee.‖

Rooth v. Wilson, 1 Barn. & A. 59.

If *A.* being a mason, and using to sell stones, is possessed of a certain stone-pit, and *B.* intending to discredit it and deprive him of the profit of the said mine, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working, and others from buying, *&c. A.* shall have an *action upon the case* against *B.*, for the profit of his mine is thereby impaired.

Cro. Jac. 567. Roll. R. 162. S. C.

If a man menaces my tenants at will of life and member, *per quod* they depart from their tenures (*c*), an *action upon the case* lies against him.

Roll. Abr. 107, 108. (*c*) But the threatening, without

their departure, is no cause of action. Roll. Abr. 108. Where a copyholder may have case against his lord for cutting the tops of trees, for not admitting on a surrender, or for not holding a court, *vide* head of *Copyhold.*

‖If a man discharges guns near my decoy-pond with design to damnify me by frightening away the wild fowl resorting thereto, and

Keeble v. Hickeringill, 11 East, 571.

and the wild fowl are thereby frightened away, and I am damnified, an *action on the case* lies against him.

Hannam v. Mockett, 2 Barn. & C. 934.

It is to be observed that wild fowl are protected by statute 25 H. 8. c. 11. and are a known article of food; but an action does not lie for discharging guns near the plaintiff's rookery, and thereby disturbing the rooks, for they are birds *feræ naturæ*, of destructive habits, and not protected by any act of parliament, and the plaintiff can have no property in them.‖

But for this *vide* head of *Common*, and Danv. 174.

If a commoner, who hath a right to common by grant or prescription, be disturbed by the lord or a stranger in the enjoyment, he may have an *action on the case*.

4 Mod. 175. 6 Mod. 19. Ld. Raym. 1225. Salk. 170. pl. 3. 564. pl. 5. Skin. 214. Lutw. 74. 101.

1 Roll. Abr. 109. Cro. Eliz. 84. 466. 2 Roll. Abr. 140. 1 Ventr. 274. Com. 7. In an action against a man for not repairing a private road leading through his ground, it is sufficient to charge him as occupier upon his possession merely. Rider v. Smith, 3 Term R. 766. ‖(a) And so also in declaring against the owner of the soil, the plaintiff may declare on his possession. 2 Will. Saund. 114. a. *notis*.‖

[If a man has a private way over the land of another, and is obstructed in the enjoyment of it, this action lies, whether he claim it by express reservation in any modern deed, by grant, by prescription, or by operation of law. This easement may be obstructed in an actionable manner, not only by stopping up the way or passage, but by ploughing up the land over which the road lies. It is sufficient as against a wrongdoer (*a*), for the declaration to allege generally that the plaintiff was lawfully possessed of a certain tenement, and by reason thereof entitled to the way in question, without deducing a regular title from any person seised in fee.

1 Roll. Abr. 89. Rex v. White, 1 Burr. 333. ‖See *post* (G), and also tit. *Nuisance*.‖

If any person erects a smelting-house, or works for making aquafortis, or such like, the vapour and smoke of which spoil the grass or corn, or injure the cattle of his neighbour, it is a nuisance to the land for which this action lies.]

For this *vide Customs*, and Roll. Abr. 107. Danv. Abr. 5, 6. and Carth. 117. Comb. 9. Skin. 175. pl. 5. 316. pl. 3. 389. pl. 25.

If *A.* hath a mill by prescription which he hath used to repair, and at which all the tenants of the manor, time out of mind, have ground their corn and grain spent in the houses of the tenants of the said manor, if one of the tenants grinds his corn elsewhere, *A.* shall have an *action on the case* against him. So, if *A.* by his prescription has a mill on his own land, and *B.* erects a mill on his own land, if by this *A.*'s mill receives any prejudice by having the water stopped or drawn away, or having too great a quantity of water run on his mill, by which it cannot grind as much as it used to do, *A.* shall have an *action on the case* against him.

Brown v. Best, 1 Wils. 174.

[If a man have ancient pits which are replenished by a rivulet, he may cleanse, but cannot enlarge the channels leading to them to the prejudice to another; if he does, he is liable to an action on the case for diverting the water.]

Bealey v. Shaw, 6 East, 208.; and see 1 Camp. 463. 6 Price, 1.

‖If the owner of land through which a river runs enlarge a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, and thereby divert more of it to the prejudice of a land-owner lower down the river, who had at any time before such enlargement appro-

appropriated to himself the surplus water which did not escape by the former channel, case lies against him.

But the plaintiff in such an action must allege, and prove that he has sustained an injury from the want of a sufficient quantity of water. If this is shewn, the action may be maintained, though the plaintiff has not enjoyed his mill precisely in the same condition for twenty years.‖

Williams v. Morland, 2 Barn. & C. 910. 4 Dow. & Ry. 563. Saunders v. Newman, 1 Barn. & A. 258. And see Greenslade v. Halliday, 6 Bing. 379.

[If a man have an ancient ferry, and another set up a new ferry so near to it as to draw away the custom, case lies; for he who has an ancient ferry is compellable by law to keep boats, *&c.* and therefore the law having imposed an obligation upon him, protects him in the exclusive enjoyment of the right.

Blisset v. Hart, M. 18. G. 2. C. B. Bull. Ni. Pri 76.

But an exclusive right to a ferry from *A.* to *B.* does not prevent persons from going by any other boat from *A.* directly to *C.* though it be near to *B.*, provided it be not done fraudulently, and merely for the purpose of avoiding the regular ferry.]

Tripp v. Frank, 4 Term R. 666.

‖In an action on the case for disturbing a ferry, it is sufficient to prove that the plaintiff was in possession of the ferry at the time when the cause of action arose. It is not necessary to allege or prove the payment of any specified sum for passage money.

Peter v. Kendall, 6 Barn. & C. 703.

Neglect of duty on the part of the owner of the ferry is no answer to the action, although the crown may, on that ground, repeal the grant by a *scire facias* or a *quo warranto.*‖

Ibid.

For injuries to a man's house or habitation, an *action on the case* will lie; as if *A.* hath the upper room, and *B.* the under room, and *A.* neglects to cover his upper room, *B.* may have an *action on the case* against *A.* and thereby compel him to cover his upper room for the preservation of the timber of the under room.

Keil. 98. b. F. N. B. 127. (C). 2 Leon. 95. So *A.* may force *B.* to support his under room for the preservation of the upper room of *A.* Kelw. 98. ‖See Peyton v. Mayor of London, *post.*‖

If the plaintiff declares that *J. S.* being seised of a messuage in fee, 23 *April*, 32 Eliz. did demise to the plaintiff a cellar from week to week, *&c.* and that after, *viz.* 29 *July*, 32 Eliz. *J. S.* did demise to the defendant a warehouse, being right over the said cellar, to hold from week to week, *&c.* and that the plaintiff being possessed of the cellar, and the defendant of the said warehouse, and the plaintiff then having in the said cellar three butts of sack, of the value of 40*l. &c.* the defendant, 30 *July*, 32 Eliz. did place so great a weight of goods in the said warehouse, and thereby did so over-burden the floor of the said warehouse, that by force and weight of the said burden, the said floor on the said 30 *July* broke, and the said goods did fall upon the said butts, and broke the same, *&c.* and the defendant pleads that a short time before the floor did sustain as great weight as this, and the warehouse was let to him to lay in thirty ton weight, and that he had placed there but fourteen ton; and that what damage had happened to the plaintiff, was by reason that the floor at the time, as also before the lease to him made, was rotten, and the wall whereupon the floor lay so decayed, that the said floor broke, *&c.* for want of repara-

Poph. 46. Edwards and Halinder, adjudged in the Court of Exchequer, and affirmed in *Cam. Scac.* 2 Leon. 93, 94. S. C.

reparations before the lease to him made; the plaintiff shall have his judgment, for it is expressly alleged that the floor, by the weight of the said merchandize, did break, and that is not traversed but answered argumentatively only, *viz.* that it did bear more before, *ergo, &c.* and though it was ruinous when the defendant took it, yet if it fell by reason of any weight by the defendant placed there, he must answer for the consequence.

For the cases on this head, *vide* Danv. Abr. 10, 11. and Salk. 13. pl. 4. 19. pl. 9. Carth. 425. Lutw. 33.

It was formerly holden, that if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbour's, that he in whose house the fire first happened, was liable to an *action on the case* on the general custom of the realm, *quod quilibet ignem suum salvo, &c.*

6 Ann. c. 31. § 6, 7. This section made perpetual by 10 Ann. c. 14. § 1. Co. Lit. 57. a. n. 1. (13th ed.)

But now by the 6 Ann. cap. 31. § 6, 7. it is enacted, that "no "action, suit, or process whatsoever shall be had, maintained, "or prosecuted against any person in whose house or chamber "any fire shall accidentally begin, or any recompense be made "by such person for any damage suffered or occasioned there-"by, *&c. provided* that nothing contained in the act shall extend "to defeat or make void any contract or agreement made be-"tween landlord and tenant."

Peyton v. Mayor of London, &c. 9 Barn. & C. 725.

‖If the plaintiff's house in Cheapside adjoins the defendant's house, and the defendant pulls his house down, and in consequence thereof the plaintiff's house in part falls, the plaintiff cannot have an action against the defendant, unless he allege and prove a right to have his house lean against and be supported by the defendant's house. But if the defendant pulls his house down without giving proper notice to the plaintiff, so that the plaintiff may protect his house by shoring it, it seems an action lies.‖

Cro. Car. 187. Jones, 224. S.C. adjudged.

If the plaintiff declares that he was and is yet possessed of a lease for several years *adtunc et adhuc ventur.* of and in a house, and that he demised the same to the defendant for six months, and that after the six months expired, the defendant being permitted to occupy the said house for two months longer, pulled down the windows, *&c.* this action well lies, in regard that the plaintiff is chargeable over in an action of *waste.*

Young v. Spencer, 10 Barn. & C. 145.; and see 1 Moo. & Malk. 350. 405.

‖The owner of a house may have an action on the case against his lessee for opening a new door, if the reversionary interest is injured by it, although the house itself is not weakened or injured.‖

9 Co. 58. *Vide* for this, title *Nuisances*, and Danv. 203.

If a man hath an ancient house, and another builds a house so near that his windows are darkened, he may have an *action on the case* against him. (*a*)

Carth. 454. Comb. 481. 6 Mod. 116. 313. See Ld. Raym. 392. 713. 2 Salk. 459. pl. 4. 460. pl. 6. 12 Mod. 63. (*a*) So, if a man builds a house so near mine as to cause the rain to fall upon my house. Roll. Abr. 107. 2 Leon. 93. S. P. [1 Stra. 645. Fortesc. 212. S.P.]

Lawrence v. Obee, 3 Camp.

‖If an ancient window has been stopped up for twenty years, it loses its privilege, and the owner cannot sue his neighbour for

for doing an act which was no nuisance while the window was stopped up, and which only became so by a new window being opened where the old one had been. 514. And where the lights had been stopped up and a blank wall built for the space of seventeen years, the privilege was held to be lost, so that the owner could not open windows again, and complain of an obstruction by his neighbour made while the blank wall was existing. Moore v. Rawson, 3 Barn. & C. 332.; and see 1 Moo. & Malk. 350.

But if an ancient window be enlarged, although the enlarged portion of it is not privileged, yet the adjoining landowner cannot obstruct the passage of light and air, to any portion of the space occupied by the ancient window; and it is no excuse for doing so, that more light and air is admitted through the unobstructed part than was anciently enjoyed. Chandler v. Thompson, 3 Camp. 80.

The owner of ancient windows cannot by altering the purposes for which his house is used, acquire any extended right against his neighbour. Therefore where a building, which had been for twenty years used as a malt-house, was converted into a dwelling-house, it was decided that the owner was entitled only to the degree of light necessary for making malt, and not to all that might be necessary for domestic purposes. Martin v. Goble, 1 Camp. 322.

A title to lights cannot be acquired as against an adjoining proprietor by twenty years' enjoyment of them, if it appear that during all that time the adjoining premises have been occupied by a tenant, and there is no evidence of the proprietor having any knowledge of the enjoyment of the lights; for without his knowledge a grant of the easement cannot be presumed against him. Daniel v. North, 11 East, 372.

And it was held the same where the land adjoining the lights had been glebe land, in the occupation of the rector; for the rector as a mere tenant for life could not grant the easement, and consequently a grant could not be presumed. Barker v. Richardson, 4 Barn. & A. 579.

But if it appear that the adjoining premises have been occupied by a tenant for twenty years, and it does not appear how they were occupied prior to that tenancy, and the lights have been enjoyed thirty-eight years without interruption, a presumption of grant may be made, since during the eighteen years after their commencement nothing appears to rebut the presumption; and it makes no difference that the lights were not opened at the extremity of the party's land. Cross v. Lewis, 2 Barn. & C. 686. 4 Dow. & Ry. 234.

If the owner of a house divide it into two tenements, and demise one to the defendant, he is liable to an action on the case for obstructing windows existing in the house at the time of the demise, although of recent construction, and though there was no stipulation against the obstruction. Riviere v. Bower, 1 Ry. & Moo. 24.; and see 1 Price, 27. 1 Moo. & Malk. 396.

[If a man has a right to sit in a particular pew in a church, and is disturbed therein, he may have an action on the case. Such right may be claimed either by prescription as appurtenant to a messuage from keeping it in repair; or under a faculty (*a*) from the ordinary; or, perhaps, under an allotment and agreement with the minister and churchwardens, especially where the church is rebuilt. In all cases it seems necessary to claim the pew Stocks v. Booth, 1 Term R. 428. Gibs. Cod. 643. 1 B. E. L. 329. Kenrick v. Taylor, 1 Wils. 326. (*a*) From long uninter-

rupted usage a faculty may be presumed. 5 Term R. 298. A faculty to a man and his heirs is not good; nor is a prescription as appurtenant to land. 1 Term R. 428. 1 B. E. L. 331.

pew as appurtenant to a messuage in the declaration. (*b*) Where this action is brought against a stranger or wrong-doer, it is sufficient for the plaintiff to allege in his declaration that he is entitled by prescription to the pew in question, as appurtenant to his messuage, without further stating the particulars of his claim. (*c*) But against the ordinary, who has *primâ facie* the disposal of all the seats in the church, a title or consideration must be shewn in the declaration and proved; as a faculty from one of his predecessors having built at a distant period, or by due authority, such pew, or having constantly repaired the same.

‖It must be appurtenant to a house or messuage in the parish. Mainwaring v. Giles, 5 Barn. & A. 356.; and see Forrest, 14. Byerley v. Windus, 5 Barn. & C. 1.‖ See Cross v. Salter, 3 Term R. 639., in which case the King's Bench held, that the sentences in the ecclesiastical courts were not conclusive evidence of the right. But that case does not seem to afford any general rule, for the two superior ecclesiastical jurisdictions appear not to have decided positively on the right. 3 Wooddes. 196. (*b*) 1 Wils. 326. 1 Term R. 431. (*c*) An uninterrupted possession of the pew for thirty years is presumptive evidence of a prescriptive right; but that presumption may be rebutted by proof of the non-existence of the pew before that time. Griffith v. Matthews, 5 Term R. 296.

Godb. 200. Cro. Jac. 367.

If a parson deface a grave-stone or coat-armour in a church, this action lies, notwithstanding the injury be wilful and direct; for in this case, as in that immediately preceding, trespass *vi et armis* cannot be brought; because the freehold of the church is in the rector.]

Spooner v. Brewster, 3 Bing. 136

‖Where, however, a person wrongfully removed a tombstone from the church-yard, and erased the inscription, it was lately held that the erector of it might maintain trespass against him.‖

As to the torts and injuries affecting a man's personal property, and for which an *action on the case* is the proper remedy, they are so many and so various in their kinds, that they cannot well be laid together; I shall set down only some of them here, and such as may govern in like cases.

Pasley v. Freeman, 3 Term R. 51. ‖Eyre v. Dunsford, 1 East, 318. S. P. Without fraud and an intent to deceive, this action, it seems, cannot be maintained;

[Fraud and deceit in the defendant, and damage to the plaintiff, are a sufficient foundation for this action, though no benefit accrue to the defendant; therefore it was holden by three justices of the Court of K. B., against *Grose* J. that it would lie for a false affirmation respecting the credit of a third person, made with intent to deceive the plaintiff, and by which he was injured, though it did not appear that the defendant was benefited by the deceit, or that he colluded with him of whom he gave the fictitious character.]

the representation must be made *malâ fide*. Haycraft v. Creasy, 2 East, 92. Holt's Ca. 387. See Lord *Eldon*'s observations on the case of Pasley v. Freeman, 6 Ves. 186. See also Tapp v. Lee, 3 Bos. & Pull. 367. If, however, the representation of the defendant is false to his knowledge, the plaintiff need not show any *intention* on the defendant's part to injure him. 7 Bing. 105. If the representation is fraudulent, and is made with reference to the plaintiff's opening an account with the party as a *general customer*, and the plaintiff, in consequence of it, sells goods from time to time to the buyer, and is afterwards a loser by him, case lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference is made. This liability, however, is to be limited within a reasonable time, and to a reasonable amount. Hutchinson v. Bell, 1 Taunt. 558. But if the vendor enquires generally of the defendant concerning the buyer's circumstances, he cannot maintain the action if the buyer pays for the particular goods which it was in contemplation to sell at this time the representation was made, though the buyer becomes insolvent and does not pay for other goods subsequently sold. De Graves v. Smith, 2 Camp. 553.; and see 2 New R. 241. 6 Price, 36. 7 Price, 544.‖

‖Where

‖Where the vendor of a public-house, pending the treaty, made deceitful representations as to the amount of business done at, *&c.* whereby the plaintiff was induced to give a large sum for it, it was held that the latter might sue for the deceitful representations, although not noticed in the conveyance or agreement of sale.‖ Dobell v. Stevens, 3 Barn. & C. 623.

If a man razes the name of the obligor out of an obligation, and in the room thereof puts in the name of *J. S.* and after sues him upon this obligation, *J. S.* may have an *action on the case.* Roll. Abr. 100. For cheating with dice, *vide* Cro. Eliz. 90.

Co. Ent. 8. F. N. B. 95. Moor, 776. For keeping a dog, knowing him to be accustomed to bite sheep. Danv. Abr. 19. [If he afterwards bite a horse; for the owner ought to have destroyed him on notice of the first mischief. Ld. Raym. 69. That he hath done so *twice* before is sufficient proof of usage. Dy. 256.] ‖See *antè*, p. 100., and 3 Carr. & P. 158.‖ For using the same mark which the plaintiff hath used to set to his cloths. Poph. 144. Cro. Jac. 471. 1 Roll. R. 28. ‖Sykes v. Sykes, 3 Barn. & C. 541. *acc.*‖

If *A.* takes my cattle and drives them into *B.*'s close, where they do *B.* such prejudice as subjects me to *B.*'s action, I may have an *action on the case* against *A.* Roll. Abr. 90. Lane, 67.

‖If a man place dangerous traps baited with flesh in his own ground, so near to a highway or the premises of another, that dogs passing along the highway, or kept in those premises, will probably be attracted by the scent into the traps, and his neighbour's dogs are so attracted, and thereby injured, an action on the case lies against him. Townsend v. Wathen, 9 East, 277.

The court of C. B. were divided in opinion on the question, whether it was lawful for the owners of woodlands to set dog spears in them for the preservation of his hares, the spears being all more than fifty yards from the public pathway, which passed through the wood, and public notice being given outside the wood. Deane v. Clayton, 7 Taunt. 489. 1 Moor. 205.; and see 2 Stark. 317.

And where a trespasser had knowledge that spring guns were set in a wood, although ignorant of the particular spots where they were placed, it was held that he could not maintain an action for an injury received from treading on one of the guns. Ilott v. Wilkes, 3 Barn. & A. 304.

But it is otherwise if the plaintiff has no knowledge. Bird v. Holbrook, 4 Bing. 1 Moo. & Malk. 595. 628. By 7 & 8 G. 4. c. 18. § 1. setting spring guns, man traps, &c. is a misdemeanour, except when set in dwelling houses.

The law requires of persons keeping instruments of danger, that they should keep them with the utmost care; therefore where the defendant being possessed of a loaded gun, sent a young girl to fetch it, and gave directions to take the priming out, and this was done, but nevertheless a damage accrued to the plaintiff's son, in consequence of the girl presenting the gun at him and drawing the trigger, when it went off, it was held that defendant was liable to an action on the case.‖ Dixon v. Bell, 5 Maule & S. 198.

If a man lend or hire another's horse, and for want of safe keeping the horse die, the owner may have an *action on the case* to repair the damage sustained by the negligence of the borrower. So, if a man lend another sheep to tath his land, and if by the negligence of the borrower they are drowned; so, if a man lend another a horse, who puts him into a ruinous stable, which tumbles in upon him and kills him (*a*): or if a man over-ride a horse lent or hired to him, in all these cases an action will lie; but, Cro. Eliz. 777. 784. Owen, 52. 5 Co. 14. Dyer, 121. Godb. 72. *Doct. & Stud.* 240. Lut. 98. ‖(*a*) See Rooth v. Wilson, 1 Barn. & A. 59.‖

but, if the stable had fallen by a violent tempest, or the horse died of any disease, then had the hirer or borrower been excused.

Godb. 285. 2 Roll. R. 312 Mod. 286. [This last authority maintains the contrary.]

If *A.* obtains judgment in a debt against *B.* as executor to his father, and thereupon *A.* takes out a *fieri facias*, but before the sheriff can execute it *B. secretè et fraudulenter* sells, removes, and disposes of all the testator's goods, so that the sheriff is forced to return *nulla bona, &c.* an *action upon the case* lies against *B.*, for the sheriff could not return a *devastavit;* and if this action does not lie, the party is without remedy.

Carth. 3, 4. Smith and Tonstall, adjudged on demurrer in *B.R.* and affirmed in the House of Peers.

If *A.* declares that he had obtained judgment against *J. S.* for 100*l.* and that 100*l.* more was due to him for rent arrear; that he intending to take out execution, and also to bring an action of debt for the rent in arrear, (the said *J. S.* being then possessed of goods and chattels sufficient to discharge the whole,) which being very well known to *B.* (the defendant) he, by covin conspiring with the said *J. S.* to defeat the plaintiff of his execution, and of recovering the money for rent arrear, procured the said *J. S.* to confess a judgment for 160*l.* (of such a term) to one *J. N. ubi revera* the said *J. S.* did not owe any thing to the said *J. N.* and that he sued out execution on this feigned judgment, by virtue whereof he seized all the goods and chattels of the said *J. S.* which he esloined to places unknown, and converted to his own use, by reason whereof the plaintiff lost his debt; the action well lies.

Leon. 240. Noy, 106. Kelw. 180. 2 Lev. 63. [Or by seducing his daughter, *per quod servitium amisit.*

Also for injuries done to a man with respect to his wife, as by having criminal conversation with her; with respect to his child, as by enticing him away, or by enticing away his servant (*a*); or if my servant without cause or licence departs from my service, and *J. S.* knowing him to be my servant, retains him in his service, and so keeps him, an action lies.

The right to which action seems to be extended to one standing *in loco parentis.* But in either case if the daughter be of age, acts of service must be proved. 2 Term R. 166. 5 Burr. 1878. 11 East, 22. If under age the relation of master and servant must subsist at the time of the seduction. Dean v. Peel, 5 East, 45. In actions of adultery the proper form is trespass; and for the other injuries adverted to in the text, satisfaction may be had in that form of action. Cowp. 54. 3 Wils. 18. See 2 Term R. 167. Ld. Raym. 1032., and the remarks thereon in 3 Wooddes. 245, 246. n. ‖See tit. *Trespass* (C), Vol. VII.‖ (*a*) But where a servant had covenanted to work at a trade for a limited time, under a penalty, and having quitted his place, the master sued him and recovered the penalty; this was holden to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service. Bird v. Randall, 3 Burr. 1345. 1 Black. R. 375. S. C. ‖See tit. *Master and Servant.*‖

Shepherd v. Wakeman, 1 Sid. 79. 1 Lev. 53. S. C. 1 Keb. 255. 269. 308. S. C.

[So it was holden, that this action would lie where the defendant falsely and maliciously wrote a letter to a person who was engaged to take the plaintiff as his wife, suggesting, that he was her husband, by means whereof the intended marriage was frustrated.]

It seems, unless some special damage could have been proved, that this cause would have been proper only for the ecclesiastical court, under the name of a suit for *jactitation of marriage.* 3 Wooddes. 211.

Roll. Abr. 88. 2 Bulst. 334.

So, if a man digs a ditch in the highway, into which my servant falls and breaks his thigh, by which I lose his service for a long

long time, I shall have an *action on the case* against him (*b*) for the loss of his service. Roll. R. 124.

(*b*) So, for digging a pit, *per quod J. S.* for whose life I hold lands, was drowned. Keb. 847.

Also *actions on the case* are proper for injuries in disturbing one in the enjoyment of any right or privilege he is entitled to; as, if the beadle of an hundred ought by virtue of his place to have by prescription certain gallons of beer of every brewer at a certain price, if the brewers will not suffer him to have it accordingly, an *action upon the case* lies. *Vide* Assumpsit. Roll. Abr. 196.

‖A declaration is bad which merely states that the plaintiff being a solicitor retained at a public meeting to submit a bill in parliament, and that the defendant, the chairman of the meeting, and one of the committee appointed for despatch of business, conspired with others to disturb plaintiff in his employment, and procured other solicitors to be employed.‖ Thompson v. Noel, 15 East, 501.

If a man ought to have toll upon the buying of cattle in a market, if one buys cattle and does not pay the toll, an *action on the case* lies against him. 7 H. 4. 44. b. 9 H. 6. 45. b. Fitz. Action sur le Case, 26.

S.R. Bro. 37. S. C. Roll. Abr. 106. S. C. [In such case, *assumpsit* is now usually brought, 1 Term R. 616. 660.] So, if persons coming to market are disturbed, by which I lose my toll, an action on the case lies. 11 H. 4. 47. b. Roll. Abr. 106. Vent. 26, 28. Or if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies. 9 H. 6. 45. Roll. Abr. 106. [It is the proper remedy for a fraud upon the toll of a market. Cowp. 664.] ‖Bailiffs, &c. of Tewkesbury, v. Bricknell, 2 Taunt. 120.‖

[An action on the case will not lie against justices of the peace for refusing to grant a licence to keep an inn or ale-house.] Basset v. Godschall, Esq. and others, 3 Wils. 121.

‖In an action against a magistrate for a malicious conviction, it is not sufficient for plaintiff to shew himself innocent of the offence, but he must also prove, from what passed before the magistrate, that there was a want of probable cause.‖ Burley v. Bethune, 5 Taunt. 580. 1 Marsh. 220.; and see tit. *Justices*, and tit. *Trespass*.

If my tenants within a certain seignory ought time out of mind to go free to every market and fair to sell and buy goods without payment of toll, and one takes toll of them in his fair or market, an *action on the case* lies against him. 43 E. 3. 30. Roll. Abr. 106. 107. ‖See Yard v. Ford, 2 Saund. 172. and the notes (5th ed.).‖

If a man disturbs my steward in holding my leet, an *action on the case* lies against him. 38 H. 6. 16. So, if the lord's servants are disturbed in collecting his tythes. 19 R. 2. 52. Roll. Abr. 107. So, if a stranger who has no right, holds a court in my manor, and by distresses, &c. so impoverishes my tenants that they cannot pay their rents, an action on the case lies. 13 H. 4. 11. Roll. Abr. 106.

If a man hath the assize of bread and beer, fines, amerciaments, and other matters of frankpledge, by the king's grant, and he distrains for an amerciament, and a stranger makes a rescue, an *action upon the case* lies against him. 38 H. 6. 9. b. Roll. Abr. 106. If in an action on the case the plaintiff declares that Queen *Elizabeth* did grant to him the office of steward of the manor of *D.* and that the defendants *eundem* plaintiff *ad exercend. dictum officium, et vadia, feoda, commoda et proficua* thereto belonging *habere et percipere, vi et armis impediverunt, &c.* this is a good declaration, notwithstanding the *causa causans, viz.* the interruption of the plaintiff to exercise the

the office, is laid to be done *vi et armis*, for the *causa causata*, *viz.* the loss of the fees, is the point of the action. 9 Co. 50. 4 Leon, 243. Hob. 180. Palm. 46. 2 Brownl. 332. Cro. Car. 377. 2 Roll. Rep. 139.

9 Co. 28. Vent. 399. Show. 17. Comb. 198.

If the sheriff of the county, or his bailiff, execute a writ in a franchise or liberty of one, who by grant or prescription hath the execution and return of writs, an *action on the case* lies.

Carrett v. Smallpage, 9 East, 330.

‖But where the long established and recognized practice had been, that a writ of *capias* with a *non omittas* clause issued in the first instance, and was executed by the sheriff, within a particular liberty, the bailiff of which had the execution and return of writs, without a writ of *latitat* first issued, and a return of *mandavi balliro, &c.*, it was held, that an action on the case could not be supported by the bailiff against the party suing out such writs; since under these circumstances he could not shew that he wrongfully, injuriously, and deceitfully caused it to be issued.‖

We are next to enquire for what wrongs and injuries committed by officers and ministers of justice, and others, acting contrary to the duty the law lays on them, with respect to their trades and callings, an *action on the case* will lie. And therefore,

1. *Where an Action on the Case will lie against Officers and Ministers of Justice.*

9 H. 6. 60. b. Roll. Abr. 92. Palm. 243. Hawk. P. C. 350. ‖Rex v. Jackson, 1 Term R. 653. Rex v. Borron, 3 Barn. & A. 432. Rex v. Bishop, 5 Barn. A. 612.‖

It seems agreed, that no action on the case (*a*) lies against a judge of a court of record for a wrong judgment, and that if it appears to have been an error of his judgment (*b*), he is subject to no prosecution whatsoever.

(*a*) Not against a judge of the inferior court for taking insufficient bail. Hutt. 120. An action lies against a judge of the Stannary Court for refusing a plea which by law he ought to have accepted. 2 Roll. R. 498. *per Jones* Just. *cæteris absentibus;* but for this *vide* title *Bills of Exceptions.* (*b*) But for corruption they are punishable; the judges in *Westminster-hall*, properly, by impeachment in parliament. 1 Hawk. P. C. 350. Inferior judges by information, attachment, &c. for which *vide* the heads; also the head of *Offices and Officers;* and 1 Salk. 396. where, *per Holt*, the Mayor of Hereford, for giving judgment for his own lessee in ejectment, was committed.*

* As to the immunity of the judges from prosecutions, *vide* 31 Ed. 3. st. 4. c. 17.

Leon. 189.

If the plaintiff declare that he affirmed a plaint of debt in the court of *B.* against *C.* and thereupon caused *C.* to be arrested, and that the defendants (being the mayor, town-clerk, and gaoler of *B.* did conspire to delay the plaintiff in his suit; and in part of his said debt had let *C.* go at large, without taking any part, this action will lie, for the not taking of bail is not the cause of the action, but the conspiracy.

14 E. 3. 39. F. N. B. 93. Like point. Roll. Abr. 92.

If the bailiffs in *ancient demesne* hold plea after the record is removed in *bank*, by which the tenant loses his land there by recovery, he may have an *action upon the case* against them.

S. P. action against the under steward of a court baron, for proceeding after a *corpus cum causâ* delivered. 5 Leon. 99 adjudged. Against a clerk who had the custody of a record, and suffered it to be altered. Raym. 53. Sid. 77. Keb. 28. 346. *Vide* Lev. 64.

4 Inst. 226. 9 H. 6. 60. Roll. Abr. 92.

If an escheator returns a false office, contrary to what was found by the jury, in prejudice of the party, an *action upon the case*

case lies against him; for in this he is barely an officer, and not a judge.

If my servant is robbed, and he goes to a justice of peace and prays to be examined touching the robbery, and the justice refuses to examine him, so that I am thereby damnified, and cannot proceed against the hundred, I shall have an action against the justice; for the examination by him in this case is not as a judge, but as a particular minister by the act appointed for this purpose. (*c*)

Leon. 323. (*c*) Stat. 27. Eliz. c. 13. But for this *vide* title *Justices of the Peace.*

(*d*) If a summoner of the ecclesiastical court falsely and maliciously *colore officii sui* to the intent to scandalize *J. S.* with the fame of incontinency with *A.*, and to put him to expense in the Ecclesiastical Court, cites *J. S.* to appear for incontinency with *A.*, upon which *J. S.* appears, and is there charged by the judge with it, and upon his answer discharged, by which he is put to expence; *J. S.* may have an action upon the case against the summoner upon such a declaration, though he be an officer of the Ecclesiastical Court; inasmuch as it is alleged that he cited him falsely and maliciously *et colore officii*, it shall be intended that he did it without process.

Roll. Abr. 90. Carlian and Mill. Cro. Car. 291. S. C. Jones, 312. S. C. (*d*) Like point in an action against churchwardens for such a presentment. Cro. Car. 285. Jones, 305. S. P. Roll. Abr. 112. pl. 9. 2 Mod. 52. Vent. 86. Sid. 465. Lev. 292. S. P.

(*a*) If a minister of justice hath a warrant to (*a*) attach (*b*) the goods of another, and can do it and does it not, an *action upon the case* lies against him.

(*a*) 3 Bulst. 212. *per Coke* C. J. Moore, 432. S. P. *per curiam.*

(*b*) So, if I shew *J. S.* to the sheriff, and give him a writ to arrest him, and he does not. Cro. Eliz. 875. *per Walmsly.* (*c*) But, if upon a *capias utlagatum* before judgment, the sheriff neglects to extend or seize goods, &c. this is the king's loss, and the party shall have no action, though it was objected, the sheriff extending, &c. would have been a means to force the defendant to appear; but it was said, that if it had been shewn that the sheriff might have taken his body, &c. there would have been more reason to support the action. 2 Vent. 90.

If a sheriff makes a false return, as, if he return a *cepi corpus* and *paratum habeo*, or *languidus*, when the party is at large without bail, an *action on the case* lies against him for the false return: but if he had taken bail, though the party does not appear at the return of the writ, yet no action lies against the sheriff; for by the 23 H. 6. c. 9. the sheriff is obliged to take bail.

For this *vide* head of *Sheriff* and *Bail in Civil Actions.*

If the sheriff returns the tenant summoned in a real action where he was not, by which he (*d*) loses by default, an action lies against him for this.

26 Ass. 48. Roll. Abr. 92. But to what actions the sheriff is liable, *vide* head of *Sheriff*. (*d*) For the judgment should stand, and the party is put to his remedy against the sheriff. Moor, 549. Bro. Action sur Case, 5. Goulds. 128.

[If a bailiff remove goods off the premises under a *fieri facias* before the landlord is paid his year's rent pursuant to the statute 8 Ann. c. 17., case lies against him; and the action may be brought at the suit of an administrator.]

Palgrave v. Windham, Stra. 212. ‖See tit. *Rent* (K), 8.‖

If at the petition of *A.* and the rest of the creditors of *B.* a commission upon the statute against bankrupts is issued out against *B.* and thereupon the commissioners sit, and offer interrogatories to *C.* and he refuses to be examined, and by them thereupon is committed to prison, and the gaoler suffers him to escape, *A.* may have an action against the gaoler for this escape.

2 Roll. Rep. 47. But for this *vide* head of *Bankrupts*, and *Gaol and Gaoler.*

[If

Ravenscroft v. Eyles, 2 Wills. 294. ‖See tit. *Escape*, and *Gaol and Gaoler*, and *Sheriff*.‖

[If a gaoler suffer a prisoner upon *mesne process* to escape, he is liable to an action on the case, though the prisoner return the same day to the prison, and the plaintiff proceed to final judgment against him.]

Roll. Rep. 78. Roll. Abr. 94. *Vide* head of *Attachment* and *Bailiff*.

If a warrant upon a *fieri facias* to levy a debt at the suit of *J. S.* be directed to an under-bailiff of a liberty, and he by virtue thereof levy the debt, and after conceal the writ and make not any certificate thereof, an *action on the case* lies against the under-bailiff, because he has done a personal *tort*.

Latch, 159. Adjudged upon a writ of error upon a judgment in Cheyney Court.

So, if a distress at the suit of *A.* issues out of the court of *C.* directed to *J. S.* (who is not the usual officer) to distrain the cattle of *B. &c.*, or that *B.* should find pledges to appear at the next court; and thereupon *J. S.* distrains the cattle of *B.* and after re-delivers them to *B.* without taking sufficient security, *&c.* and *B.* does not appear, *&c.* an action lies against *J. S.*, notwithstanding he is no known officer, but *pro hâc vice* only.

Roll. Abr. 93. 2 Bulst. 266. Moor, 835. 12 Co. 128. Roll. Rep. 63. S. C. adjudged between Powle and Godfrey.

If a summoner of the ecclesiastical court, upon a premonition directed to him by the ecclesiastical court to warn *J. S.* to pay certain costs awarded against him by the court, returns to the court, that he hath warned the said *J. S.*, by which the said *J. S.* is excommunicated, where in truth he never warned him; *J. S.* may have an *action upon the case* against him for this false return, though he be an ecclesiastical officer; for the excommunication is a temporal as well as a spiritual disadvantage, as during its continuance he cannot bring an action, and is liable to an *excommunicatio capiendo*.

Sid. 276. Keb. 947. ‖1 Salk. 320. Ld. Raym. 265.‖

If a *fieri facias de bonis ecclesiasticis* of *J. S.* be directed to the bishop of *E.* and he return *quod nulla habet bono ecclesiastica*, which is false, an *action on the case* lies against the bishop for this false return.

11 Co. 99. James Bagge's case, *per curiam*.

If upon a *mandamus* to restore *J. S.* to his place of a burgess of *P. vel causam nobis signif.* the mayor, *&c.* return a good cause, the matter of which is false, an action lies for the false return. So, an action lies against the mayor and commonalty of *L.* for making a false certificate of a custom. Hob. 87. So, against the surrogate of a bishop, who makes a false return as to the custom of choosing churchwardens. 5 Lev. 362. *Vide* Carth. 227. 2 Salk. 428. pl. 1. 430. pl. 5. Ld. Raym. 391. *Vide* tit. *Mandamus*. [And *note*, that regularly an action on the case is the proper remedy for all false returns. Doug. 153, 154.]

Vent. 25, 26. between Turner and Sir Samuel Sterling, adjudged *per totam curiam cont.* Vaughan, and Vent. 206. S. C. upon a writ of error in *B. R.* affirmed *per totam curiam*. 2 Lev. 50.

If the plaintiff declares, that within the city of *London* there is an ancient bridge, and that by custom of the said city two officers to look after it, called *bridge-masters*, by the citizens at a common hall assembled have been yearly chosen or continued; and that if one of them within the year hath died, another for the remainder of the year hath always been chosen as aforesaid, and that there are certain fees and profits belonging to the said office; and that *A.* and *B.* were elected to this office; that *A.* during his said year died, and upon a hall, by the defendant (being then lord mayor) called for the election of a bridge-master in the place of *A.* then and there the plaintiff and one *J. S.* as competitors stood for the said office; and thereupon the question did arise, who had the greater

greater number of electors; and the plaintiff did aver his number to be the greater; and thereupon did request the defendant, that according to the custom they might go to the poll, but the defendant did refuse to number the polls, and made proclamation that the electors should depart, and discharged the court, and *J. S.* was sworn; *per quod* the plaintiff lost the profit of the place, *&c.* this action lies as well for this (*a*) injurious prevention of him from obtaining the office, as for an hindrance of him in the execution thereof; for *qui destruit medium destruit finem.*

S. C. And there the custom was laid, that if the electors were so divided, that the plurality could not be known by the view, the mayor ought to grant the poll, and that the electors were so divided, &c. And adjudged *per cur. præter Vaughan*, that the action lay; though it was not averred that he would have been elected if the poll had been granted; for the mayor did not do his duty, and the *per quod* he lost the profits of his place is sufficient after verdict. (*a*) If upon a writ *de coronatore eligend.* the sheriff will not return him coroner who is chosen by the major part, an action lies. 2 Vent. 26. *Vide* 2 Sid. 168, 169, &c. 3 Keb. 664. 859. Diversity between an office of government and an office of profit.

A. declares that the king's writ issued, and was delivered to the sheriff of *Bucks*, for election of members of parliament in his county; that the sheriff made out his precept to the defendants, being constables of the borough of *Aylesbury*, for the election of two burgesses for that borough, which was delivered, and the burgesses duly assembled to choose, *&c.* and that the plaintiff being duly qualified, *&c.* and ready to give his voice for *L.* and *M.* to be burgesses, *&c.* the defendants, knowing the premises, maliciously obstructed him, and would not allow or receive it, and that without his voice two burgesses were chosen; it was adjudged after a verdict for the plaintiff in *B. R.* by three judges against *Holt* C. J. that the action did not lie. Their chief reasons were, that this was a parliamentary offence, and properly enquirable there; that to determine it here might occasion a clashing of jurisdictions; that it did not appear that the party had suffered any injury; that to allow of such actions would create a multiplicity of actions, to the great prejudice of officers; and *per Gould* J. the officer is a judge, and therefore not liable to an action; and *per Powis* J. he is *quasi* a judge, and therefore has a distinguishing power who to admit and who to refuse.

Salk. 20, 21. &c. Ld. Raym. 938, &c. 3 Salk. 17. 8. St. Tri. 89. Cas. Temp. Holt, 524. 6 Mod. 45. &c. Ashby v. White *et al.* adjudged by three judges, *contrà Holt* C. J. who held, that for every injury an action lay; that this was an injury done the plaintiff, as it deprived him of the greatest privilege a subject has, which is that of consenting to those laws by which he is to be bound; that the parliament's having a jurisdiction is no objection, especially in this case, where the grievance is, that the party is not represented; that the officer is neither a judge, nor *quasi* a judge; that the multiplicity of actions is no objection; for if a man will multiply wrongs, it is but reasonable that actions should be multiplied, &c. And *note;* the judgment was reversed in the House of Lords, according to *Holt*'s opinion: *Trevor* C. J. and *Price* and sixteen lords concurred with the judges of *B. R.* the rest of the judges and fifty lords concurred with *Holt.* ‖1 Bro. P. Ca. 62. S. C. But though the judgment was reversed in the House of Lords, yet the lords did not proceed upon the broad ground which Lord *Holt* had taken in the court below. Lord *Holt* had insisted that the action lay for the mere obstruction of the right; but the lords, in the justification of their conduct, which was supposed to be written by Lord *Holt*, put it upon a different principle, the wilfulness, the maliciousness of the act. 8 St. Tr. 129. And subsequent cases have considered malice as of the very essence of actions of this kind, and upon that principle judges have adopted the decision of the lords in this case. Harman v. Tappenden, 1 East, 555. Drew v. Colton, *Id.* 563. Milward v. Sargent, *Id.* 567. Cullen v. Morris, 2 Stark. R. 577.‖

‖In case against the sheriff of *Suffolk*, the declaration charged, that the defendant maliciously intending to deprive him of the

Barnardiston v. Soame.

2 Lev. 114. Pollexf. 470. office of knight of the shire, made a double return. Upon a trial at bar, *Twisden*, *Rainsford*, and *Wylde* held, and so directed the jury, that if the return were made maliciously, they ought to find for the plaintiff; which they did with 800*l.* damages. On motion in arrest of judgment, *Hale* C. J. being in court, he, *Twisden* and *Wylde* J. held, that forasmuch as the return was laid to be *falso et malitiosé et eâ intentione* to put the plaintiff to charge and expense, and so found by the jury, the action lay. Judgment, however, was reversed in the Exchequer Chamber, and that judgment of reversal affirmed in parliament. This reversal gave occasion to the act of 7 & 8 W. 3. c. 7. which should seem to be a declaratory act, and which gives an action against the returning officer for all false returns *wilfully* made, and for double returns *falsely, wilfully, and maliciously* made.

3 Lev. 50. 1 Lutw. 89. 7 St. Tr. 422. 8 St. Tr. 102.

Schinotti v. Bumstead, 6 Term R. 646. An action on the case lies against a commissioner of the lottery for not adjudging a prize to the holder of a ticket entitled to receive it.‖

2. *Where Case will lie for Torts and Injuries committed by Persons contrary to the Duty of their Trades and Callings.*

Roll. Abr. 2. *Vide* for this title *Carrier*, and head of *Trover and Conversion.* If a man (*a*) delivers goods to a common carrier (*b*), to carry them to a certain place, if he loses them, an *action upon the case* lies against him; for by the common custom of the realm he ought to carry them safely.

(*a*) An action lies against a ferryman that refuses to carry passengers. Hardr. 163. *Vide* a special declaration against a letter-carrier for the non-delivery of a letter delivered out to him at the general post-office. Rob. Ent. 103. (*b*) So, against a lighterman, master of a ship, or owners. Roll. Abr. 2. 2 Lev. 69. Hob. 25. That the undertaking makes him a common carrier. Cro. Jac. 262. Sid. 245. *Vide* head of *Bailment.* So, if they are damaged. Palm. 525. So, if he be robbed of them. 4 Co. 84. 2 Saund. 380. [The carrier is liable for every accident, except by the act of God, or of the king's enemies. 1 Term R. 33.]

Roll. Abr. 3, 4. But for this *vide* head of *Inns and Innkeepers.* So, if an innkeeper refuses to entertain a guest, on pretence that his house is already full, an *action on the case lies* against him: so, if the goods of his guest are stolen or lost in his house, *&c.*

Ld. Raym. 214. 1 Danv. 77. ‖Seare v. Prentice, 8 East, 347.‖ So, where a [So, if a man suffer materially from the neglect or ignorance of a *common surgeon or apothecary; alitèr*, if of a person not making public profession of such business, for it was the plaintiff's own folly to trust to one who was unskilled; however, upon an express undertaking, the action would lie, even in that case.]

surgeon and an apothecary broke the callus of the plaintiff's leg after it was formed, it appearing that it was done by their going out of the common course of practice, and in making an experiment with a new instrument. Slater v. Baker and Stapleton, 2 Wils. 359.

(*c*) Kelw. 50. Roll. Abr. 91. Saund. 312. If a smith refuses to shoe my horse, or if he pricks him, an *action on the case* lies against him. (*c*)

Roll. Abr. 10. 92. 19 H. 6. 49. That an action lies So, if a farrier kills my horse with bad medicines, or by neglect in curing him; an *action on the case* lies, without any express promise.

against a *barber* for shaving the plaintiff *negligentèr et inartificialitèr.* 2 Bulst. 333. *Vide* Hob

211. 11 Co. 54. Saund. 312., that before 5 Eliz. c. 4. no man was restrained from exercising any trade; but he that performed it falsely and insufficiently was answerable in an action. [An action cannot be maintained against a carpenter simply as such, and without any express consideration, for an injury sustained in consequence of his not entering upon a piece of work he had engaged to perform. Elsee v. Gatward, 5 Term R. 143.]

If a client receives an injury by the neglect or fraud of his attorney, an action lies (*d*); as, if an attorney suffers judgment to go against his client by *nil dicit*, when he had a warrant to plead the general issue (*e*); so, if in a plea of land he makes default (*g*); or, if an attorney by collusion with *J. S.* and without any warrant from me, appears for me in an action of trespass at the suit of *J. S.* and suffers the inquest to pass against me by default, whereupon *J. S.* recovers against me, I may have an *action on the case.*

Vide tit. *Attorney.*
(*d*) Winch, 90.
(*e*) Roll. Abr. 95. (*g*) F. N. B. 96. Cro. Jac. 695. Dyer, 362. Stile, 426 2 Sid. 171. Comb. 2. And *qu.* Whether the judgment should not be vacated. Cro. Jac. 344. 695. 3 Inst. 122. Keb. 89. 2 Roll. Abr. 724. Where case will lie against a counsellor, *vide* Roll. Abr. 10. 91. ‖Blackstone expressly lays it down, "An advocate or attorney that betray the cause of their client, or being retained neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case for a reparation to their injured client." Book 3. c. 9. p. 164. Finch's Law, p. 188. And in the Year-Book, 11 Hen. 6. 24. 55. it is laid down, "If one retains counsel and give him his fee to assist in the purchase of a manor, if he becomes counsel for another, or discovers his council, case lies;" which is cited by Lord *Hale*, F. N. B. 94. *notâ.* And in the Year-Book, 14 Hen. 6. pl. 18., it is laid down by *Paston* J., "If a serjeant-at-law undertake to plead my cause, and do it not, or plead it otherwise than I inform him, whereby I incur damage, an action on the case lies;" which is cited Bro. Abr. Action sur le Case, p. 69. Roll. Abr. Action sur le Case, 6, 7, 8., and Com. Dig. Action on the Case for Deceit, (A) 5.; and see Broke v. Mountagu, Cro. Jac. 90. *acc.* Harrison v. Lumley, 2 Ves. R. 488. *per* Lord *Hardwicke;* and Bradish v. Gee, Ambl. 229. In the above instances there seems to have been a breach of faith in the counsel's conduct, and not mere negligence or unskilfulness. And in Fell v. Brown, Peake's Ca. 96. Lord *Kenyon* held, that an action did not lie against a barrister for unskilfully and negligently settling a bill in Chancery, whereby it was referred for scandal and impertinence, and the plaintiff obliged to pay the costs. In this case the Court of Chancery may order the counsel to pay the costs. Beames's Ord. 167. Mitford's Plead. 39. — In Turner v. Phillips, Peake Ca. 122., where an action was brought against a counsel to recover back a fee paid him, on the ground that he had not attended the trial, Lord *Kenyon* expressed himself strongly against the action, and it was settled. This, however, is no authority that the plaintiff might not have sued the counsel specially, showing a damage from his non-attendance, which seems the proper remedy in such a case, and not an action to recover back the fee.‖

[It was holden to lie against an attorney for not charging a person in execution at his client's suit according to the terms of a rule of court, though it seemed to be rather an error of judgment than any actual negligence.]

Russell v. Palmer, 2 Wils. 325. ‖See Pitt v. Yaldin, 4 Burr. 2060. Lee v. Ayrton, Peake's Ca. 118.‖

‖An attorney employed to purchase an annuity was held not liable to his client for not advising him that the annuity was void under the enrolment act, when the courts had not at that time decided on construing the act in such a manner as to render it void.

Baikie v. Chandless, 3 Camp. 17.

An attorney is not liable except for *crassa negligentia*, not for a misconstruction of an obscure rule of court.

Laidler v. Elliott, 3 Barn. & C. 738.

If an attorney employed for the vendor of an estate, in taking counsel's opinion on the title, omit to state certain material deeds in the chain of title, and wrongly state a party to be seised in fee when he was not so, and, in consequence thereof, the counsel advises that the title is good, and he would have advised other-

Ireson v. Pearman, 3 Barn. & C. 799.

wise had he known of the deeds omitted; these facts are sufficient to justify a jury in finding the attorney guilty of negligence, so as to sustain an action.

Reeve v. Righy, 4 Barn. & A. 202.

Where an attorney for the plaintiff suffered the cause to be called on without previously ascertaining whether a material witness whom the plaintiff had undertaken to bring into court had arrived, in consequence of which the plaintiff was nonsuited, it was held, that in an action for negligence it was properly left to the jury to say whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict.‖

(G) Where an Action on the Case will lie for a Nuisance, and therein of the Inconvenience of multiplying Actions.

Vide head of *Nuisances*. Co. Litt. 56. a. Roll. Abr. 88. 110. 2 Roll. Abr. 140, 141. Moor, 180. 4 Co. 18. 9 Co. 113. 2 Brownl. 147.

IT is clearly agreed, that for a common nuisance, which is an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires, *no action on the case* will lie; for this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore in such cases the remedy must be by indictment at the suit of the king.

Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191. 451. Ld. Raym. 486. Salk. 15. pl. 17.

Co. Litt. 56. Cro. Jac. 446. Keb. 847. 2 Jones, 157.

But, if by such a nuisance I suffer a particular damage, as, if by stopping up a highway with logs, *&c.* my horse throws me, by which I am wounded or hurt, an action lies.

Vide the authorities, *suprà*. *Vide* Carth. 191. 451. Salk. 15. pl. 17. what shall be such a special damage as will maintain the action.

Russell v. Devon, 2 Term R. 667.

‖An action does not lie by an individual for an injury sustained in consequence of a county bridge being out of repair.

Bush v. Steinman, 1 Bos. & Pull. 404.

If *A.* or his servants, in repairing his house, place a quantity of lime in the road whereby *B.*'s carriage is overturned, *A.* is answerable in an action on the case.

Matthews v. West London Water-works Company, 3 Camp. 403.

So, if the servants of a water-works company, in laying down pipes, leave rubbish in the street, without any light or watchman to warn passengers, and a coach driven by the plaintiff is thereby overturned, and plaintiff's leg broken, the company are liable to an action.

Jones v. Bird, 5 B. & A. 837.; and see 1 Stark. 189.; but see Harris v. Baker, 4 Maule & S. 27.

Coupland v. Hardingham, 3 Camp. 398.

So, if the owner of a house do not properly fence in his area, so as to be safe for passengers, and the plaintiff falls down the area and is hurt, the owner is answerable; and it is no excuse that when he took the house, and as long back as can be remembered, it was in the same state.

Harmond v. Pearson, 1 Camp. 515.

So, if the owner of a vessel which is sunk in a navigable river neglect to place a buoy over the wreck, and, in consequence, the barge of another strikes on it and is damaged, he is liable to his

his action, and this although he may have placed a watchman near the spot to point out the danger.‖

Also, an action lies for continuing a nuisance; as, where for erecting a nuisance 2 *die Febr.* the defendant pleaded a prior action brought for erecting a nuisance 20 *die Martii*, and a recovery thereupon, and averred these to be the same nuisance and erection: on demurrer the plaintiff had judgment; for though he cannot have a new action for the same erection, yet he may for continuing the same nuisance. Salk. 10. pl. 3. Carth. 455. Ld. Raym. 570.

(H) Where an Action on the Case will lie for a Conspiracy, and oppressive Proceedings in Prosecutions and Suits at Law.

IT seems agreed, that for a false and malicious prosecution for any crime (*a*), whether capital or not, by which the party may be put in peril of his life, suffer in his liberty, reputation, or property (*b*), an action on the case in nature of a writ of conspiracy lies; whether the prosecutor proceeded so far as actually to exhibit an indictment, on which the party was acquitted, or not. Roll. Abr. 112. Several cases to this purpose. (*a*) How far the prosecution must be false and malicious and without probable cause of suspicion, *vide* Cro. Eliz. 70. 134. Leon. 107. Kelw. 81. Moo. 600. Danv. 212., and Salk. 15., where *per Holt* C. J., that this action is not to be favoured, because it deters men from prosecuting; and, therefore, if the grand jury find the bill, the defendant shall not be obliged to shew a probable cause, but it shall lie on the plaintiff's side to prove an express rancour and malice. *Quære*, How far the modern practice of granting a copy of the indictment upon an acquittal, makes it necessary that such copy should be produced, in order to prove it a false and malicious prosecution. And *vide* Carth. 416. Ld. Raym. 374. 12 Mod. 208. 211. 5 Mod. 394. 405. 408. [A copy of the record of the acquittal granted by the court must be produced in order to support an action for a malicious prosecution of a *felony*; but in the case of misdemeanors the practice is different. 1 Black. R. 385.] ‖It seems not sufficient to produce the original indictment, because it does not prove the caption. 2 Esp. Ca. 37. See 10 Barn. & C. 70. If the prosecution was before a magistrate the proceedings should be produced; or if they have been lost secondary evidence should be given. 2 Barn. & C. 496.‖ (*b*) It has been holden, that for exhibiting an indictment, which only affected a man's property, no action lay if the indictment were insufficient, or the bill found *ignoramus* by the grand jury. *Vide* Danv. 208, 209. several cases put *pro.* and *con.* And Salk. 15. *in margine*, that in an action on the case for maliciously procuring *H.* to be indicted for exercising the trade of a badger without licence, *per quod* he was put to great expense; in which it was agreed, that the indictment was insufficient; it was resolved by *Parker* C. J. and the whole court, upon great consideration, that there was no reason for this diversity between a malicious prosecution upon a good indictment and upon a bad one; and that this action will lie as well for damages by expense, as by scandal or imprisonment, though the indictment be insufficient. Hil. 12 Ann. Jones and Gwin. 10 Mod. 148. 214. [Gilb. Cas. 185. Stra. 691. 977. Ca. temp. Hardw. 54. 4 Term. R. 247. *acc.*] ‖This was confirmed in Pippet v. Hearn, 5 Barn. & A. 634. The mere return of *ignoramus*, where the indictment contains no scandal, and where the defendant has suffered no imprisonment, no special damage, will not of itself support the action without proof of express malice. Byne v. Moore, 5 Taunt. 187. *Sed vide* 4 Barn. & C. 23. Nor can malice be inferred so as to sustain the action from the mere fact of the plaintiff having been acquitted for want of the prosecutor's appearing when called for. Purcell v. M'Namara, 9 East, 361.; and see 14 East, 302. 1 Camp. 294. If some of the charges in the indictment are maliciously preferred, though others are not so, the action lies. Reed v. Taylor, 4 Taunt. 616. And it is no answer that the defendant did what he did by the advice of counsel if the opinion was ill-founded, or if the facts were improperly stated to counsel. Hewlett v. Crutchley, 5 Taunt. 277.; and see 2 Barn. & C. 693.‖ [The action may be brought by a husband for the expense of defending his wife. 2 Stra. 977.]

Carth. 416. Bull. Ni. Pri. 14. But see a doubt in this case by Saunders, where the declaration stated the injury to have been committed *per conspirationem inter eos habitam.* Saund. 230. In actions for prosecutions or oppressive proceedings, it is indispensably necessary to make out two grounds: *malice* and *want of probable cause.* 4 Burr. 1974. From the latter the former may be implied, but not *è converso.* ‖In general the plaintiff must give some evidence of the want of probable cause; but as this is evidence of a negative, very slight evidence is sufficient to call on the other party to shew the affirmative. See Cotton v. James, 1 Barn. & Adolph. 133.‖ Where there had been a condemnation of goods by sub-commissioners excise for not entering and paying the duties, which was afterwards reversed by the commissioners of appeal, it was adjudged that an action for a malicious prosecution did not lie against the informer, for the judgment of the sub-commissioners shewed that there was a foundation for the prosecution. 1 Wils. 232. 1 Term R. 500. ‖See 1 Barn. & Adolph. 133.‖ In actions of this kind the plaintiff must allege that the original suit, wherever instituted, is at an end. Dougl. 205.; for otherwise the point would come to be tried too soon and disorderly. Yelv. 117., it must be *legally* at an end; and, therefore, in an action against a justice for an illegal commitment on a supposed charge of felony, the court held an allegation that the plaintiff was *discharged* from his imprisonment, to be insufficient; because there are various ways by which a *discharge* may be had, without putting an end to the suit: it ought to have been shewn *how discharged.* 2 Term R. 225. Stra. 114. Hob. 206. 266. 10 Mod. 245. So, in an action for maliciously holding to bail, it must be shewn what is become of the original action. 1 Salk. 15. Dy. 285. If it has been abandoned, it should seem that an action will lie, for abandonment is an indication of its being false and hopeless. W. Jones, 93. ‖*Sed qu.* and *vide* Sinclair v. Eldred, 4 Taunt. 7.‖ So, where the plaintiff suffered himself to be nonsuited. Bull. Ni. Pri. 13. (4th edit.) But a *nolle prosequi* by the attorney-general is not such a termination of a criminal suit as will authorize an action. 6 Mod. 261. See 10 Mod. 219. Gilb. Cas. 185., &c. Nor is a *stet processus.* Wilkinson v. Howel, 1 Moo. & Malk. 495.‖ *Qu.* Whether the defect of stating the original action to be determined, may not be cured by a verdict or plea in bar? Raym. 418. 2 Keb. 456. 753. 3 Keb. 781. Saund. 229.

[If the action be brought against several, and one only be found guilty, it is sufficient; for there is a great difference between the action on the case in the nature of conspiracy, and the writ of conspiracy at common law; for in this case the damage sustained is the ground of the action.

Austin v. Debnam, 3 Barn. & C. 139.; and see 5 Barn. & A. 513.; *sed vide* 2 Camp. 594.

‖Where there are mutual dealings between two parties, and items known to be due on each side of the account, if one party arrests the other for the amount of one side of the account, without giving credit for what is due on the other, the arrest is malicious and without probable cause, and an action may be supported.

Nicholson v. Coghill, 4 Barn. & C. 21. 6 Dow. & R. 12.; and see Wentworth v. Bullen, 9 Barn. & C. 840.

Where *A.* arrested *B.* on the 10th *December*, and was ruled to declare on the 17th., and filed a declaration on the 24th, and discontinued the action on payment of costs on the 31st, it was held, that the circumstances were sufficient *primâ facie* evidence of malice and want of probable cause.

Berry v. Adamson, 6 Barn. & C. 528.; and see 2 New R. 211. 1 Moo. & Malk. 244.; *sed vide* 2 Carr. & P. 605.

If the sheriff's officer having a writ against *A.* send him a message to fix a time to call and give bail, and *A.* accordingly attend and give bail, this is no arrest; and an action for a malicious arrest does not lie, although the party suing out the writ have no cause of action.

Ravenga v. Mackintosh, 2 Barn. & C. 693.; and see 1 Stark. Ca. 502.

If the defendant can show that in making the arrest, he acted *bonâ fide* on the opinion of counsel of competent skill and ability, and believed that he had a good cause of action against the plaintiff, this forms a good defence to an action for a malicious arrest. But where it appeared that the party was influenced by an indirect

rect motive in making the arrest, it was held to be well left to the jury to say whether he acted *bonâ fide* on his counsel's opinion, and believed that he had a good cause of action.

If the plaintiff in an action for malicious prosecution, prove a case which in the opinion of the judge shows that there was no probable cause for the indictment, and the defendant then calls a witness, who proves an additional fact, which in the judge's opinion shows a probable cause, and there is no contradictory testimony, and nothing in the demeanour of the witness to impeach his credit, the judge is not bound to leave the fact to the jury, but may act upon it as a fact proved, and nonsuit the plaintiff. Davis v. Hardy, 6 Barn. & C. 225.

The plaintiff may maintain the action, although he has obtained a criminal information.‖ Caddy v. Barlow, 1 Ry. & Moo. 275.

If a justice of peace *malitiosè et invidè machinans J. S. de bonis, nomine, famâ et vitâ deprivare*, directs his warrant to several constables to apprehend *J. S.* alleging, in his said warrant, that *J. S.* was accused before him for stealing an horse; whereupon he is arrested, and detained till he enters into bond for his appearance; whereas he was not accused, nor stole such horse; an action will lie; for though the justice (*a*) is excused when upon a false accusation he sends out his warrant, yet it is otherwise where he makes it out without any accusation at all. (*b*) Windham v. Clere, Leon. 187. Cro. Eliz. 130. S. C. [(*a*) This case of Windham v. Clere is not law; for the immediate act of imprisonment proceeded from the justice; and therefore the action should have been trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action on the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other person. Morgan v. Hughes, 2 Term R. 231.] ‖See 2 Chitt. 304. 1 Dow. & R. 97.‖ (*b*) If a justice of peace procures some witnesses to appear and give evidence upon an indictment, that is but his duty; and though his name was indorsed upon the indictment to give evidence, yet this made him no prosecutor, and so no action lies against him for a malicious prosecution. Vent. 47. 2 Keb. 572.

[An action on the case is the proper remedy against excise officers who enter a house under a legal warrant to search for concealed goods, when there are none.] Boot v. Cooper and another, E. 25 G. 3. *B. R.* 1 Term R. 535. See the case of Bostock v. Saunders and others. 2 Black. R. 912. 3 Wils. 434. where the Court of Common Pleas, after hearing two arguments, held, that trespass would lie in such a case.

‖So also for maliciously suing out a commission of bankruptcy or lunacy.‖ Cotton v. James, 1 Barn. & Adol. 133. 1 Gow. Ca. 50.

An action on the case lies against churchwardens, for that they falsely and maliciously, to the intent to draw the plaintiff within the censures of the ecclesiastical court for adultery, presented him there, upon a fame of living in adultery with *A. S.* *Vide* Roll. Abr. 112. and 2 Bulst. 343., where case will not lie for an ecclesiastical scandal. *Sed qu.* If it will not lie for the expense, trouble, and vexation attending defence?

If *A.* was churchwarden of *B.* and at the end of the year gave up his account to his successor, and yet *A.* is falsely and maliciously cited by *D.* into the Ecclesiastical Court to render an account, and at the request of *D.* he is excommunicated for not rendering up Raym. 418. 2 Jones, 132. S. C. adjudged, the plaintiff declaring that the defendant

knowing the plaintiff had before made up his accounts, which were approved by the parish, &c. *Vide* Hardr. 194, 195. S. C. and a long argument.

up his account, an action lies against *D.* notwithstanding this sentence was given by the judge.

Ackerley v. Parkinson, 3 Maule & S. 411.

‖An action on the case cannot be maintained against the judge of an ecclesiastical court, for excommunicating the plaintiff for disobeying a citation of the court, if the judge has jurisdiction of the subject-matter, and if no malice appears, notwithstanding the citation by which the plaintiff was cited be void, and the proceedings thereon have been set aside on appeal.

Beaurain v. Sir W. Scott, 3 Camp. 387.

But if the judge excommunicate a party for disobeying an order which the judge has no authority to make, or if the party has not been previously served with a citation or monition, or had notice of the order, the action lies against the judge, though there is no pretence of malice.‖

Salk. 14. 3 Lev. 210. Hob. 266. 3 Leon. 138. Cro. Jac. 432.

But it must be observed, that there is a great difference between a false and malicious prosecution by way of indictment, and bringing a civil action; for, in the latter, the plaintiff asserts a right, and shall be amerced *pro falso clamore;* also the defendant is entitled to his costs; and therefore, for commencing such an action, though without sufficient grounds, no action on the case lies.

Sid. 424. 2 Keb. 546. Mod. 4. Lev. 275. 3 Lev. 211. S. C. cited. Salk. 14. S. C. cited and greed; 3 Term R. 185. S. P.

But, if the plaintiff declares, that he being arrested in *Middlesex* at the suit of the defendant, and the defendant, intending to detain him in prison, *falso et malitiosè dixit* to the sheriff of *Middlesex*, that the plaintiff owed him 500*l.* requiring him to take bail accordingly, *per quod* he was detained in gaol several days; the action lies, because of the special damage sustained by the party on this false affirmation.

‖Without the ingredient of *malice* this action cannot be supported: *malice* must be averred and proved. Scheibel v. Fairbain, 1 Bos. & Pull. 388. Gibson v. Chater, 2 Bos. & Pull. 129. With that ingredient, mixed with falsehood, it will lie for holding to bail in an inferior court as well as in the courts of *Westminster Hall*, either where the inferior court has not cognizance of the cause, the defendant knowing that it has not, Goslin v. Wilcock, 2 Wils. 302. or, where the sum actually due would not authorize an arrest in it. Smith v. Cattle, *Id.* 376.‖ But it is not enough to declare generally that he brought an action against him *ex malitiâ et sine causâ, per quod* he put him to great charge, &c. but he must shew the grievance specially; ‖he must shew that the original suit is terminated; judgment of *non pros* in the original action is not of itself proof of malice. Sinclair v. Eldred, 4 Taunt. 7.‖ Saund. 228. Vent. 12. 19. 86. Danv. 196. 1 Salk, 15. pl. 6. Ld. Raym. 503. 12 Mod. 273. ‖2 Term R. 232.‖

7 H. 6. 43. Roll. Abr. 101. S. C. March 47 S. P. Cro. Eliz. 629.

If a stranger brings an action against *A.* in the name of *J. S.* without the consent of *J. S.* an action on the case lies against him. (*a*)

(*a*) Or there may be remedy upon the 8 Eliz. c. 2. But *quære* where there are several plaintiffs, and one of them gives his consent. Cro. Eliz. 236. 2 Sid. 162. If upon an issue between *A.* and *B.*, a stranger that was not returned of the jury, causes himself to be sworn in the name of one that was returned of the jury, and a verdict is given for *B.*, *A.* may have an action upon the case against the stranger. March, 81.

Saund. 131. Lake and King. Mod. 58. S. C. 2 Keb. 561. 462. 466.

If *A.* exhibits a petition to a committee of parliament, appointed for the examination of public grievances, and therein charges *B.* being a doctor of law, and vicar general to the Bishop of *L.* with several great offences, as extortion, *&c.* in his office;

and

and for the better manifestation of these grievances, causes the said petition to be printed, and to be delivered to several of the members of the said committee; yet no action upon the case lies; for this printing and delivering of the case as aforesaid, is according to the order and course of proceeding in parliament. ‖ [*Aliter*, if it had been dispersed abroad before it had been presented. 2 Keb. 832. 1 Hawk. P. C. c. 75. § 8. 12. 15. Case will not lie for words spoken or sworn in a legal and judicial way. 2 Burr. 810.] If a man brings a writ of forgery against a peer, &c. and the defendant is found not guilty, yet shall he not have *scandalum magnatum*, and lay the charge contained in the writ to be a scandal. Roll. Abr. 34. Moor, 38. Hetl. 55. Hob. 266. No action lies against a witness for perjury, in giving his evidence in a cause. *Vide* Danv. 195.

659. 664. 801. 832. S. C. Lev. 240. S. C. Sid. 414. S. C. ‖See titles *Libel* and *Slander*. Hardr. S. C.

In *case*, the plaintiff declared that the defendant maliciously levied a plaint in *London*, and prosecuted the plaintiff thereon, *ubi revera* the cause of action did arise in *D.* in *Kent*, out of the jurisdiction of the court of *London*; after verdict for the plaintiff, the court inclined that the action would not lie; for the plaintiff might have pleaded to the jurisdiction, and if they had refused his plea, he might have applied for a prohibition. was fit to have the opinion of all the judges; for that such action was never *North*'s time. *Vide* Vent. 669. 2 Jones, 214. Hob. 205. Cro. Jac. 667. Sid. 463. Sand. 221. 4 Co. 14. No action lies for suing an attorney in an inferior court; for who knows whether he will insist on his privilege, and if he does, he may plead it. Mod. 209, 210. *per cur.* [It is now settled that an action of the case will lie for maliciously suing a person in an inferior court, when that court has no jurisdiction of the cause: and the Court of Common Pleas, after due consideration, refused a new trial in such a case, though the declaration did not allege, as it ought to have done, that the defendant knew that the inferior court had no jurisdiction. 2 Wils. 502.]

Carth. 189. Temple v. Killingworth, Show. 194. 254. Cases. *B. R.* 4 S. C. But no resolution, and there said, that it held to lie till

[An action on the case is maintainable for a malicious abuse of delegated authority of the highest nature; as, where the governor and vice-admiral of one of his majesty's islands suspended the judge of the vice-admiralty court from the exercise of that office, maliciously and without any reasonable cause.

Sutherland v. Murray, Sittings at *Westminster* after Easter, 1785. *cor. Eyre* B. 1 Term R. 538.

But this action will not lie for a malicious prosecution before a naval court martial, for an offence cognizable therein (*a*): nor for delaying to bring an officer under arrest to a court-martial, it being a military offence. Nor will it lie (*b*) against a commanding officer for an improper exercise of his power, *flagrante bello*, and out of the British dominions.]

Johnstone v. Sutton, 1 Term R. 495. (*b*) Particularly if the defendant has not been tried for it by a court-martial. (*b*) Barwis v. Keppel. 2 Wils. 314.

‖An action on the case does not lie to recover damages against the lessor of the plaintiff in a vexatious ejectment.‖

Purton v. Honnor, 1 Bos. & P. 205.

(I) Where Case will lie, though the Party injured has another Remedy.

IF one slanders my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, yet I may have an action against him that caused the disturbance.

Allen, 3. ‖*Sed vide* Vicars v. Wilcock, 8 East, 1. and 2 Bos. & Pull. 284. and tit. *Slander*, C.‖

If a man stops a water-course, *per quod* his neighbour's ground is

Dyer, 250. *in*

AFFIDAVIT.

AN affidavit is an oath in writing, signed by the party deposing, sworn before, and attested by him who hath authority to administer the same. As most motions and orders of court are grounded on affidavits, it seems impracticable, and indeed unnecessary, to instance in what cases they are to be made use of, or when they may be said to be defective, short, or evasive; this being a matter of practice, and few things relating thereto being thought worth reporting.

We shall, however, under this head, set down what we find relating to

(A) The taking and filing of Affidavits.
(B) Where an Affidavit is necessary.
(C) Where it may be said to be short and defective.

(A) The taking and filing of Affidavits.

‖(See Tidd's Practice, c. 19. (9th ed.) and Beames's Ord.)‖

Style Pract. Reg. 78.

AFFIDAVITS were only to be taken by some judge of that court in which they were to be made use of. But now,

29 Car. 2. c. 25. By the 16 & 17 Car. 2. c. 9. the chancellor of the duchy of *Lancaster* may empower persons to take affidavits. [By the 4 G. 3. c. 21. a similar power is given to the chancellor and justices of the Court of Pleas in the county Palatine of *Durham*].

" By the 29 Car. 2. c. 5. the chief justice, and other the justices " of the Court of King's Bench, or any two of them, whereof " the chief justice to be one for that court; the chief justice of " the Common Pleas, and the rest of the justices there, or two of " them, whereof the chief justice to be one for that court; and " the lord treasurer, chancellor, and barons of the Exchequer, " or two of them, whereof the lord treasurer, chancellor, or " chief baron to be one for that court, may by commission or " commissions under the seal of the said respective courts, from " time to time, as need shall require, empower persons in the " several counties to take affidavits concerning any thing de- " pending or concerning any proceedings in the said courts, as " masters in chancery extraordinary use to do; and any judge " of assize in his circuit may take affidavits concerning any " thing depending, *&c.* as aforesaid; which affidavits shall be " filed in the several offices of the said courts, and be made use

" of

" of as other affidavits taken in the said courts; and all persons " forswearing themselves in such affidavits shall incur the same " penalties as if they had been taken in open court; the persons " taking such affidavits shall receive only 1*s.* for so doing, be- " sides the king's duty, which duty shall be paid to the proper " officers in the said courts, before such affidavit be there filed " or made use of."

‖By rule of H. T. 3 & 4 G. 4., no commission for taking affidavits can be issued to any person practising as a conveyancer, unless such person be an attorney or solicitor. 1 Barn. & C. 288. 2 Dow. & R. 438.

And by rule of E. T. 4 G. 4., attornies and solicitors of the great session in Wales, and the counties palatine of Chester, Lancaster, and Durham are within the above rule.‖ 1 Barn. & C. 656. 2 Dow. & R. 870.

[By a rule of the Court of King's Bench E. 31 G. 3. it is ordered, " That where any affidavit is taken by any commis- " sioner of that court made by any person, who from his or her " signature appears to be illiterate, the commissioner taking " such affidavit shall certify or state in the jurat, that the affi- " davit was read in his presence to the party making the same, " and that such party seemed perfectly to understand the same, " and also that the said party wrote his or her signature in the " presence of the commissioners taking the said affidavit." ‖See 8 Price, 501.‖

Affidavits taken before a person who is solicitor in the cause are not allowed to be read either at law or in equity. 5 Atk. 815. 3 Term R. 403. ‖9 Price, 88.‖

‖Nor can affidavits be received which are sworn before the attorney of the party, or his partner. Batt v. Vaisey, 1 Price, 116.

Hopkinson v. Buckley, 8 Taunt. 74.; and see 5 Moo. 325.

But an affidavit may be taken before the clerk of the attorney in the cause, if the clerk be empowered to take affidavits. 8 Term R. 638.

It may be taken before the party's own attorney, if in the country, if the agent in town be the attorney on the record. Read v. Cooper,

5 Taunt. 89.; and see 8 Taunt. 435.

Affidavits not entitled " in the King's Bench," and sworn before *A. B.* a commissioner, *&c.* without stating him to be a commissioner of that court, were not allowed to be read; but affidavits sworn in court or before a judge of the court, though not entitled " in the King's Bench," were read.‖ R. v. Hare, 13 East, 189. *Vide* Kennett, &c. v. Jones, 7 Term R. 189.

If affidavits taken before commissioners in the country, according to the above statute, be expressed to be in a cause depending between *A.* and *B.* and there be no such cause in court, they cannot be read, because the commissioners have no authority to take them, and there can be no perjury; otherwise, if there be a cause in court, and this concerns some collateral matter. 2 Salk. 461. pl. 2.

[If an affidavit in a cause have no title, it cannot be received, though the adverse party is willing to wave the objection.] 2 Term R. 644.

‖So if it be not entitled in any court, it cannot be received. Osborn v. Tatteson, 1 Bos. & Pull. 271.

An affidavit to support a rule *nisi* for staying proceedings on a bail-bond, should be entitled in the action against the bail. Roberts v. Giddins,

But

1 Bos. & Pull. 337. But, where no action against the bail is commenced, as, if a motion be made to cancel the bail-bond, the affidavit must be entitled in the original action; for unless it be entitled in some action, no perjury can be assigned upon it.‖

1 Stra. 704. An affidavit upon a motion for a *certiorari* to remove an indictment is properly entitled, "*the King* v. *A. B.* (the defendant.)"

Bevan v. Bevan, 3 Term R. 601. The same practice prevails in affidavits to move for informations. Rex v. Pierson. Andr. 310. 2 Stra. 1107. S. C. The affidavits on which to apply for an attachment for disobeying an award, where the submission is made a rule of court under the statute, need not be entitled in any cause; but those in answer must.

Bainbridge v. Houlton, 5 East, 21. ‖But neither need be entitled on a motion to set aside the award.‖

Wood v. Webb, 3 Term R. 253. So, if granted, though not issued. 7 Term R. 439. Rex v. Sheriff of Middlesex, 6 Term R. 60. Whitehead v. Firth, 12 East, 165. ‖Such title is sufficient without naming the cause, though it is convenient to do so. 5 Barn. & C. 389.‖ Affidavits for attachments in civil suits are to be entitled with the names of the parties, but as soon as the attachments issue, the king is to be named as prosecutor.

Rex v. Robinson, cited in Rex v. Cole, 6 Term R. 387. ‖An affidavit on a motion for leave to file a criminal information ought not to be entitled; and if it is, it cannot be read. But the affidavits produced on shewing cause against the rule may or may not be entitled; all affidavits made after the rule is made absolute must be entitled.

Ex parte Nohro, 1 Barn. & C. 267. In moving for a rule *nisi* for a *certiorari* the affidavit must not be entitled in any cause.

Kelly v. Wrother, 2 Chitt. 109. *Sed vide* 1 Bing. 142. 7 Moo. 600. Affidavits in support of a rule to set aside proceedings on a bail-bond may be either entitled in the action on the bond, or in the original cause.

Gandell v. Rogier, 4 Barn. & C. 862. Where a motion is made in a cause removed to the K. B. by writ of error, the affidavit must be entitled in the cause in error.

Sowerby v. Woodroffe, 1 Barn. & A. 567. In entering up judgment on an old warrant of attorney, the affidavit may be properly entitled in a cause.

Fores v. Diemar, 7 Term R. 661. The Christian names as well as surnames of the parties must be inserted in the title of an affidavit produced to shew cause against a rule.

Steyner v. Cottrell, 3 Taunt. 377. An affidavit, the title of which styles the plaintiff "*assignee*," without more is bad.

Doe v. Want, 2 Moo. 722. Bullman v. Callow, 1 Chitt. 727. And so also if the names of all parties are not stated. *A. B.* "and others," is insufficient.‖

2 Wils. 371. Where an affidavit has been read and filed, it cannot be taken off the file.

Rex v. Jolliffe, 4 Term R. 285. Affidavits made for one purpose may occasionally be used for another. Thus an affidavit taken before a judge at *nisi prius* upon

upon an information out of the King's Bench, and afterwards returned into that court and filed, was admitted as a ground on which to grant another information, the court considering the authority of the judge at *nisi prius* in that case as an emanation of their own. So, affidavits upon which a defendant hath obtained his discharge in one cause, have afterwards been admitted for a similar purpose in another cause.

Cooke v. Schmoll, 4 Term R. 285.

‖The courts of this country will take notice of affidavits sworn before foreign judicatures, provided they are properly authenticated.

Where the affidavit is taken before one of the judges of the superior courts in Ireland, an affidavit that the signature is in his hand-writing, has been admitted as a sufficient authentication of it. But, with respect to ordinary magistrates, it is usual to require the attestation of a notary public. In a late case (*a*), however, the Court of King's Bench received an affidavit purporting to be sworn before the high bailiff and chief magistrate of the district of *Douglas* in the *Isle of Man*, upon oath made before the court here, that the deponent believed the signature to be of the proper hand-writing of that magistrate.

Ex parte Worsley, 2 H. Black. 275.

(*a*) Dalmer v. Barnard, 7 Term R. 251.; but see Riddle v. Nash, 8 Moo. 632.

Affidavits sworn before a justice of the peace in *Scotland*, are admissible in a cause in the K. B. if the handwriting of the justice be authenticated.‖

Turnbull v. Moreton, 1 Chitt. 463. 721. *Sed vide* 19 Ves. 345. So, also, before a baron of exchequer in Scotland. 1 Jac. & W. 296.

(B) Where an Affidavit is necessary.

THE law and practice of the courts require, that on all motions for an information, attachment, complaint against any officer for an offence not committed in the face of the court, for a new trial, relating to the serving and returning of writs or processes, &c. oath or affidavit be made of what is affirmed, that the judges may be satisfied, as well of the truth thereof, as of the reasonableness of granting relief when made out.

Vide the several heads. [By the st. of 7 & 8 W. 3. c. 34 it is enacted that the solemn affirmation and declaration of a Quaker shall be accepted in all cases, except in a criminal cause, instead of an oath in the usual form. See too 12 G. 2. c. 13. 22 G. 2. c. 46.]

Also, by acts of parliament, affidavits are made necessary, as by 4 Ann. cap. 16. § 11. in the case of dilatory pleas; and by the 12 Geo. 2. cap. 29. to hold to special bail.

‖As a general rule the court requires in all petitions under acts for local improvements, &c. for payment of money out of court, that the parties applying shall by affidavit shortly verify their title, and state that, to their knowledge and belief, no other person has any title to, or claims any interest in the estate.‖

2 Younge & J. 493.

If a person exhibits a bill for the discovery of a deed, and prays relief thereupon, he must annex an affidavit to his bill, that he has not such deed in his possession, or that it is not in his power to come at it; for otherwise he takes away the jurisdiction of the common law courts, without shewing any probable cause why he should sue in equity.

Chan Ca. 11. 231. Vern. 180. 247. 3 Chan. R. 6. Gilb. Hist. Ch. 51. Eq. Ca. Abr. 13. 2 Eq. Ca. Abr. 13. 2 Freem. 7. 2 P. Wms. Rep. 541. Prec. Ch. 536. 3 Atk. 17. 132. *Contr.* 1 Vern. 59. evidently a mistake.

But,

Vern. 180. 247.

But, if he seeks discovery of the deed only, or that it may be produced at a trial at law, he need not annex such affidavit to his bill; for it is not to be presumed that in either of these cases he would do so absurd a thing, as exhibit a bill, if he had the deed in his possession.

King v. King, Mosely, 192.

[It is also unnecessary in the case of a bill for discovery of a cancelled instrument, and to have another deed executed, for if the plaintiff had the cancelled instrument in his hands, he could make no use of it at law, and the relief prayed is such as a court of equity only can give.]

Abr. in Eq. 14. Prec. Ch. 536. Gilb. Hist. Ch. 52.

Also, if he sets forth the whole circumstances of his case, and prays general relief, the prayer of relief shall be applied to the discovery only.

Philips v. Carew, 1 P. Wms. 117. Shirley v. Earl Ferrers, 3 P. Wms. 77. 1 Atk. 460. Mitf. Eq. pl. 51. 131.

[If a bill be filed for examining a material witness upon the ground that his evidence is likely to be lost by death or departure from the realm, there must be an affidavit annexed to it, of the circumstances from which the danger of such loss is apprehended. So, if a bill be filed for perpetuating the testimony of a witness upon the ground of his being the only witness to a particular point, and his evidence being of the utmost importance, an affidavit of the witness himself should be annexed to it. The principle on which it is required in these cases to annex to the bill an affidavit of the circumstances which render the examination of witnesses proper in a court of equity; though the matter is capable of being made immediately the subject of a suit at law; seems to be the same as that on which the practice of annexing an affidavit of the loss or want of an instrument, to a bill seeking to obtain in a court of equity the mere legal effect of an instrument, is founded; namely, that the bill tends to alter the ordinary course of the administration of justice, which ought not to be permitted on the bare allegation of a plaintiff in his bill.

Taylor v. Sharp, 3 P. Wms. 371. Mitf. Eq. pl. 78. 82.

In order to obtain the leave of the court to bring a bill of review, or a supplemental bill in the nature of a bill of review *upon the discovery of new matter*, there must be an affidavit that such new matter could not have been produced or used by the party claiming at the time when the decree was made.]

Bunb. 303. ‖See 2 Ves. & B. 410.‖

In an interpleading bill, the party who prefers it must make affidavit that he does not collude with either of the other parties.

[(*a*) He must swear positively that the defendant is indebted to him in a sum *certain*: where indeed a bill is for an account only, the plaintiff's swearing that he believes the balance in his favour will be so much, will be sufficient. 3 Atk. 501.] ‖See 5 Ves. 96. 8 Ves. 52. 7 Ves. 417. 10 Ves. 164. 11 Ves. 54. 16 Ves. 470. 18 Ves. 354. 19 Ves. 342. 6 Madd. 276.; and see tit. *Prerogative*, Vol. VI.‖

He who moves for a *ne exeat regno* against another, must make affidavit of the loss he is like to sustain by the party's going out of the kingdom, and that thereby the debt may be lost, and that the party is actually going out of the kingdom. (*a*)

Wood v. Story, 1 P. Wms. 781.

[A Quaker hath been permitted to put in an answer to a frivolous and vexatious bill without either oath or affirmation.

3 P. Wms. 142. note.

Where a party excepts to a fact certified by a master's report, he must support his exception by an affidavit.

The

The nobility of this kingdom, and lords of the upper house of parliament, are of ancient right to answer in all courts, as defendants upon protestation of honour only, and not upon oath.] Jones, 155. Seld. 3 Vol. p. 2. 1335.

A peeress by her answer owned that she had several deeds in her power, but did not set them forth; and on motion she was ordered to produce them on oath, but that order was changed, and she to produce them on honour only, being in supplement to her answer, which was on honour. Pre. Ch. 93. Duke Hamilton and Lady Gerrard; but *quære* Whether any order that a peer or peeress should produce writings on affidavit, or be examined on oath, as to any thing in his answer, is not good. [Lord *Harcourt* held, that the privilege of a peer to depose on his honour only, was confined solely to his answer in Chancery; that in all other cases he must be upon oath; and therefore the Lord *Stourton* was put to answer upon his oath to interrogatories. Sir Thomas Meers v. Lady Stourton, 1 P. Wms. 146.]

(C) Where it may be said to be short and defective.

AN affidavit must set forth the matter positively, and all material circumstances attending it, that the court may judge whether the deponent's conclusions be just or not.

And therefore, on motion to put off a trial for want of a material witness, it must appear that sufficient endeavours were made use of to have him at the time appointed, and that he cannot possibly be present, though he may on further time given. Faresl. 121. Comb. 422.

‖In an affidavit in a cause the plaintiff need not state his residence.‖ Crockets v. Bishton, 2 Madd. 446.

Upon a rule to shew cause, the plaintiff offered several new affidavits, and this diversity was taken, *viz.* where they contain new matter, and where they tend only to confirm what was alleged and sworn when the rule was made; in the latter case they may be read, not in the former. 2 Salk. 461. pl. 1.

[When a defendant who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his case (if he mean to produce any); but if in the course of the enquiry the court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day. Rex v. Wilson, 4 Term R. 487.

When a defendant who has been convicted on an indictment comes up for judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, which affidavits the defendant is at liberty to answer.] Rex v. Sharpness, 1 Term R. 228.

If there be affidavit against affidavit, the proper method is to have it tried by an issue at law. Comb. 399. ‖See Beame's Ord. 54.‖ But this is matter discretionary in the court. See 3 Mod. 108. where an action on the case was brought for scandalous matter inserted in an *affidavit*; that the party is to put nothing in the *affidavit* but what is material to the point, and therefore not to set forth the merits of his cause on motion. Stile Prac. Reg. 79. where the *affidavit* of one who stood in the pillory was read. 2 Salk. 461. But for this *vide* tit. *Evidence*. ‖As to affidavits in support of *injunctions*, see tit. *Injunction*.‖

‖An affidavit made in support of a state of facts may be referred for scandal, but not for impertinence, by a party who has *In re* Burton, 1 Russell, 380.

See 7 Price, 594.

filed, in support of a counter state of facts, an affidavit which appears to be an answer to the former.‖

AGREEMENTS.

(a) An agreement is defined *aggregatio mentium in re aliqua facta vel facienda.* Plowd. 17. a. ‖*Duorum vel plurium in idem placitum consensus.* Dig. Lib. ii. tit. 14. § 1.‖ Though a contract executed with all the solemnity required by law, may properly be called an agreement, yet in the more common acceptation of the word *articles, minutes, and escrow*, &c. containing something preparatory to a more solemn and formal execution, are called *agreements.*

AN *agreement* (*a*) is the consent of two or more persons, the one to part with, and the other to receive, some property, right, or benefit. The notion of contracting or entering into agreements arose from the increase of commerce, and the necessity men were under of bartering their superfluities for things of real use, which lay out of the way of their acquiring. That men should execute their agreements and perform their promises, though made without writing or consideration, is enjoined by the law of nature; but in civil societies, and in ours in particular, circumstances are required which protect the weak, and those who are under the power of others; and provision is made against fraud and circumvention.

Under this head we will consider,

(A) Who are capable of contracting and binding themselves or others by their Agreements.

(B) Of Agreements which are good in Law, and will be decreed in *Specie* in Equity: and herein,

1. *Of unreasonable Agreements, and such as may be said to be obtained by Fraud or Circumvention.*

2. *Of voluntary Agreements.*

3. *Of the Manner in which they are to be performed.*

(C) Of Parol Agreements, or such as may be said to be within the Statute of Frauds and Perjuries: and herein,

‖1. *Of Agreements mentioned in the First, Second and Third Sections of the Statute.*

2. *Of Agreements mentioned in the Fourth Section: and herein,*

1. Of

1. Of Promises by Executors, Administrators, &c.
2. Of Promises to answer for the Debt, Default, or Miscarriage of another.
3. Of Agreements in consideration of Marriage.
4. Of Contracts for Sale of Lands, Tenements, and Hereditaments.
5. Of Agreements not to be performed within One Year from the making of them.

3. *Of Agreements mentioned in the Seventeenth Section: and herein,*

1. What Agreements are within the Section.
2. Of Acceptance of Goods, and part Payment within the meaning of the Section.
3. Of the Memorandum in Writing, and the signing by the Party to be charged, or by an Agent.‖

(D) Of Cases where Equity decrees specific Performance of Agreements on the Ground of their being in part performed.

(A) Who are capable of contracting and binding themselves or others by their Agreements.

A PERSON *non compos* is not capable of entering into any agreement, for an agreement is an act of the understanding which such persons are incapable of, and therefore are to be under the care of their curators or guardians, by a commission from the public.

But for this *vide* head of *Idiots and Lunatics.*

An infant for the same reason is incapable of contracting.

Vide also head of *Infancy and Age*, ‖and *Void and Voidable.*‖ [If an infant, says Ld. *Mansfield*, does a right act which he ought to do, or which he was compellable to do, it shall bind him. 3 Burr. 1801. And if an infant enter into a contract with the advice and concurrence of his friends, and such contract appear to be beneficial to the interests of the infant, equity will support and give it effect. 1 Eq. Cas. Abr. 287.

A wife during the intermarriage is (*a*) incapable of entering into any agreement *in pais*, being under the power of her husband.

Vide tit. *Baron and Feme.*

(*a*) But it is said, that if a feme covert, by agreement made with her husband, is to surrender a copyhold or levy a fine, though the husband die before it be done, equity will compel her to perform the agreement. 2 Vern. 61. pl. 52. Eq. Ca. Abr. 25. pl. 6. Upon looking into the Registrar's book, it appeared that the court made no decree in it, but it was by consent referred to Mr. Serjeant Rawlinson for his arbitration. Equ. Ca. Abr. 62. pl. 2. *per curiam.*

The ancestor seised in fee may by his agreement bind his heir; therefore if *A.* agrees to sell lands, and receives part of the purchase money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey (*b*), and the money shall go to the executor, especially if there are

Baden v. Countess of Pembroke, 2 Vern. 215.

[(*b*) So in the case of a cus-

tomary heir. 2 Ves. 640.] But if a man more debts due than the testator's personal estate is sufficient to pay.

for 100*l.* assumes to make a lease for twenty-one years, and dies, his heir is not compellable in a court of equity to make the lease, for this is against the common law. *Quære.* Eq. Cas. Abr. 265. pl. 4. ‖Roll. Abr. 377. pl. 18.‖

Vide infrà of voluntary Agreements. (*a*) *J. S.* upon a marriage treaty was to settle 500*l. per annum* as a jointure, in So if a father conveys to a younger son by a defective conveyance, and dies, the heir at law in two cases shall be compelled to make it good. 1. Where there is a covenant (*a*) for further assurance, binding the heir, because the heir is bound by the covenant. 2. Where there is a provision made by the father in his life-time for the heir, or he hath such provision by descent from the father. (*b*)

consideration of a marriage portion; *J. S.* was intrusted with the drawing of the settlement, which was never read by the wife; the jointure settled was but 400*l. per annum*, of which the husband took notice, and talked of making it up so much, but dying before it was done, his heir was decreed to make it up, although there was no covenant by which he bound his heir to make it up so much. Vern. 16. [(*b*) See the case of Chetwynd v. Fleetwood, 4 Br. P. C. 435. where a specific performance of an agreement made by the ancestor, only tenant for life, was decreed against the heir, the agreement being clearly for his benefit.] ‖See Brummell v. Clavering, 3 Swanst. 690.‖

Hob. 203. Chan. Ca. 171. 10 Mod. 469. 2 Vent. 350. (*d*) So though there be a decree against the tenant in tail to levy a fine and suffer a recovery, If tenant in tail agrees to convey, or bargains and sells the lands for valuable consideration, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not (*c*) bound either in law or equity, for equity cannot set aside the statute *de donis*, which says, *voluntas donatoris observetur;* nor can the court set up a new manner of conveyancing, and supersede fines and recoveries; for thereby the king would lose the perquisites by fines, on the writs of entry and fines for alienation.

and he dies in contempt and in prison for not executing it, yet the issue shall not be bound. *Vide* Eq. Abr. 25. pl. 4. 265. pl. 2. 2 Vern. 306. [2 Ves. 634. But see Hill v. Carr, 1 Ch. Ca. 294. The issue not bound by a covenant for further assurance. 1 Lev. 237. nor by articles to convey for payment of debts. 2 Eq. Ca. Abr. 28. p. 34. By analogy to the cases of tenants in tail who claim paramount to the contracting party, it hath been holden, that the widow of a copyholder for life, who had agreed for the sale of his estate, but died before the conveyance was executed, was not debarred by this agreement of her *free bench;* for that her claim was not under the husband, but from the custom of the manor. Musgrave v. Dashwood, 2 Vern. 45. 63. But Ld. *Hardwicke* thought that the widow's estate was a branch of, and arose from that of the husband, and that the custom merely directed its derivation; and therefore where the agreement was for a valuable consideration, paid, as to the greatest part, he decreed a specific performance against her. Hinton v. Hinton, 2 Ves. 631. 638. Ambl. 277. S. C. In the same case of Musgrave v. Dashwood, 2 Vern. 63. and upon the same principle, it was said, that if a joint tenant enter into an agreement to alien, and die without doing so, equity would not enforce the agreement against the survivor. But this, it seems, must be taken with this limitation, where the articles are not such as amount to a severance of the jointure; if they are such, equity will decree against the survivor. *Per* Ld. *Hardwicke*, 2 Ves. 634. Co. Litt. 59. b.]

Chan. Ca. 171. Ross and Ross. (*d*) So if the issue in tail had recovered part of the purchase-money in his father's life-time, or after *A.* seised of lands in tail, agrees with *B.* that he and his heirs shall enjoy the entailed lands, if *A.* and his heirs may enjoy his fee-simple lands; this agreement is executed accordingly, and *B.* had a decree against *A.* to levy a fine and settle it, pursuant to the agreement; but *A.* died without doing it: though it was decreed that *A.* himself was bound by this agreement to convey, yet since he died before he executed the fine, his issue was not bound by the agreement: but if the issue in tail had approved of his ancestor's

ancestor's agreement, as he did in this case, by entering on the land of *B.* then it becomes his own agreement, and consequently in equity he shall be obliged to perform it. (*d*)

his death, or if he had joined in the deed with the father,

or covenanted for further assurance, &c. Chan. Ca. 171. Lev. 258. [Any agreement with an equivalent will bind the issue, as a partition, though but by parol, or an exchange of lands. 2 Vern. 202. Co. Litt. 174. a. 384. a.]

If there be tenant in tail in equity as of a trust, or under an equitable agreement, and he for valuable consideration bargain and sell the land without fine or recovery, this shall bind his issue, because the statute *de donis* doth not extend to it, being an entail in equity and a creature of the court. (*a*)

Chan. Ca. 234. 2 Chan. Ca. 64. 2 Vent. 350. Vern. 13. 440. 2 Vern. 133. 583. 702.

[(*a*) It seems that upon the same principle the heir in tail of a copyhold, whose ancestor had entered into an agreement to sell, but had died before surrender, would be decreed to convey to the purchaser; for the entail of a copyhold is not within the statute *de donis*. Powell on Contr. 126.]

As tenant in tail is restrained from alienating the estate without fine or recovery, so he is from charging it, or disposing of the lasting improvements after his death; therefore if tenant in tail sells the trees growing on the inheritance, the vendee must sever them during the life of the tenant in tail, for if he dies before they are cut down, his issue shall have them as part of the inheritance, and the vendee, though (*b*) obliged to pay the whole sum contracted for, yet shall not be allowed to cut down one tree after the death of tenant in tail; for as the tenant in tail has power over the inheritance but during his own life, so he cannot delegate that power to another but for the same time; and consequently, whatever remains part of the inheritance at the death of tenant in tail, at which time his power over it ceases, must necessarily go to the heir, to whom the inheritance belongs.

Bro. Contract. 26. 11 Co. 50. Poph. 194.

(*b*) *Qu.* Whether he may not have relief in equity; or rather, *Qu.* If an action for money had and received would not lie against the representative? [If tenant in tail covenant to make a lease, which he has power to make, and die before execution, equity, it seems, will carry it into execution against his heir. 10 Mod. 469. If tenant for life, with power to make leases for twenty-one years, grant one for twenty-six years, such lease shall bind the remainder-man for twenty-one years, for under the power of leasing there is a referable privity given. Campbell v. Leach, Ambl. 740.] ‖*Vide* Shannon v. Bradstreet, 1 Scho. & Lef. 52. Ellard v. Lord Llandaff, 1 Ball. & B. 241., and 1 Chan. Ca. 23. 3 Chan. R. 11.‖

[A mother, acting as administratrix, may bind her children.

Highter v. Sturman, 1 Vern. 210.

Churchwardens are in that character competent to enter into any agreement which may be beneficial to the parish, and thereby to bind the parishioners and their successors, as also succeeding churchwardens.

Dr. Martin v. Nutkin, 2 P. Wms. 266. ‖See tit. *Churchwardens.*‖

If a party undertaking for and on the behalf of another have no authority from his principal, there it is a fraud, and the undertaker ought himself to be liable. But where a due authority is given to treat, there the performance of the contract shall be enforced against the principal.

Johnson v. Ogilby, 3 P. Wms. 279. Parrot v. Wells, 2 Vern. 127. Duchess of Marlborough v. Strong, 5 Vin. Abr. 533. p. 38. 2 Bro. P. C. 500. S. C. If an attorney should bid more for an estate sold under a decree of the Court of Chancery, than he was empowered to bid, and declare his principal, Sir *Thomas Sewell*, Master of the Rolls, thought that the attorney himself would be liable, but doubted whether the principal would. Ambl. 498. But where many are concerned in interest, and the credit is evidently given to the person, and not to any fund, the immediate contractors are liable. Thus where a man contracted

tracted to pave the streets of a town by a written instrument executed between him and two of the parishioners, the Court of Exchequer decreed him relief against the undertakers, and left them to their remedy over against the rest of the parish; more especially as the written contract, which was the plaintiff's evidence, was in the hands of one of the defendants. Merick v. Wymondfold, Hardr. 205. So it was holden, that a bill might be supported against the committee of a club for an agreement entered into by them on account of the club, without making the rest of the subscribers parties. Cullen v. Duke of Queensberry, 1 Bro. Ch. R. 101. affirmed in *Dom. Proc.* March 27. 1787. So, where the commissioners of a navigation act entered into an agreement with an engineer, they were holden to be *personally* liable. Horsley v. Bell, Ambl. 770. S. C. in 1 Bro. Chan. R. 101. in note. ‖Eaton v. Bell, 5 Barn. & Ald. 34. In these cases the contracting parties, though agents, are held liable on the ground of the absence of any responsible principal; but there is an exception to this rule in the case of government agents and public officers: *e.g.* the governor of a settlement, a commissary general, the commander of a ship of war, who, in general, are not personally responsible on the contracts made in their public capacity, although there be no principal against whom a remedy can be had. Macbeath v. Haldimand, 1 Term R. 172.; and see Myrtle v. Beaver 1 East, 135. Bowen v. Morris, 2 Taunt. 374. If, indeed, the agent bind himself by a formal engagement, as if a factor enter into a charter party in his own name, or if an agent purchasing bills for his principal indorse them himself, or if an agent covenant for himself and his heirs for the act of his principal, then, whether a public officer or not, he is personally liable. 1 Term R. 181. 2 Moll. 331. 2 Atk. 623. 2 Vern. 280. Goupy v. Harden, 7 Taunt. 159. Appleton v. Binks, 5 East, 148. Burrell v. Jones, 3 Barn. & A. 47. Paley on Princ. and Agent, ch. 6. (2d edit.)‖

Daniel v. Adams, Ambl. 495.

Where an agent employed by husband and wife to sell the wife's estate by public auction sold it by private contract, at a higher price than they had required, the court refused to compel them to execute the contract, the agent not having acted pursuant to the authority given him.

Ambl. 498. ‖It would be otherwise in case of a broker. 1 Esp. Ca. 111.‖

But if a factor sell goods at less price than he is commissioned, the sale will bind the principal for the convenience of trade.

Cox v. Peele, 2 Bro. Ch. R. 554.

The agreements of the solicitors in a cause, relative to orders of court, are binding on their clients.]

‖As to admissions by attorneys of facts, *vide* tit. *Evidence*.‖

(B) Of Agreements which are good in Law, and will be decreed in *Specie* in Equity: and herein,

1. *Of unreasonable Agreements, and such as may be said to be obtained by Fraud or Circumvention.*

(*a*) *Vide* tit. *Actions, Assumpsit, and Covenant.* *Vide* Abr. Eq. 16. [(*b*) It is the rule of courts of equity not to

IN many cases the party injured by breach of an agreement may have a remedy either by action at common law (*a*), or by recourse to a court of equity; but here a general rule must be observed, that wherever the matter of the bill is merely in damages, there the remedy is at law, because the damages cannot be ascertained by the conscience of the chancellor, and therefore must be settled by a jury. (*b*)

entertain the suit unless the plaintiff wants the thing in specie, and cannot have it any other way. Errington v. Aynesley, 2 Bro. Ch. R. 343. Therefore, in general, they will not allow a bill for a specific performance of contracts of stock, corn, hops, or other articles of merchandize, but will leave the plaintiff to his remedy at law. 1 P. Wms. 570. 5 Vin. Abr. 538. S. C. Capper v. Harris, Bunb. 135. Dorison v. Westbrook, 2 Eq. Ca. Abr. 161. p. 8. 5 Vin. Abr. 540. p. 22. A breach of the common covenant to repair demised premises, is considered as much in the same light, and proper only to be redressed by action at law. Whistler v. Mainwaring, in Ch. Mich. 14 G. 3. cited in 3 Wooddes. 464. n. 2.] ‖Mosely v. Virgin, 3 Ves. 185. Rayner v. Stone, 2 Eden. 128.‖ [But on a covenant to rebuild, as it was holden by Lord *Hardwicke*,

Hardwicke, the landlord or lessor may come into Chancery for a specific performance, if he is in due time, and no constructive acquiescence can be imputed to him. City of London v. Nash, 1 Ves. 12. and 3 Atk. 512. S. C. This doctrine, however, has been lately controverted, and perhaps entirely over-ruled. Lucas v. Comerford, 3 Bro. Ch. R. 166.] ‖See Mosely v. Virgin, 3 Ves. 185. Flint v. Brandon, 8 Ves. 164. Hill v. Barclay, 16 Ves. 402.‖ [In the cases of Gardener v. Pullen, 2 Vern. 394. Thomson v. Harcourt, 2 Bro. P. C. 415. a performance of an agreement for stock was decreed. But it should be observed, that in those cases the party who had undertaken to transfer the stock was plaintiff, seeking relief against a penalty, in which he had bound himself for performance of the contract, and that the performance of it was the only ground on which equity could relieve him. Fonbl. Notes on Eq. Tr. p. 120. But on a bill filed against the party who had undertaken to transfer the stock, Lord *King* did not think the rule so invariably settled, as to allow a demurrer to the bill for want of equity. Colt v. Nettervill, 2 P. Wms. 304.] ‖See Mason v. Armitage, 13 Ves. 37. Nutbrown v. Thornton, 10 Ves. 161. And a bill will lie for performance of an agreement to purchase stock where it prays a delivery of certificates which give a legal title to stock. Doloret v. Rothschild, 1 Sim. & Stu. 590.‖ [And contracts respecting mere personal chattels will be enforced in equity where the damages recoverable at law would not be an adequate compensation for the non-performance. Buxton v. Lister, 3 Atk. 383., and Taylor v. Neville, and Duke of Buckingham v. Ward, there cited; and Lord Ranelaugh v. Hays, *infrà*.] ‖As in the case of the stock on a farm seized by the landlord during the tenancy. Nutbrown v. Thornton, 10 Ves. 159.; family pictures and furniture. Lady Arundell v. Phipps, *Ibid.* 139.; and see Withy v. Cottle, 1 Sim. & Stu. 174. 1 Turner & R. 78. The court will enforce a specific performance of a contract to purchase a debt. Wright v. Bell, 5 Price R. 325. Dan. 95.; and see Withy v. Cottle, *suprà*. Adderley v. Dixon, 1 Sim. & Stu. 607.‖

But if there be matter of fraud mixed with the damages, as if *A.* sues *B.* on a covenant at law for damages, and *B.* files a bill for an injunction upon this equitable suggestion, that the covenant was obtained by fraud, if *A.* files his cross-bill for relief upon that covenant, the court will retain it, because the validity of the covenant is disputed in that court, and on a head properly cognizable there; and therefore, if the validity of the deed be established, the court will direct an issue for the *quantum* of the damages. Chan. R. 158. Abr. Eq. 17.

So where the agreement is to do something in *specie*, as to convey lands, execute a deed, *&c.* there it will be proper to apply to a court of equity for a specific execution, to which the party is entitled, if the agreement be good and sufficiently proved, when otherwise he could only recover damages at law. See Chan. Ca. 42. where an agreement in nature of a wager was decreed in specie.

‖A specific performance will not be decreed of an agreement to submit to arbitration. Street v. Rigby, 6 Ves. 818. Agar v. Macklew, 2 Sim. & Stu. 418. Gourlay v. Somerset, 19 Ves. 431.

Nor of an agreement to purchase an attorney's business, since supposing such agreement not illegal, the court has no means of carrying it into execution. Bozon v. Farlow, 1 Meriv. 459.

Nor of an agreement for partnership, as it may be dissolved immediately afterwards.‖ Hercey v. Birch, 9 Ves. 557.; *sed vide* 3 Atk. 385. Madd. Treatise on Chan. 411. note (*x*).

The plaintiff assigned some shares of the excise to the defendant, who thereupon covenanted to save him harmless, and to stand in his place touching all payments to the king; the plaintiff being sued by the king, brought his bill to have the agreement performed in *specie*; and although it was insisted that the plaintiff might recover damages at law, and that this was not a covenant for any thing certain; and by this means a Master in Vern. 189. pl. 199. Lord Ranelaugh v. Hays, 2 Chan. Ca. 146. S. C.

Chancery was to tax damages instead of a jury; yet it was decreed, that the defendant should perform his covenants; and it was directed to a Master, that, as often as any breach should happen, he should report it specially; that the court, if occasion should be, might direct a trial in a *quantum damnificat.*

Abr. Eq. 18. pl. 7. [(*a*) In Denton v. Stewart, 4th *July* 1786. Sir *L. Kenyon* Master of the Rolls, directed the Master to enquire what damage the plaintiff had sustained by the defendant's not having performed his agreement, of which a specific performance was prayed by the bill, but which could not be decreed, the defendant having, by sale of the estate, put it out of his power to perform his agreement with the plaintiff. Fonbl. Notes on Eq. Tr. 389.] ‖This decision was followed by the Master of the Rolls in Greenaway v. Adams, 12 Ves. 395.; but the principle was doubted in that case, and also in Gwillim v. Stone, 14 Ves. 128., and Todd v. Gee, 17 Ves. 273.; and see a full note of Denton v. Stewart, 17 Ves. 276., and 1 Cox R. 258.‖

So if a jointress brings her bill to have an account of the real and personal estate of her late husband, and to have satisfaction thereout for a defect of value of her jointure lands, which he had covenanted to be and to continue of such value; and the defendant insists, that this is a covenant which founds only in damages, and properly determinable at law; though it be admitted that a court of equity cannot regularly assess damages; yet in this case, a Master in Chancery (*a*) may properly enquire into the value and defect of the lands, and report it to the court, who may decree such defect to be made good, or send it to be tried at law, upon a *quantum damnificat.*

Abr. Eq. 18. pl. 8. [(*b*) It hath been holden that to found a decree for a specific performance, the contract must be good at law; and therefore it is stated by Sir *Thomas Clarke*, Master of the Rolls, in Ambl. 406. that it was the practice before Lord *Somers'* time with respect to agreements, to send the party to law; and if he recovered any thing by way of damages then to entertain the suit. But equity will often enforce a performance of agreements, though no action will lie at law upon them, as in the case in the text, and in Cannel v. Buckle, 2 P. Wms. 243. Acton v. Pierce, 2 Vern. 480. Scott v. Wray, 1 Chan. R. 45. Edwin v. East India Company, 2 Vern. 210.] ‖Chandos v. Brownlow, 2 Ridg. P. Ca. 416.; but see 2 Freem. 216., and see 1 Anst. 45. 3 Swanst. 417.‖

The condition of a bond was to settle certain lands in such a manor, by such a day; and the obligor died before the day, so that the bond was saved at law; yet the court decreed a specific execution. (*b*)

Abr. Eq. 17. 3 Atk. 386. Cas. temp. Talb. 234. Pr. Ch. 538. 1 Bro. Ch. R. 440.

But here it must be observed, that agreements, out of which an equity can be raised for a decree in specie, ought to be obtained with all imaginable fairness, and without any mixture tending to surprise or circumvention; and that they be not unreasonable in themselves. (*c*)

[(*c*) Vaughan v. Thomas, 1 Bro. Ch. R. 556. *acc.* Stanhope v. Toppe, 2 Bro. P. C. 183. 2 Eq. Ca. Abr. 55. note to Ca. 1.] ‖Costigan v. Hastler, 2 Scho. & Lef. 166. Howel v. George, 1 Madd. R. 11. note. Revell v. Hussey, 2 Ball & B. 287.‖ [But inadequacy of price, simply and of itself, independently on any other circumstances, is not a ground with the court to annul an agreement, though executory. Keen v. Stukeley, Gilb. R. 155., and 2 Bro. P. C. 396. Mortimer v. Capper, 1 Bro. Ch. R. 156. Floyer v. Sherrard, Ambl. 18. Jackson v. Lever, 3 Bro. Ch. R. 605. Still less is it a ground to rescind one already executed. Nicols v. Gould, 2 Ves. 422. Henley v. Acton, 2 Bro. Ch. R. 17. Spratley v. Griffith, 2 Bro. Ch. R. 179. Willis v. Ternegan, 2 Atk. 251.; but see Herne v. Meeres, 1 Vern. 465. In the case of Heathcote v. Paignon, 2 Bro. Ch. R. 167. Lord *Thurlow* admitted, that mere inadequacy of price was scarcely sufficient; but said, that "there was a difference between that and evidence arising "from inadequacy. If there is such inadequacy as to shew that the person did not under-"stand the bargain he made, or was so oppressed that he was glad to make it, knowing its "inadequacy, it will shew a command over him which may amount to fraud." And see *acc.* Young v. Clerk, Pr. Ch. 538.] ‖Love v. Barchard, 8 Ves. 135. Westburn v. Russell, 3 Ves. & B. 187. Matthews v. Fearn, 1 Cox's R. 278. Copis v. Middleton, 2 Madd. 430. Coles v. Trecothick,

Trecothick, 9 Ves. 246. Underhill v. Harwood, 10 Ves. 219. Burrows v. Lock, 10 Ves. 474. Murray v. Palmer, 2 Scho. & Lef. 488. Peacock v. Evans, 16 Ves. 517. Lukey v. O'Donnel, 2 Scho. & Lef. 471. Pickett v. Logan, 14 Ves. 240. Inadequacy of price coupled with distress of the vendors, and want of advice, is a ground for invalidating a sale. Wood v. Abrey, 3 Madd. 417.; and see Kemyes v. Hansard, Coop. C. 125. Martin v. Mitchell, 2 Jac. & W. 13.‖ [And where agreements are endeavoured to be set aside, for supposed weakness of understanding in one of the contracting parties, for breach of confidence, or other substantive reason, the inequality of the terms may be a material ingredient in the case, as evidence of imposition. 3 Wooddes. 453., and Griffin v. De Veulle, and others, reported in the Appendix. It is to be further observed, that where an agreement appears very unequal, the courts will lay hold of very slight circumstances to avoid enforcing the execution of it; as where the plaintiff had not made out his title by the time stipulated. Kenn v. Stukely, 2 Bro. P. C. 396,; a circumstance which, in general, has not any weight with them. Gibson v. Patterson, 1 Atk. 12. If the contract be fair in its creation, it shall not be affected by a subsequent event, which has thrown the advantage greatly, or wholly on one side. See the case of Cass v. Rudele, 2 Vern. 280. more correctly stated in 1 Bro. Ch. R. 157. City of London v. Richmond, 2 Vern. 423. Carter v. Carter, Ca. temp. Talb. 271. Mortimer v. Capper, 1 Bro. Ch. R. 156. and the case there referred to by Lord *Thurlow*. Adams v. Weare, 1 Bro. Ch. R. 567. Jackson v. Lever, 3 Bro. Ch. R. 605. where contracts, under such circumstances, have been specifically decreed. And see the case of Nicols v. Gould, 2 Ves. 422. Henley v. Acton, 2 Bro. Ch. R. 17. Baldwin v. Boulter, cited in 1 Bro. Ch. R. 156. where the courts have refused to set them aside.] ‖Ramsbottom v. Parker, 6 Madd. 5.‖ [To this current of authorities must be opposed the dictum of the Master of the Rolls, in Stent v. Bailis, 2 P. Wms. 220. and the case of Pope v. Roots, 7 Bro. P. C. 184., in which case an estate was sold for an annuity, but the vendor dying before any payment was made; and after the day on which the first payment was to have been made, the contract was rescinded, though not impeached in any other respect. James v. Owen, E. T. 1733, cited in Fonbl. Notes on Tr. Eq. c. 2. § 11., appears to have proceeded on a different ground: the plaintiff had agreed to present the defendant to the Court of Aldermen, and to resign the place of printer to the city of *London* in his favour, to which place certain fees and profits were then annexed, but which the Court of Aldermen intimated their intention to reduce; and for that reason the defendant refused to perform his agreement. The court thought, that the object of the agreement being the then profits, which were not purely contingent, and the plaintiff not having actually surrendered, the performance of the agreement ought not to be decreed.] ‖See Paine v. Mellor, 6 Ves. 349. Revell v. Hussey, 2 Ball & B. 287.‖ [A party who demands a specific execution of an agreement, must shew that he has performed all that was to be done on his part, or that he is ready to do so; "for if he "either will not, or through his own negligence cannot perform the whole on his side, he has "no title in equity to the performance of the other party, since such performance could not "be mutual." Tr. of Eq. c. 6. § 2. But it must be observed, that though a plaintiff has not performed what was required on his part within *the time* stipulated, he is yet in general entitled to a specific execution, especially if the non-performance has not arisen by his default. Penn v. Lord Baltimore, 1 Ves. 450. If in the sale of an estate, it be stipulated that the price shall be paid, or the title be completed by a certain day, which elapses without either being done, still the contract shall be enforced; for the general rule is, not to consider the time as of the essence of agreements. Gibson v. Paterson, 1 Atk. 12.] ‖But this doctrine is much questioned, and see on the subject Pincke v. Curtis, 4 Bro. Ch. R. 329. Lloyd v. Collett, 4 Bro. Ch. R. 469. Ormerod v. Hardman, 5 Ves. 736. Seton v. Slade, 7 Ves. 265. Hall v. Smith, 14 Ves. 426. Wynn v. Morgan, 7 Ves. 202. Alley v. Deschamps, 13 Ves. 228. Radcliffe v. Warrington, 12 Ves. 326. 1 Ball & B. 68. Morgan v. Shaw, 2 Meriv. 140. Levy v. Lindo, 3 Meriv. 84.; and what is said in Hudson v. Bertram, 3 Madd. R. 447. Boehm v. Wood, 1 Jac. & W. 419. Morse v. Merest, 6 Madd. 26. Doloret v. Rothschild, 1 Sim. & Stu. 590. Coslake v. Till, 1 Russell, 376. Newman v. Rogers, 4 Bro. Ch. R. 391. Lewis v. Lechmere, 10 Mod. 503. ‖[In the case of non-completion of the title by the day appointed, if the vendee, immediately upon the vendor's failure in that respect, demand a return of the deposit, and distinctly refuse to go on with the purchase, the court will not compel him; but if he acquiesce in the delay, knowing the state of it, or do not sufficiently declare his determination not to proceed in the purchase, he will not be allowed to resist the performance afterwards upon that ground. Pincke, v. Curtels, 4 Bro. Ch. R. 329., and the case of Ambrose v. Hodgson therein cited. Vernon v. Stephens, 2 P. Wms. 66. However, in either case, if any injury would accrue to the other party from the failure, or if the circumstances which occasioned it are likely to create any embarrassment, or to protract the final completion of the agreement for any unreasonable time, the court will set it entirely aside. In the case of Mackreth v. Marlar, at the Rolls, *July 10. 1786*, Sir *L. Kenyon* decreed a contract for the purchase of an estate to be delivered up,

up, the purchaser having died shortly after the contract, and a suit having been instituted for an account of assets, which was then depending. The purchaser had agreed to complete his purchase on or before the 30th of *November*; he died on the 12th of *January* following, and the vendor filed this bill in the beginning of the year 1785. This decree was, that the defendants, the executors of the purchaser, should deliver up the contract to the plaintiff the vendor, and that the plaintiff should retain his costs out of the deposit. 2 P. Wms. 67. note 1. Equity, too, distinguishes between those cases, where the one party having performed part of the agreement, is rendered unable to perform the whole by some subsequent accident; and yet, notwithstanding the part performance, is *in statu quo*, and those where after such part performance he is not *in statu quo*, and in the latter holds him entitled to a performance from the other party, though it refuses it in the former. To this distinction must be referred the difference of decision in the cases of Earl of Feversham v. Watson, Rep. temp. Finch. 445. 2 Freem. 35. S. C. Meredith v. Wynn, Pr. Ch. 312. Gilb. Ch. 242. S. C. 1 Eq. Ca. Abr. 70. pl. 15. S. C. Gilb. Eq. R. 170. S. C. If the plaintiff has taken all necessary steps to perform his part of the agreement, but has been prevented by the defendant, his endeavours will be considered as equivalent to performance Blackwell v. Nash, 1 Stra. 535. Hotham v. East India Company, 1 Term R. 638. Though it be generally said that contracts are entire, and shall be performed *in toto*, or *not at all*, yet there are cases in which the courts will decree a performance, notwithstanding a partial failure, as in the case of marriage agreements, in favour of a wife or children, where there has been a failure by the father's or mother's relations in the part they had engaged to perform. Earl of Feversham v. Watson, *supra*. Perkins v. Lady Thornton, cited in Pyke v. Pyke, 1 Ves. 376.; or of part becoming illegal by a subsequent statute. Dr. Bettesworth v. Dean and Chapter of St. Paul's, Sel. Ca. Ch. 66.; or of part exceeding the power of the contracting party. Pawsey v. Bowen, 1 Ch. Ca. 23. Campbell v. Leach, Ambl. 740. So in the case of a sale of an estate by lots, though the vendor cannot make a good title to all the lots, yet the court will oblige the purchaser to take those to which a good title can be made, if they can be separated from the others without being lessened in value. Poole v. Shergold, 2 Bro. Ch. R. 118.]

2 Ch. Ca. 17. As where by a marriage agreement the son's intended wife was to have more than would have been left for the father (though indebted), his wife and two daughters unpreferred, the Court would not decree it; principally, by reason of the extremity of it, but left the party to his remedy at law.

Vern. 227. pl. 225. Phillips v. Duke of Bucks. So where *A.* articled for the purchase of *B.*'s estate, pretending he bought it for one whom *B.* was willing to oblige, and thereby got it somewhat cheaper, when in truth he bought it for another (*a*), equity would not decree an execution of this agreement.

[(*a*) In the case of Lord Irnham v. Child, 1 Bro. Ch. R. 95., Lord *Thurlow* is reported to have said, that "he should be very sorry to lay it down, that a man treating with a third person in trust for "a second, whom he had refused to deal with, could therefore set the contract aside; that "no case had gone so far; that Phillips v. Duke of Bucks was upon a difference of price." But in the case of Eyre v. Popham, M. 14 G. 3., Lord *Bathurst* held, that an agreement entered into under the circumstances stated by Lord *Thurlow*, was not that fair agreement which ought to be decreed in specie by a court of equity.] ‖See Davis v. Symonds, 1 Cox's R. 407.‖

Fellowes v. Lord Gwyder, 1 Sim. 63. ‖But if *A.* in contracting with *B.* falsely represent himself as the agent of *C.* and thereby obtains better terms, the court will notwithstanding enforce the contract, unless *A.* knew that such would be the effect of the misrepresentation.

Scott v. Hanson, 1 Sim. 15. see Wells v. Stubbs, 1 Madd. 80. Where a piece of land imperfectly watered was described in the particular as uncommonly rich water meadow, it was held that this was not such a misrepresentation as would avoid the sale.

Cadman v. Homer, 18 Ves. 10.

Buxton v. Lister, 3 Atk. 383. Where on the face of an agreement a specific sum was to be given for timber; but it was shown by parol testimony that the defendants were induced to give that sum by a representation that

that it had been valued by two timber merchants, the agreement was not enforced.

So, where an agreement was to pay so much rent, but it appeared in evidence that the defendant agreed to the rent on the plaintiff's false representation that it was the rent he paid, a specific performance was refused. Woollam v Hearne, 7 Ves. 219.

So, where the defendant had executed the agreement on the faith of a parol agreement by the plaintiff which was unperformed, a specific performance was refused. Clark v. Grant, 14 Ves. 519.; and see Beaumont v. Dukes, 1 Jac. 422.

And a party obtaining an agreement by a partial misrepresentation is not entitled to a specific performance on waving the part affected by the misrepresentation. Clermont v. Roxburgh, 1 Jac. & W. 112.

Where the particulars of sale state it to be without reserve, and puffers are employed by the vendor, a specific performance will not be decreed.‖ Meadows v. Tanner, 5 Madd. 54.

So, where *A.* on the marriage of his daughter to *B.* covenanted that *B.* should have his lands at his death cheaper than any other person, and he lived twenty years after, and devised to *B.* 1000*l.* and to his daughter, *B.*'s wife, 500*l.* and he devised the lands to his grandson; the court refused to decree an execution of the agreement, because of the uncertainty of it, and it not being mutual; *B.* not being bound to take it at any price. Bromley and Jefferies, 2 Vern. 415. ‖See Emery v. Wase, 5 Ves. 846. Brodie v. St. Paul, 1 Ves. j. 326., and Lyndsay v. Lynch, 2 Scho. & Lef. 7.‖

An agreement for a purchase being obtained by an attorney from an old woman of ninety, and several suspicious circumstances appearing, the court would neither decree it to be carried into execution against the heir at law, nor to be delivered upon a cross bill exhibited for that purpose; but left the parties to their remedies at law. 2 Vern. 632. Green and Wood, Ca. temp. Talb. 236. Savage v. Taylor, S. P.

But as these cases, and all others on this head, depend so much upon circumstances, and are to stand or fall according to the degrees of fraud or circumvention attending them, and proved in the cause, or by what appears unreasonable on the face of them; I shall only observe, that a court of equity will much more easily be prevailed on to dismiss a bill which prays a specific execution of an unreasonable agreement (*a*), than set aside an agreement, though not strictly fair (*b*), on a bill for that purpose; for this deprives the party of what he had a right to by law; and that where such agreements are set aside, it must be on refunding what was *bonâ fide* paid, making allowances for improvements, *&c.* (*c*) [The Court will not compel a purchaser to take a title which is at all doubtful; Shapland v. Smith, 1 Br. Ch. R. 75. Cooper v. Denne, 4 Br. Ch. R. 80. nor will they interpose where a party has forborne to insist upon an agreement for several years; Scolefield v. Whitehead, 2 Vern. 127. Wingfield v. Wheley, 5 Vin. Abr. 534. pl. 58. Powell v. Hankey, 2 P. Wms. Orby v. Trigg, 9 Mod. 2. ‖Moore v. Blake, 1 Ball. & B. 62.‖ unless the delay can be accounted for by special circumstances; Eq. Tr. c. 4. § 27. nor in case of a written agreement, afterwards discharged by parol; Goman v. Salisbury, 1 Vern. 240. Ld. Milton v. Edgeworth, 6 Br. P. C. 580. Legal v. Miller, 2 Ves. 299. nor in the case of a sale by auction, where an accident has happened to cast a damp upon the sale, though without blame imputable to any one; as where the vendor's agent, *known to be such to the company present*, bid for the purchaser; Twining v. Morrice, 2 Br. Ch. R. 326. ‖Smith v. Clarke, 12 Ves. 483. *Sed vide* Meadows v. Tanner, 5 Madd. 34.‖ nor if the agreement be to do a thing which would tend to extortion, or promote

mote inebriery; Mythwold v. Walbank, 2 Ves. 238. ‖See Stone v. Liddesdale, 2 Anstr. 533.‖ nor if damages be stipulated; Woodward v. Gyles, 2 Vern. 119. But a penalty in general will not be allowed to release parties from their agreements; it being usually designed merely as a medium for securing the performance of the contract. Parks v. Wilson, 10 Mod. 517. Chilliner v. Chilliner, 2 Ves. 528. Sloman v. Walter, 1 Bro. Ch. R. 418. Howard v. Hopkyns, 2 Atk. 371. nor will they interpose, if the agreement be founded on an illegal consideration, as that of stifling a prosecution for felony, or for fraud. 3 P. Wms. 279. Keen v. Stukely, Gilb. Eq. R. 153. Hanger v. Eyles, 2 Eq. Ca. Abr. 20. p. 16. Hickes v. Phillips, Pr. Ch. 575. (*a*) See *acc.* Savage v. Taylor, Ca. temp. Talb. 236. Young v. Clark, Pr. Ch. 538. Vaughan v. Thomas, 1 Bro. Ch. R. 556. Davis v. Symonds, *Scac.* 1787. (*b*) Solemn conveyances, releases, and agreements by parties, are not slightly to be blown off and set aside, *per* Ld. *Macclesfield*, Cann v. Cann, 1 P. Wms. 227. ‖See Stockley v. Stockley, 1 Ves. & B. 31.‖ Equity therefore will not avoid a *reasonable and fair agreement*, though founded on mistake. Frank v. Frank, 1 Ch. Ca. 84. Stapleton v. Stapleton, 1 Atk. 10. or though the party were intoxicated, ‖see Cragg v. Holm, 18, Ves. 14.‖ or in prison, at the time he entered into it, or some paternal authority were exerted, and some benefit accrue to the father under it. Cory v. Cory, 1 Ves. 19. Hinton v. Hinton, 1 Ves. 632. Kinchant v. Kinchant, 1 Bro. Ch. R. 369. ‖See Poth. tom. 1. 17. Brown v Carter, 5 Ves. 576. Hawes v. Wyatt, 2 Cox, 263. 3 Bro. C. C. 156. Wycherley v. Wycherley, 2 Eden, 180.‖ It will not decree a forfeiture after an agreement, in which, if there were a mistake, it was the mistake of all the parties to it. Pullen v. Ready, 2 Atk. 592. Malden v. Merril, 2 Atk. 8. (*c*) Savage v. Taylor, Ca. temp. Talb. 236. For cases of Fraud, *vide infrà*, tit. *Fraud* (B).] ‖And see Bowes v. Heaps, 3 Ves. & B. 117. Dalbiac v. Dalbiac, 16 Ves. 116.‖

2. *Of voluntary Agreements.*

3 Co. 81. b. 2 Black. Com. 443. Dy. 336. b. 2 Bulstr. 225.

As men have a right to their acquisitions, so may they dispose of them at their pleasure, and without valuable consideration; but if a man promises to convey lands, or to give goods, without valuable consideration, or without delivering possession of them, this alters no property, nor has the party any remedy in law or equity, it being *nudum pactum unde non oritur actio.* (*a*)

[(a) Though we have borrowed this maxim from the civil law, yet we do not agree with the civilians in their definition of what constitutes a *nudum pactum*, the want of consideration not being regarded by them. In their law, " *Nuda conventio est, quæ in nudis placiti et conventionis finibus stat, nec certum nomen* " *habens, nec ullam obligandi causam præter conventionem.*" D. l. 7. § 1. 2. and 4. de Pact. l. 27. Vinnius, in his Commentary on the Institutes, p. 578. explains some of the terms of this definition. " *Duo sunt conventionum genera; unum eorum, quæ speciale nomen habent, ex quo* " *genere sunt emptio-venditio, locatio-conductio, societas, mandatum, depositum, commodatum,* " *pignus, et similes contractus, qui, quod certum nomen habent, dicuntur contractus nominati, et* " *obligationem actionemque producunt, non utique propter nomen, quod extrinsecum quid est atq:* " *accidens; sed propter utilitatem commercii, cujus indicium est, quod certo ac proprio nomine* " *appellantur; vel potius quia hæ conventiones ob frequentiorem usum talem accepere vim ac* " *naturam, quæ etiamsi nihil specialiter dictum sit, ex ipso nomine satis intelligatur.* Grot. L. 2. " de Jure Bell. et Pac. 12. n. 3. *Alterum genus est earum conventionum, quæ nomine quidem pro-* " *prio carent, sed quibus præter consensum subest causa, ut hoc exprimit jurisconsultus.* D. l. 7. " § 2. *Et hæ quoque conventiones obligationem et actionem pariunt. Causam definio dationem* " *vel factum certâ lege, puta, si quid tibi dedi aut feci eâ lege, ut vicissim mihi aliquid dares aut* " *faceres.*" See further Fonbl. Notes on Eq. Tr. p. 326. A mere agreement by a creditor to take a less sum than that which is owing to him, is *nudum pactum.* Heathcote v. Crookshanks, 2 Term R. 24.; ‖see tit. *Accord and Satisfaction.*‖ As to the *nudum pactum*, see Elsee v. Gatward, 5 Term R. 143. A consideration executed will not support a subsequent promise, unless the act were done at the request of the party promising. Dy. 272. Lampleigh v. Braithwaite, Hob. 105. Hayes v. Warren, 2 Barnard. 141. Robertson v. St. John, 2 Bro. Ch. R. 140. or unless the party promising were under a moral obligation to do the act himself, or to procure it to be done. Church v. Church, cited in Hunt v. Wotton, Sir T. Raym. 259. Turner v. Watson, Bull. Nisi Prius, 147. (4th edit.) Trueman v. Fenton, Cowp. 544. An agreement to settle boundaries, though nothing valuable is given, implies sufficient consideration extending to both parties, who have an interest in shunning contention. Penn v. Lord Baltimore, 1 Ves. 444.]

But

But if it be done by deed duly executed, under seal, this is good in law, though there be no consideration, or no delivery of possession; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting. (*a*)

Pl. 308, 309. Yelv. 196. Cro. Jac. 270. Brownl. 111. 3 Burr. 1637. 2 Black. Com. 446.

[A consideration is by our law necessary, though the agreement be evidenced by *writing*, unless the writing, as in the text, from its being of the highest solemnity, import a consideration, or unless it be negotiable at law, and the interests of *third* persons be involved in its efficacy; for in this latter case *as between the original parties*, the want of consideration may be averred, and will bar the plaintiff from recovering. Pearson v. Garnett, 4 Mod. 242. Jefferies v. Austin, 1 Stra. 674. Gilb. Lex Prætoria, 288, 289. Fonbl. Notes on Eq. Tr. 335. ‖And so also between third parties, if it appear that the holder gave no consideration for the instrument. Rees v. Headfort, 2 Camp. 574. Reynolds v. Chettle, *ibid.* 596. Patterson v. Hardacre, 4 Taunt. 114. Delauney v. Mitchell, 1 Stark. 459.‖ (*a*) Though the agreement be under seal, yet if there be no consideration, equity will not agree specifically; for as in such case nominal damages only could be recovered at law, equity, which follows the law, will not give more substantial relief. 1 Ves. 450. 1 Atk. 10. Fursaker v. Robinson, 1 Eq. Ca. Abr. 123. Pr. Ch. 475. S. C. Gilb. Eq. Rep. 479. S. C. Tudor v. Anson, 2 Ves. 582.]

‖Notwithstanding the case of *Fursaker* v. *Robinson*, *supra*, and the dictum of Lord *Northington* in *Wycherly* v. *Wycherly*, 2 Eden, 177, that he did not recollect a precedent of specific performance of a voluntary agreement, there are precedents both ways.

Randall v. Randall, Prec. in Ch. 464. Beard v. Nuttall, 1 Vern. 427. Husband v. Pollard, 2 P. Will. 467. Wiseman v. Roper, 1 Ch. Ca. 84. Frank v. Frank, *Ibid.* Peacock v. Monk. 1 Ves. 133. Underwood v. Hitchcox, 1 Ves. 280. Griffin v. Hanson, 4 Ves. 344.

In some cases the court has held that it has a discretionary authority.

Prec. Chan. 75.

It seems to be now settled that the court will not interfere *against* volunteers, unless in case of fraud; nor *for* them, by enforcing the specific performance of a mere voluntary agreement.

Morrice v. Burroughs, 1 Atk. 401. Stapelton v. Stapelton, 1 Atk. 10.; and see 3 Atk. 399. 18 Ves. 149. Matthews v. Lee, 1 Madd. R. 563. Crosbie v. M'Doual, 13 Ves. 148.

Unless, indeed, in those cases where a specific performance of marriage articles has been decreed in favour of collaterals, as being within the consideration of marriage.

Goring v. Nash, 3 Atk. 189. Osgood & Strode, 2 P. Wms. 245. Edwards v. Warwick, *Ibid.* 175.

And this cannot be done against a purchaser subsequent to the articles or settlement.

Sutton v. Chetwynd, 3 Meriv. 249.

And a voluntary covenant in a marriage settlement in favour of a stranger, clearly cannot be enforced at law or in equity.

Johnson v. Legard, 3 Madd. 283.

If, however, a voluntary deed is sufficient to pass the subject out of the conveyor, it will be specifically enforced in equity as a trust executed, and not resting in contract, as where stock is actually transferred, or lands conveyed to a trustee, the court will execute the agreement as against the trustee and author of the trust.‖

Colman v. Sarrel, 3 Bro. C. C. 14. S. C. 1 Ves. jun. 50. Ellison v. Ellison, 6 Ves. 662. Griffin v. Nanson, 4 Ves. 356. Pulvertoft v. Pulvertoft, 18 Ves. 99. Lechmere v. Carlisle, 3 P. Will. 222. Smith v. French, 2 Atk. 243. Antrobus v. Smith, 12 Ves. 46.; and see Willan v. Willan, 16 Ves. 82. Bayley v. Tyrrell, 2 Ball & B. 363.

So in equity, voluntary conveyances are good against the parties, and cannot be revoked; nor will the court interpose in behalf

Vern. 100. 132. 427. 456.

464. 1 Ch. R. 173. 2 Ch. R. 432. ‖Worrall v. Jacob, 3 Meriv. 271.‖

behalf of one volunteer against another; but if they affect creditors, purchasers, or younger children, the court will set them aside.

For cases where voluntary deeds and settlements are held void as against creditors, &c. see tit. *Fraud.*

2 Vent. 365. 1 Vern. 37. 2 Vern. 475. 1 Ch. R. 147. 2 Freem. 65.

If there be a defective conveyance, without an equitable consideration, a court of equity will not oblige the party to make it good, though there be a covenant for further assurances; as if a man makes a feoffment to a stranger, without livery, the feoffor, or his heir, shall not be obliged to make good that feoffment, but it shall be construed in equity to be an estate at will, as it is at law. (*a*)

[(*a*) Equity will not supply the want of a surrender of a copyhold in favour of a bastard daughter against the heir of her father, though the father had covenanted to convey it, and make further assurances; for the daughter is, in consideration of law, a mere stranger, *nullius filia*, and the conveyance is merely voluntary. Fursaker v. Robinson, 1 Eq. Ca. Abr. 123.]

Abr. Eq. 24. 5. pl. 7. 93. p.

If an annuity is granted by one to his housekeeper, with a bond for payment of it, and the bond is lost, equity will decree payment of the annuity; for service is a consideration, and no *turpis contractus* shall be presumed, unless proved. (*b*)

[(*b*) Equity will enforce the payment of a bond given to an innocent woman whom the obligor hath seduced, for it is *præmium pudoris*. Marchioness of Annandale v. Harris, 2 P. Wms. 432. Eq. Cas. Abr. 87. p. 6. S. C. 3 Bro. P. C. 445. S. C. Cray v. Rooke, Ca. temp. Talb. 153. S. P. And a bond of this kind hath been holden good at law. Turner v. Vaughan. 2 Wils. 339. So where a provision has been made for her by an ineffectual conveyance, it will interpose in her behalf both against the grantor himself and his representative. Ord v. Blackett, cited in 2 P. Wms. 435., and Carew v. Stafford, *Ibid.* See the last case in Ambl. 520. by the name of Cary v. Stafford. Nor will it relieve against a bond given even to a common prostitute, if there be no fraud in the case, though the application be made by the representative of the obligor. Hill v. Spencer, Ambl. 641.; a circumstance which hath been formerly thought to strengthen the ground for relief. Matthew v. Hanbury, 2 Vern. 187. *Aliter* where there is fraud, as where the plaintiff claims it as *præmium pudicitiæ*, and she is found to have been a prostitute prior to the time of her having been connected with the party giving it. Clark v. Periam, 2 Atk. 333. But bonds of this kind entered into *ex turpi causâ* are void; as where a woman, *knowing* a man to be married, submits to his temptation. Priest v. Parrot, 2 Ves. 160.; or where a woman having ignorantly married a man who had another wife alive, upon coming afterwards to the knowledge of his situation, continues to live with him. Lady Cox's case, 3 P. Wms. 339. So where the condition of the bond was that the parties should live together in a state of fornication. Walker v. Perkins, Administrator, 3 Burr. 1568. 1 Black. R. 517. S. C.] ‖But notwithstanding the case of Priest v. Parrot, it is decided that a bond given by a married man to a woman who had cohabited with him knowing him to be married, on the cessation of intercourse may be enforced at law. Nye v. Moseley, 6 Barn. & Cres. 133., and see S. C. *nom.* Knye v. Moor, 2 Sim. & Stu. 260.‖

Basse v. Grey, 2 Vern. 692.

[Equity will not carry a merely voluntary covenant beyond the letter of it.

[(*c*) This rule is established in favour of *issue male* by many cases; first, where there are articles *only*, as in

In decreeing the execution of agreements, it regards the intent of the parties, and does not confine itself to the strictly legal operation of the words. Where, therefore, marriage articles, literally taken, would give the husband or wife an estate tail, it decrees a strict settlement; for otherwise the provisions for the issue (*c*), the object of the settlement, might be defeated. (*d*)]

Jones v. Laughton, 1 Eq. Ca. Abr. 392. pl. 2. Nandick v. Wilkes, 1 Eq. Ca. Abr. 393. pl. 5. Cusack v. Cusack, 1 Bro. P. C. 470. Trevor v. Trevor, 1 P. Wms. 622. Dodd v. Dodd, Ambl. 274. Robinson v. Hardcastle, 2 Term R. 252. So where there are articles before marriage, and a settlement is made after marriage in the words of the articles, as in Streatfield v. Streatfield, Ca. temp. Talb. 176.; or where there are both articles and settlement before marriage, and

and the settlement is made *in pursuance* of the articles, as in Honor v. Honor, 1 P. Wms. 123. Roberts v. Kingsley, 1 Ves. 238. But otherwise, where the settlement made *before* marriage is *not* in pursuance of the articles; for then the parties will be presumed to have come to a new agreement. Legg v. Goldwire, cited in Ca. temp. Talb. 20. Partyn v. Roberts, Ambl. 315. And the same equity arises to the issue female. Burton v. Hastings, Gilb. Eq. R. 113. West v. Erissey, 2 P. Wms. 349., and Hart v. Middlehurst, 3 Atk. 371. But this must be understood where the articles make no other provision for them. Powell v. Price, 2 P. Wms. 535. (*d*) But where this mischief does not occur, or where the intention of the parties to create an estate of inheritance is not sufficiently explicit, it seems the rule is not applicable. Chambers v. Chambers, Mos. 333. Green v. Eakins, 2 Atk. 476. Partyn v. Roberts, Ambl. 315. Cordwell v. Mackrill, Ambl. 515. Highway v. Banner, 1 Bro. Ch. R. 584.

In contracts proper for a specific performance, equity considers them often as actually performed (*a*) from the time they are entered into. Money covenanted to be laid out in land, it considers as land; and land articled to be sold, it treats as money; and invests each with the qualities of the other.

Money covenanted to be laid out in land, will go to the heir, and not the executor. Chaplin v. Homer, 1 P. Wms. 483. Scudamore v. Scudamore, Pr. Ch. 540. Edwards v. Lady Warwick, 2 P. Wms. 171. Lechmere v. Earl of Carlisle, 3 P. Wms. 221.] ‖See Thornton v. Hawley, 10 Ves. 219.‖ [Settled on the wife of a freeman of *London* in lieu of dower, will not bar her of her customary part. Babington v. Greenwood, 1 P. Wms. 530. It will not be personal assets. Earl of Pembroke v. Bowden, 3 Ch. R. 115. 2 Vern. 52. S. C. Lawrence v. Beverley, 2 Keb. 841. cited also in 1 Vern. 471. It shall be subject to the curtesy of the husband. Sweetapple v. Bindon, 2 Vern. 536. Otway v. Hudson, 2 Vern. 583. Cunningham v. Moody, 1 Ves. 176.; but not to the dower of the wife, because she is not dowable of an equitable estate. It shall pass as land by a will, under sweeping words, if at the time of making the will the testator has an equitable estate therein. Davie v. Beardsham, 1 Ch. Ca. 39. Prideaux v. Gibben, 2 Ch. Ca. 144. Milner v. Mills, Mos. 123. Alleyn v. Alleyn, Mos. 262. Greenhill v. Greenhill, 2 Vern. 679. Pr. Ch. 520. S. C. Shorer v. Shorer, 10 Mod. 39. Lingen v. Sowray, 1 P. Wms. 172. Pr. Ch. 400. S. C. Langford v. Pitt, 2 P. Wms. 629. Guidot v. Guidot, 3 Atk. 254. Potter v. Potter, 1 Ves. 437. Gibson v. Lord Montfort, 1 Ves. 494. And it will not pass as money under a general bequest to a legatee, unless described as so much money agreed to be laid out in land. Cross v. Addenbroke, and Fulham v. Jones, cited in a note 3 P. Wms. 221.] ‖See Biddulph v. Biddulph, 12 Ves. 161.‖ [Where a recovery would be necessary to give a person the absolute interest in it, if land, a fine will not be sufficient. Colwell v. Shadwell, cited in 1 P. Wms. 471. 485. Edwards v. Countess of Warwick, 2 P. Wms. 171. Collet v. Collet, 3 Atk. 11. Trafford v. Boehm, 3 Atk. 447. Carter v. Carter, Ca. temp. Talb. 272.] ‖See 7 G. 4. c. 45. § 1, 2. empowering a court of equity, where money is directed to be invested in land, to be settled in such manner that the first tenant in tail might bar the estates tail and remainders, to order the money to be paid to the tenant in tail; and 6 Ves. 116. 156. 8 Ves. 609. 9 Ves. 462. 1 Jac. 234.‖ [But equity will not consider money as land, unless the covenant or direction to lay it out in land be express. Symons v. Rutter, 2 Vern. 227. Curling v. May, cited in 3 Atk. 255.] ‖See Pearson v. Lane, 17 Ves. 104.‖ [And money thus circumstanced shall be deemed as part of the personal estate of one who might have aliened it, there being no other use but to himself. Chichester v. Bickerstaff, 2 Vern. 295. Pulteney v. Earl of Darlington, 1 Bro. Ch. R. 236. Wade v. Pagett, 1 Bro. Ch. R. 368.; but see Lechmere v. Earl of Carlisle, 3 P. Wms. 220. Ca. temp. Talb. 90. S. C.— Where land is agreed or directed to be sold, it seems the creditors of the bargainor may compel the heir to convey the land. Best v. Stamford, 1 Salk. 154. (*c*) Therefore the personal estate of a man, who, in consideration of marriage with an orphan of a citizen of *London*, had covenanted to take up his freedom of the city, was divided according to the custom, though the covenant was not performed. Frederick v. Frederick, 1 P. Wms. 710. 1 Bro. P. C. 7.]

3. *Of the Manner in which they are to be performed.*

If an agreement be to quit the possession of lands, the court will not decree a conveyance of the lands themselves; but if the agreement was to convey the lands, it is said that the court would have decreed the agreement, though the party was not apprized what estate he had in the lands.

Gerrard v. Vaux, Vern. 121. How agreements and promises are to be executed at law, *vide* heads of *Assumpsit and Covenant.*

If

Gardner v. Pullen, 2 Vern. 394. *Vide suprà* (B), 1. note c. ‖And as to the measure of damages at law for not transferring stock, see Shepherd v. Johnson, 2 East, 211. M'Arthur v. Lord Seaforth, 2 Taunt. 257. Harrison v. Harrison, 1 Car. & P. 412.‖

If one is bound to transfer 300*l.* *East-India* stock before such a time, which he neglects to do, and the stock is much risen, he shall be obliged to transfer the stock in *specie*, and account for all dividends from the time that it ought to have been transferred.

Vern. 210. [Ambl. 332. But *qu.* whether equity will not relieve in such case, if the security be bettered. 1 Ch. Ca. 110.] ‖See *antè*, *Accord and Satisfaction*.‖

If a creditor agrees with his debtor to take less than his debt, so that it be paid precisely at such a day, and the debtor fails of payment, he cannot be relieved, for *cujus est dare, ejus est disponere.*

2 Vern. 134. Halifax v. Higgins. [(*a*) As this case is stated in Lady Holles v. Wyse, 2 Vern. 289., and in Shode v. Parker, 2 Vern. 316., the interest was reserved at 6*l.* per. cent. with an agreement to accept 5*l.* per cent. if duly paid; a statement doubtless correct, as it reconciles the case to the other decisions upon this point, which at present it clashes with. See Jury v. Cox, Pr. Ch. 160. Walmsley v. Booth, Barnard. Ch. R. 481. Nichols v. Maynard, 3 Atk. 519. 3 Burr. 1374.] ‖See *post.* tit. *Mortgage*.‖

If money be lent on a mortgage, at 5 per cent. and the mortgagor covenants to pay 6 per cent. if he make default for the space of sixty days after the time of payment; if he makes default, the court will not relieve, this being the agreement of the parties. (*a*)

Vern. 316. Barker v. Holder, 1 Eq. Ca. Abr. 28. pl. 5. S. C.

If a lessee for a long term of years covenants to lay out 200*l.* upon the premises within the first ten years, and lays out but 30*l.* and after the expiration of thirty years of the lease, the lessor brings an action of *covenant*, and recovers 150*l.* damages, equity will neither relieve against the damage, nor decree the money to be now laid out in the improvements; for though the damages seem excessive, yet the jury were proper judges; and to degree it to be laid out now the lease is almost expired, is not proper; for it is probable the lessee would not be so careful in laying it out in lasting improvements, as he would have been if laid out at first.

Marshall v. Corporation of Queenborough, 1 Sim. & Stu. 520.

‖If a regular corporate resolution has been passed, and upon the faith of it, expenditure has been incurred, the court will compel the corporation to make a legal grant in pursuance of the resolution, though not under the corporation seal.

Morse v. Merest, 6 Madd. 26.

Where there is a contract to sell at a valuation, by *A.*, *B.*, and *C.*, the court will compel the vendor to permit the valuation.

Walker v. Barnes, 3 Madd. 247.

Where the vendor of an estate having lost his title-deeds, agreed to give *real* security for the title, the court held that personal security was not sufficient, and that he must purchase real estate for the purpose.

Wood v. Griffith, 1 Swanst. 54.; and see 10 Ves. 316.

If a person possessed of a term, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and the court will arrange the equities between the parties.

Ormond v. Anderson, 2 Ball & B. 369.; and see *Id.* 288.

Equity has the power to compel the specific performance of a complete contract, but cannot add any term not agreed on.‖

(C) Of

(C) Of Parol Agreements, or such as may be said to be within the Statute of *Frauds and Perjuries.*

¶1. *Of the First, Second, and Third Sections of that Statute.*¶

THE common law required no other solemnity in passing lands or tenements, but that of livery and seisin, which being a translation of the feud *coram paribus curtis*, and testified by them, was held an act of sufficient notoriety to direct the lord of whom to demand his service, and strangers against whom to commence their actions; but now,

Co. Lit. 48. Spelm. Gloss. 510. 9 Co. 137. Roll. Abr. 7.

By the 29 Car. 2. c. 3. § 1. it is enacted, "That all leases, "estates, interests of freehold, or terms of years, or any uncer- "tain interest of, in, or out of any messuages, manors, lands, "tenements or hereditaments, made or created by livery and "seisin only, or by parol, and not put in writing, and signed "by the parties so making or creating the same, or their agents "thereunto lawfully authorized by writing, shall have the force "and effect of leases or estates at will only, and shall not, either "in law or equity, be deemed or taken to have any other or "greater force or effect; any consideration for making any such "parol leases or estates, or any former usage to the contrary "notwithstanding.

29 Car 2. c. 3. § 1.

"Except leases not exceeding the term of three years from "the making thereof, whereupon the rent reserved to the land- "lord, during such term, shall amount unto two third parts at "the least, of the full improved value of the thing demised."

§ 2.

Also it is enacted, "That no leases, estates or interest, "either of freehold or terms of years, or any uncertain interest, "not being copyhold or customary interest of, in, to or out of "any messuages, manors, lands, tenements or hereditaments, "shall be assigned, granted or surrendered, unless it be by "deed or note in writing, signed by the party so assigning, "granting or surrendering the same, or their agents thereunto "lawfully authorized by writing, or by act or operation of law."

§ 3.

¶Notwithstanding the words of the first section, it is settled that parol leases for more than three years have the effect of leases from year to year, and require a notice to quit, in order to determine them, the meaning of the statute being that such leases shall not create a term.

Clayton v. Blakey, 8 Term R. 3.; and see 5 Term R. 471. and Holt's N. P. C. 47

A parol lease for three years, to satisfy the statute, must commence from the time of making, and cannot be made to commence at a subsequent day.

Rawlins v. Turner, Lord Raym, 736.; and see Ryley v. Hicks, Stra. 651. Legg v. Strudwick, 2 Salk. 414.

Where a lease had been made by deed for twenty-one years to *A.*, who afterwards took *B.* into partnership, and *A.* and *B.* made a parol agreement with the landlord, that if he would enlarge the building, they would pay him 10 per cent. on the cost, in addition to the original rent, for the rest of the term, which

Hoby v. Roebuck, 7 Taunt. 157.

exceeded three years, and the new building was consequently made, the Court of Common Pleas held that this agreement was not within the statute, for that as whatever was subsequently built became part of the premises demised, it was a collateral contract.

Farmer v. Rogers, 2 Wils. 26. Botting v. Martin, 1 Camp. 318.

Though the statute does not require that an assignment should be by deed, it absolutely requires it to be in writing, and therefore, where a parol assignment was made of a lease from year to year granted by parol, it was held void under the statute.

Roe dem. Berkeley v. Archbishop of York, 6 East, 86.; and see Doe v. Thomas, 9 Barn. & C. 288.

The mere cancelling, in fact, of a lease, is not a legal surrender.

Farmer v. Rogers, 2 Wils. 26.

A surrender of a lease may be made without deed; as where a mortgagee wrote on the mortgage-deed, "Received of *A. B.* "for principal and interest, and I do release and discharge the "within premises from the term of 500 years," this was holden a sufficient surrender.

Thomas v. Cook, 2 Barn. & A. 119.; and see Phipps v. Sculthorpe, 1 Barn. & A. 50.

If the landlord accept an under-tenant as his tenant, with consent of the original lessee, and distrain upon his goods, this amounts to a surrender of the original tenant's term, by operation of law, though there is no surrender in writing.

Stone v. Whiting, 2 Stark. 235. Hamerton v. Stead, 3 Barn. & C. 478.

Johnstone v. Huddlestone, 4 Barn. & C. 922

But a bad notice to quit, though accepted by the landlord, cannot operate as a surrender.

Whitehead v. Clifford, 5 Taunt. 518.; and see *Ibid.* 519.

If the landlord accept possession of the demised premises from the tenant, he cannot subsequently sue him for use and occupation, although there is no surrender of the tenant's term in writing.

Walls v. Atcheson, 3 Bing. 462.

And so if the landlord let them to another tenant.

2. *Of Agreements within the Fourth Section.*

§ 4.

And it is further enacted, "That no action shall be brought "whereby to charge any executor or administrator, upon any "special promise to answer damages out of his own estate, or "whereby to charge the defendant upon any special promise to "answer for the debt, default or miscarriages of another person; "or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, "tenements or hereditaments, or any interest in or concerning "them; or upon any agreement that is not to be performed "within the space of one year from the making thereof, unless "the agreement upon which such action shall be brought, or "some *memorandum* or note thereof, shall be in writing, signed "by the party to be charged therewith, or some other person by "him thereunto lawfully authorized.

1. Of Promises by Executors, Administrators, &c.

2 Jones, 108. Gilmore and

The clause which enacts, that no action shall be brought, *&c.* to

to charge an executor, &c. extends not to promises made before, though to be performed after the making of the statute; for it would be against natural justice, that a promise made upon good consideration should be destroyed by the retrospect of a law which none could divine would be made. Shutter, 1 Freem. 466. S. C. Vent. 330. 2 Mod. 310. 2 Lev. 227. 2 Show.

R. 16. S. C. ‖Rann v. Hughes, 4 Bro. P. C. 27. 7 Term R. 350. n.‖

A. promised if the widow of an intestate would permit him to be joined with her in the letters of administration, that he would make good any deficiency of assets to pay debts. Lord *Hardwicke* held this promise not within the act; nor within the first branch of the section, for *A.* was not administrator at the time of making it; nor within the second, for here is a new distinct consideration. Tomlinson v. Gill, Ambl. 330.

The plaintiff in his declaration need not shew any note in writing, but it will be sufficient for him to produce it on the trial; but if such promise is pleaded in bar of another action, it must be shewn to be in writing, so that it may appear to the court to be such a promise upon which an action will lie. Raym. 450, 451. 2 Jones, 158. S. C. 2 Salk. 519.

‖2. Of Promises to answer for the Debt, Default, or Miscarriage of another.‖

On the clause, *that no action shall be brought on a special promise to answer for the debt, default*, &c. *of another*, it has been resolved that if *A.* is about hiring a horse from *B.*, and *C.*, to encourage him to lend the horse, promises that *A.* should deliver him safe, this is a collateral promise, and an undertaking within the statute; for *C.* subjects himself to an action on the breach of the original contract by *A.*, against whom *detinue* lies on the bailment. So if two come to a shop, and one of them contracts for goods, and the seller does not care for trusting him, whereupon the other says, let him have them, and I will undertake he shall pay you; but if the promise be, I will see you paid; or I will be your paymaster, it is otherwise. So if *A.* comes to *B.* and tells him, let your horse to *J. S.* and I will see you paid the hire; there the hiring is to *A.* and not to *J. S.* who is considered as servant to *A.* So, in all cases where the whole credit is given to the undertaker, he alone is liable to an action. Salk. 27. pl. 15. 28. pl. 17. 6 Mod. 248, 249. Ld. Raym. 224. 2 Ld. Raym. 1085. 1087. See 12 Mod. 250.

[A doubt was formerly entertained, whether, if the undertaking of a third person were before the delivery, it were within the statute. But the general line now taken, is, that if the person for whose use the goods are furnished is liable at all, any promise by a third person to pay that debt, must, in all cases, be in writing. 2 Term R. 80. Cowp. 227. 1 H. Black. 120.

If *A.*, in consideration that *B.* will stay proceedings in an action he had commenced against *C.* to recover a sum of money due from *C.* to him, promise to pay that money, such promise must be in writing, for it is to pay a debt of another person still subsisting: but where in consideration that the plaintiff in an action of assault and battery against *J. S.* would withdraw his record, and forbear to proceed, the defendant promised to pay him 30*l.* the court held the promise not to be within the statute, for the Fish v. Hutchinson, 2 Wils. 94. Reed v. Nash, 1 Wils. 305. ‖*Qu.* whether this case is

not overruled by Kirkham v. Marter, *post* ?‖

consideration was new, here was no subsisting debt; it could not be known before the trial whether the plaintiff would recover any damages or not.]

Kirkham v. Marter, 2 Barn. & A. 613. See Maggs v. Ames, 4 Bing. 474.

‖*A.*, without the leave or licence of the plaintiff, wrongfully rode the plaintiff's horse, and caused its death, and the defendant in consideration that the plaintiff would not sue *A.*, promised to pay the plaintiff for the damage sustained. Held, that as *A.* was liable to the plaintiff for the wrong, this was a collateral promise of the defendant, and consequently not being in writing was void.‖

Williams v. Leaper, 3 Burr. 1886. 2 Wils. 308. ‖Bampton v. Paulin, 4 Bing. 264.‖

[*J. S.* becoming insolvent, made a bill of sale to the defendant of all his goods in his dwelling-house in trust to be sold for the benefit of his creditors. After the defendant had taken possession, the landlord came to distrain for rent, and to prevent the distress, and that the sale might go on, the defendant promised to pay it. This promise is not within the statute.]

Thomas v. Cook, 8 Barn. & C. 728. (*a*) Nor is a promise to

‖If *A.*, at the request of *B.*, enter jointly with him into a bond to indemnify a third party, and *B.* promise to save *A.* harmless from all loss by reason of the bond, this is not a promise requiring writing within the statute. (*a*)‖

indemnify the plaintiff against all costs of a tithe suit, in consideration that the plaintiff (defendant in the tithe suit) would allow defendant to defend it in plaintiff's name. Adams v. Dansey, 6 Bing. 506.

Watson v. Turner, *Scacc.* Tr. 7 G. 3. Bull.N.P.284. (4th edit.)

[Wherever a man is under a moral obligation (*a*) to do a thing, and another does it without request, a subsequent promise to pay is good, though not in writing; as where an overseer promises by parol to pay an apothecary who, without his knowledge, has administered medicines to a pauper.]

‖(*a*) But the obligation on the overseers to provide medicines for the poor is a *legal* one, and it is at least doubtful, whether in any case a mere moral obligation is a sufficient consideration to support an express promise; it clearly is not sufficient to raise an implied promise. See the elaborate note to Wennall v. Adney, 3 Bos. & Pull. 249. In Wing v. Mill, 1 Barn. & Ald. 104. the court held that an action was maintainable by an apothecary against the overseer of the parish where a pauper was settled, for medicines furnished to the pauper in another parish where he lived, the overseer having expressly promised to pay; — but here also there was a legal obligation on the overseers of the parish of settlement to provide for the pauper, which they had acknowledged by making him a weekly allowance. In Atkins v. Banwell, 2 East R. 505. it was decided, that a parish where a pauper was taken ill and died, could not recover the price of medicines and necessaries furnished to him against the parish in which he was settled, since there was no legal obligation to reimburse the amount, and there was no express promise; and see Lamb v. Bunce, 4 Maule & S. 275. There could be no ground for requiring writing to such a promise as that in the principal case, since it is not within the scope of any clause in the statute; and see 1 Smith R. 305. 1 Dow. & Ry. 541. 1 Car. & Pa. 132. 5 Barn. & C. 738.‖

Goodman v. Chase, 1 Barn. & A. 297.; and see Williams v. Leper, 2 Wils. 308.

‖So also a promise to pay the debt of a debtor, in consideration of his being discharged out of custody, is an original promise, and not within the statute, since the debt is extinguished by the discharge, and the debtor ceases to be liable. Castling v. Aubert, 2 East, 325. Anstey v. Marden, 1 New R. 124.

Jarmain v. Algar, Ry. & Moo. 348.; and see 4 Bing. 474.

So also a promise to execute a bail-bond for *A. B.*, in consideration of the plaintiff forbearing to arrest him, is not within the statute.

Chater v. Beckett, 7 Term R. 201.

But an agreement to pay a composition on the debt of another is within the statute, since the debtor remains liable.

So

So also in cases of promises to pay for goods, *&c.* supplied to a third party, if the third party is liable at all the promise is within the statute, and requires writing; but if the articles are supplied entirely on the credit of the promiser, so that the third party is not liable, then the promise is not within the statute. Anderson v. Hayman, 1 H. Black. 120. Matson v. Wharam, 2 Term R. 80. Jones v. Cooper, 2 Term R. 80. Browning v. Stallard, 5 Taunt. 450. Colman v. Eyles, 2 Stark, 62.; and see 4 Bing. 474.

And there is no distinction whether the promise is made before the goods are supplied, or afterwards. Matson v. Wharam, 2 Term R. 80.

The word "agreement" in the fourth section, is held to import not merely the promise on one side, but also the consideration on the other; and, therefore, in cases within the section it is necessary that both should appear in writing, and parol evidence is inadmissible to shew either. (*a*) Where, however, a letter was written by the defendant to the plaintiff's attorney, undertaking to pay the debt of another, parol evidence was held admissible to shew the amount, and also that the person receiving it was the plaintiff's attorney; and in several late cases the courts have gathered a sufficient consideration from the import of the instrument, where it did not appear in very clear terms on the face of it. Wain v. Warlters, 5 East, 10. Stadt v. Lill, 9 East, 348. Saunders v. Wakefield, 4 Barn. & A. 595. Bateman v. Phillips, 15 East, 272. (*a*) This decision was questioned by Lord *Eldon* in *Ex parte* Minet, 14 Ves. 190., and in *Ex parte* Gardom, 15 Ves. 288. his lordship decided against it; but its authority is now established by Saunders v. Wakefield, 4 Barn. & A. 595. and Jenkins v Reynolds, 3 Bro. & Bing. 14.

Thus where the defendant wrote a letter to the plaintiffs, "our mutual friends, Messrs. *R. J. S.*, having accepted the "underwritten bill drawn on them by your firm, I hereby give "my guarantee for the due payment of the same, should it be "dishonoured by the acceptors;" and a copy of the bill was at foot: the court held that the consideration of forbearance to sue *R. J. S.*, and of giving them time by taking a bill, sufficiently appeared on the face of the guarantee to satisfy the statute of frauds. Boehm v. Campbell, 3 Moo. 15.; and see Morris v. Stacey, 1 Holt, N.P.C. 153. Pace v. Marsh, 1 Bing. R. 216. Russell v. Mosely, 3 Bro. & Bing. 211. Stead v. Liddard, 1 Bing. R. 196. Benson v. Hippius, 4 Bing. 455.

But where the guarantee was in these words, "To the amount "of 100*l.* consider me as security on *J. C.*'s account;" it was held insufficient, for want of a consideration appearing. Jenkins v. Reynolds, 3 Bro. & Bing. 14.; and see Dixon v. Bromfield, 2 Chitt. 205. Morley v. Boothby, 3 Bing. 107. 10 Moo. 395.

Where the original guarantee is in writing, so as to satisfy the statute of frauds, it is not requisite that a subsequent acknowledgment of the guarantee, relied on to take the case out of the statute of limitations should be also in writing; a parol acknowledgment is sufficient. Gibbons v. M'Casland, 1 Barn. & A. 690. But this was before the 9 G. 4. c. 14.; for which see tit. *Limitation of Actions* (E).

3. Of Agreements made upon Consideration of Marriage.

It is now settled, notwithstanding former decisions to the contrary (*a*), that this clause does not extend to mutual promises to marry; consequently such promises are binding, although not reduced into writing and signed by the party. (*b*)‖ (*a*) Philpot v. Warren, 3 Lev. 65. Freem. 241. S. C. (*b*) Cork v. Baker, 1 Stra. 24. Harrison v. Cage, Ld. Raym. 386.; and see 10 Ves. 438. Bull. N. P. 280.

Abr. Eq. 19. pl. 4. 1 P. Wms. 618. S. C. Prec. Ch. 526. S. C. Stra. 236. S. C. Gilb. Hist. Ch. 244. S. C. 2 Bro. Ch. R. 565.

If a parol agreement is agreed to be reduced into writing, and in part executed, but the reducing it into writing is prevented by fraud, it may be decreed in equity; as if upon a marriage treaty instructions are given by the husband to draw a settlement, and by him privately countermanded, and afterwards he draws in the woman by persuasions and assurances of such settlement to marry him.

Abr. Eq. 20. 2 Vern. 373. S. C.; but no mention made of the fraud, only that the father consented to the match.

So where the defendant on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by at a corner of the street to see them go by to be married; and the plaintiff was relieved on the point of fraud.

2 Vern. 322. Freem. 291. S.C. Where a letter from the father, promising a portion, and a marriage had

On a bill exhibited for a marriage portion, the chief evidence to support it was a letter proved to have been written by the father's direction, where it was said he would give 1500*l.* portion with his daughter, and that he was afterwards privy to the marriage, and consented to it, and the portion was decreed the husband.

in pursuance thereof, has been held sufficient, *vide* 2 Vent. 361. 2 Vern. 200. 2 Ch. R. 157. Prec. in Chan. 561. Where an uncle in his letter promised his niece 1000*l.* portion; but in the same letter dissuaded her from marrying the person; Lord Chancellor would not decree the payment, but left the party to his action at law. 2 Vern. 202. [A letter from a father to his daughter that he will give her 3000*l.* not shewn to the husband, who afterwards accepts of 2000*l.* under a will, is no foundation for a decree. See a different state of this case in 9 Mod. 5. 2 P. Wms. 65. Nor is a letter promising a portion, but not reducing it to any certainty. Hall v. Butler, Eq. Ca. Abr. p. 7. Gilb. Lex. Prætor. 243. For a letter cannot be set up as an agreement unless the terms of the contract are distinctly set forth therein. Seagood v. Neale, 1 Stra. 426. Pr. Ch. 560. Clerk v. Wright, 1 Atk. 13.] ‖See Luders v. Anstey, 4 Ves. 501. 5 Ves. 216. The amount of consideration and the subject matter must appear. Kennedy v. Lee, 3 Meriv. 441.‖ [But a letter, (though not signed) referring to, and promising to perform an agreement in which the terms are set forth, is sufficient. Tawney v. Crowther, 3 Bro. Ch. R. 318. ‖And it is said parol evidence is admissible to shew what was the thing referred to. Clinan v. Cook, 1 Scho. & Lef. 33.; and see Brodie v. St. Paul, 1 Ves. jun. 326. And a letter is binding, though the writer look to the execution of a more formal instrument. Fowle v. Freeman, 9 Ves. 351. Whether a note written in the third person offering to purchase and accepted, is a sufficient agreement, *quære* Morison v. Turnour, 18 Ves. 175. The court will not decree a performance on letters, unless on a fair interpretation they import a concluded agreement. Huddlestone v. Briscoe, 11 Ves. 591. Stratford v. Bosworth, 2 Ves. & Bea. 346.; and see Rose v. Conynghame, 11 Ves. 550. Selby v. Selby, 3 Meriv. 2. Boys v. Ayerst, 6 Madd. 316. Randall v. Morgan, 12 Ves. 67.‖ *Qu.* Whether a court of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed (but not executed), varying the terms expressed in the letter? Cookes v. Mascal, 2 Vern. 35. Or if the terms be varied by parol? Jordan v. Sawkins, 3 Bro. Ch. R. 388. See 2 Ch. Ca. 180. Fitzgib. 215. 2 Salk. 444. ‖Whether a settlement made after marriage, reciting a parol agreement made before marriage, which is proved to have had existence, is good against creditors, does not appear settled. Dundas v. Dutens, 1 Ves. jun. 197. Randall v. Morgan, 12 Ves. jun. 67. Hodgson v. Hutchinson, Vin. Abr. tit. Contract and Agreement (H), Ca. 34.‖ [That an agreement in writing may be discharged by parol, see 1 Vern. 240. 2 Ves. 376. A bond given by a woman to her intended husband, conditioned to settle an estate upon him in fee, is good evidence of the agreement so specified in the condition on a bill in equity to carry it into execution, though it be void at law. Cannel v. Buckle, 2 P. Wms. 242. It is a sufficient signing, if a person, *knowing the contents*, subscribe a deed as a witness only. Welford v. Beazely, 3 Atk. 503. 1 Ves. 6. 1 Wils. 118. As to the signature, in order to comply with the requisitions of the statute, it must have the effect of giving authenticity to the whole instrument; and where it has that effect, it is immaterial in what part of the instrument it is found: but where a party had given written instructions to his agent for a lease, and had inserted his name

name in those instructions as applicable only to a particular purpose, the Court of Exchequer held that this did not amount to a sufficient authentication. Stokes v. Martin, 1 P. Wms. 771. note 1. It was formerly thought necessary that both parties should sign; but in the case of Cotton v. Lee, before the Lords Commissioners, 1770, it was determined to be sufficient if the party charged has signed. Cited in 2 Bro. Ch. R. 564. An agreement signed by one party may, in some cases, be conclusive against both. Owen v. Davis, 1 Ves. 82. ‖Seton v. Slade, 7 Ves. 265.‖ [But, though the contract itself must be in writing, an authority to buy, or treat as agent for another, may be good without writing. Vin. Abr. tit. Contract and Agreements (H), p. 45. Wedderburne v. Carr, in the Exchequer, Tr. T. 1775. 3 Wooddes. 427.] ‖Coles v. Trecothick, 9 Ves. 234. 250. Clinan v. Cooke, 1 Scho. & Lef. 22. Barry v. Barrymore, *Ibid.* 28. Emmerson v. Heelis, 2 Taunt. 38.‖

But where on a marriage treaty the lady's father proposed to give 4500*l.* portion, and the husband was to settle 4 or 500*l.* per ann. for a jointure; the father and intended husband went to Mr. *Minshul*'s chambers, who hearing the proposals on both sides took down minutes or heads thereof in writing, and the same day gave them to his clerk to draw a settlement according to the terms of the agreement; the next day the father fell sick suddenly, and died in two hours after, and the next morning the marriage was consummated; and on a bill brought to have a specific performance of the agreement, my Lord Chancellor decreed it to be within the statute of *frauds*, and said he knew no case where an agreement, though written by the party himself, should bind, if not signed or in part executed by him (*a*); and that those preparatory heads might have received several alterations or additions, or the agreement might have entirely broke off upon some further enquiry of the party's circumstances; and this decree was thought very just by the bar, who all agreed with my Lord Chancellor, that if the marriage had been on the foot of this writing, and the father had been privy and consenting to it, that he should afterwards have been obliged to execute his part thereof.

Abr. Eq. 21. Bawdes and Amhurst. [Pr. Ch. 402. S. C. See Ld. *Hardwicke*'s observations up on this case, 3 Atk. 503.]; ‖and see Coles v. Trecothick 9 Ves. 234. Griffin v. Griffin, 6 Ves. 179. n. Buckmaster v. Harrop, 7 Ves. 341. Selby v. Selby, 3 Meriv. 2.‖

[(*a*) A note signed and given by a husband to his wife previously to their marriage, promising to rectify a mistake in the settlement, in consideration of which she was induced to execute it, was holden to be part of the settlement, and binding on the husband and his assignees, Tyrrell v. Hope, 2 Atk. 558.]

On the marriage of the plaintiff with the defendant's daughter, the defendant promised to give her 450*l.* portion, and accordingly paid the plaintiff 200*l.* in part, but took a bond from him for it till a suitable settlement should be made, and the defendant himself gave particular directions concerning the settlement, which was drawn accordingly and engrossed; but before it was executed the plaintiff's wife died, and the bill was brought to have the 200*l.* bond delivered up, and the remaining 250*l.* paid; the defendant pleaded the statute of *frauds* and *perjuries*, the agreement not being reduced into writing and signed by the parties; and by way of answer denied that the 200*l.* was paid in part of the portion, but said it was lent the plaintiff, and the bond given for it; and the plea was allowed; for if the marriage should be looked upon as an execution of the agreement on the one side, so as to take it out of the statute, it would entirely evade it; for all promises of this kind suppose a marriage either already had or to be had.

25 Jan. 1724. On plea and demurrer, adjudged between Sansum and Butter.

‖4. Of Contracts for Sale of Lands, Tenements, and Hereditaments.‖

Attorney-General v. Day, 1 Ves. 218. ‖Blagden v. Bradbear, 12 Ves. 466.‖

[A judicial sale of an estate under a decree of the Court of Chancery is not within the statute. Thus *A.* being likely to die, made a conveyance of a real estate in favour of a charity, and then made a will, by which he gave 3000*l.* (the exact value of that land,) and also 250*l.* to the same charity, and gave the estate to *D.* (wife of *B.*) and *C.* A bill was brought for an account, and for the direction of the court for a settlement of the estate under the will; and a decree was had thereupon, and the master was thereby directed to receive a scheme for carrying the conveyance into execution; the foundation of part of which was to consider, in what way the money should be laid out, and a perpetual fund created for the maintenance of the charity. The master reported a scheme for laying out the money in the purchase of lands; and the case being set down to be heard on the matter reserved, the court made a decretal order confirming the master's report, and ordering that the scheme should be approved of, and the other matters therein carried into execution. These directions were all acquiesced under by *B.* and *D.* who survived him. After her (*D.*'s) death, an information was brought on behalf of the charity, together with the administratrix of *D.* to have this purchase carried into execution by the aid of the court against the devisee of the heir at law of *D.* and the infant son of *C.* the co-devisee with *D.* And it being objected that there was no agreement signed pursuant to the statute of frauds, one question was, whether the transactions which passed in the life-times of *D.* and *C.* amounted to a binding agreement on them for the sale of the lands? And Lord *Hardwicke* held, that here was such an agreement as the court ought to execute notwithstanding the statute; this being a judicial sale of the estate. And upon the same principle it is holden that purchasers before the masters are out of the statute, and the court will in such cases carry into execution against the representative, a purchase by a bidder before the master, without the bidder's subscribing, after confirmation of the master's report that he was the best bidder: the judgment of the court taking it out of the statute. So if the authority of an agent who subscribed for a bidder before the master cannot be proved, yet if the master's report can be confirmed, the court will carry it into execution, unless there be some fraud.

Ves. 221.

Ibid.

Cox v. Peele, 2 Bro. Ch. R. 334.

And Lord *Thurlow* was of opinion, where the attornies, concerned in a suit by a first mortgagee for a foreclosure, agreed, with respect to the final decree, that the estate should be sold, the first mortgagee paid principal and interest, and the remainder paid to the second mortgagee, but that the former should in the mean time take a decree; that if the first mortgagee made an improper use of the decree, this agreement, though by parol, might be read, on an applicatian to open the foreclosure, as an agreement relative to a decree; the attornies being competent to make agreements relative to the orders of the court. And upon that

that ground he admitted the evidence of it *de bene esse*, though it had been rejected at the Rolls, because it was not in writing, and therefore void under the statute.]

If there be a parol agreement for the purchase of lands, and a bill brought for a specific execution thereof, and the substance of the agreement is set forth in the bill, and confessed by the defendant's answer, the court will decree a specific execution, because there is no danger of perjury, which was the principal thing the statute intended to prevent.

Abr. Eq. 19. pl. 3. Gilb. Eq. R. 35. S. C. Gilb. Ch. 237. S. C. Prec. Ch. 208. S. C. Symondson v. Tweed, Pr. Ch. 374. Lacon v. Martins, 3 Atk. 3. Attorney-General v. Day, 1 Ves. 221. S. P. Gunter v. Halsey, Ambl. 586. Potter v. Potter, 1 Ves. 441. [See Eyre v. Ivison, *Scac.* Tr. 1785. cited 2 Bro. Ch. R. 563. Stewart v. Careless, *Scac. April* 1785, cited *Ibid.* 564., and Rondeau v. Wyatt, 2 H. Black. R. 68.] ‖But according to the modern doctrine, if the defendant insist on the statute, a specific performance will not be enforced, though the agreement is confessed; for as the defendant cannot protect himself from answering whether there was an agreement or not, it would be unjust to take the case out of the statute on the ground of his admission. Cooth v. Jackson, 6 Ves. 39. Rowe v. Teed, 15 Ves. 375. Blagden v. Bradbear, 12 Ves. 471. Walters v. Morgan, 2 Cox's R. 369. As to whether an agreement confessed will be enforced if the party do not insist on the statute, see *Ex parte* Whitbread, 19 Ves. 211. 1 Fonb. on Eq. 180. note (*d*).‖ [If the party himself die, his heir will, it seems, be bound on a bill of revivor. *Per* Lord *Hardwicke*, 1 Ves. 221. And upon this principle, equity will decree an agreement on evidence of its having been confessed by a party to it, although it be denied by his answer. As where an agreement was proved by one witness only, and positively denied by the defendant's answer; but there was proof in the cause that the defendant had confessed the agreement: the Master of the Rolls offered to direct an issue to try the agreement if the defendant desired it; but he declined that, unless his honour would make an order that his answer should be read at the trial, which his honour refused, there being circumstances to corroborate the evidence of the single witness, and decreed the agreement to be carried into execution. Only v. Walker, 3 Atk. 407. Where the two defendants in a suit confessed an agreement in their answer, but different from that stated in the bill, and an agreement different from either was proved by the testimony of only a single witness, Lord *Loughborough* C. decreed a performance pursuant to the terms of the agreement confessed by the answer. Mortimer v. Orchard, 2 Ves. jun. 243.] ‖If the party to an agreement is dead, so that his answer cannot be had, evidence of his parol confession of the agreement in his lifetime is inadmissible. Perchard v. Benyon, 1 Cox's R. 214.‖ [In what manner, and in what cases the statute may be pleaded to a bill for the performance of a parol agreement, *vide* in Whitbread v. Brockhurst, 1 Bro. Ch. R. 404. Whitchurch v. Bevis, 2 Bro. Ch. R. 559., and the cases there mentioned. See also Mitf. Eq. Tr. 217. (3d edit.) Taylor v. Beach, 1 Ves. 297.] ‖Evans v. Harris, 2 Ves. & B. 361. Morison v. Turnour, 18 Ves. 175. Strickland v. Aldridge, 9 Ves. 516.‖

[The plaintiff agreed with the defendant to sell him a house for 640*l.* and by consent of both parties an attorney was employed to make a draft of the conveyance: which the attorney accordingly prepared and sent to the defendant, who made several alterations therein with his own hand, and delivered it back to the attorney to be engrossed; upon which a time was appointed for the plaintiff and defendant to meet at a tavern to execute the writings, and for the latter to pay the money. The plaintiff and his attorney came to the tavern, where the plaintiff executed the writings, and having gotten the conveyance registered, (the house being in *Middlesex*,) brought his bill against the defendant to compel him to pay the purchase-money. The defendant pleaded the statute of *frauds*; and it was holden he was not bound, he not having signed the agreement.

Hawkins v. Holmes, 1 P. Wms. 770.

A. agreed by parol with *B.* for the purchase of lands. *B.* delivered a rent-toll which was dated and altered in his own handwriting, and shewed by the title of it that an agreement had been made

Whaley v. Bagenal, 6 Bro. P. C. 45.

made between them for the sale of the estate at twenty-one years' purchase. An abstract of the title was also delivered to *A.* together with the deeds, in order to be compared with the rent-roll, *B.* likewise wrote letters to several of his creditors, informing them that he had contracted with *A.* for the sale of his estate at twenty-one years' purchase, and sent the tenants to treat with *A.* for the renewal of their leases. Notwithstanding all these circumstances, upon *A.*'s filing a bill for a specific performance, the plea of the statute of *frauds* was allowed by the House of Lords both as to the discovery and relief.

2 Bro. Ch. R. 569. If there be general instructions for an agreement consisting of material circumstances, to be hereafter extended more at large, and to be put into the form of an instrument with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he shall not be compelled to perform such an agreement as that, when he insists upon the statute of *frauds*. *Per* Lord *Thurlow*.]

O'Connor v. Spaight, 1 Scho. & Lef. 306. ‖An agreement for an abatement of rent of land is within the statute, and must be in writing.

Crosby v. Wadsworth, 6 East, 602.; *sed vide* 1 Lord Raym. 182. So also a contract for the purchase of a growing crop of grass, to be mown and made into hay by the vendee, but no time being fixed for the mowing, is a contract for an interest in land within the statute, and is voidable if not in writing, and may be discharged by a parol notice from the vendor, before any act is done in part execution of it.

Scorell v. Boxall, 1 Young & J. 396. So also the sale of growing underwood, to be cut by the purchaser, has been held to convey an interest in land under the fourth section.

Teal v. Auty, 2 Brod. & B. 99.; *sed vide* 9 Barn. & C. 561. So also as to a sale of growing poles.

Emmerson v. Heelis, 2 Taunt. 38.; and see Waddington v. Bristow, 3 Bos. & P. 452. So also a sale of growing turnips, no time being fixed for their removal, and their degree of maturity not being stated.

Parker v. Stannilands, 11 East, 362. Warwick v. Bruce, 2 Maule & S. 205.; and see Poulter v. Killingbeck, 1 Bos. & P. 397.; and Evans v. Roberts, 5 Barn. & C. 836. which seems to over-rule Emmerson v. Heelis; and see Smith v. Surman, 9 Barn. & C. 561., where a contract for sale of growing timber, at so much per foot, was held not within the fourth, but within the seventeenth section. But where the contract was for a crop of potatoes, to be taken by the vendee *immediately* out of the ground, it was considered as a sale of personal chattels, and not within the fourth section.

Winter v. Brockwell, 8 East, 308. A licence to enjoy an easement is good without writing, this not being an interest in land within the statute.

Russell v. Russell, 1 Bro. C. R. 269. *Ex parte* Haigh, 11 Ves. 403. Norris v. Wilkinson, 12 Ves. 197.; and see tit. *Mortgage*, (A). Vol. V. A deposit of title-deeds, by way of security, is held to constitute an equitable mortgage, though unaccompanied by any writing. This decision has been much regretted as letting in parol evidence as to the terms of the deposit, and leading to discussion on the truth and probability of evidence, which it was the object of the statute to exclude. But the doctrine is now settled.

It

It has been repeatedly decided (*a*), that, on a sale of goods by auction, the auctioneer is the agent of both parties, and able to bind both within the statute by his signature.

(*a*) Simon v. Motivos, 3 Burr. 1921. 1 Black. 599. Hinde v. Whitehouse, 7 East, 558.; and see 2 Barn. & C. 945.

But the contrary has been decided (*b*) as to sales by auction of estates in land, though the principle of the distinction is not evident; and it has been questioned by several judges.

(*b*) Walker v. Constable, 1 Bos. & P. 306. Stansfield v. Johnson, 1 Espin. Ca. 101. Buckmaster v. Harrop, 7 Ves. 341. 13 Ves. 456. Coles v. Trecothick, 9 Ves. 234.

And in two late cases the Court of Common Pleas held the auctioneer an agent for the purchaser on a sale of land.

Emmerson v. Heelis, 2 Taunt. 38. White v. Proctor, 4 Taunt. 209.

The latter case was an action against the vendee for the auction-duty on the sale, and the vendor afterwards filing a bill for a specific performance of the contract, the Master of the Rolls, on the authority of the cases in the Common Pleas, held the auctioneer's signature sufficient to bind the vendee, and decreed accordingly. The rule appears, therefore, now to be settled, that the auctioneer is the lawful agent of both parties on a sale of land, as well as of goods.

Kemeys v. Proctor, 3 Ves. & B. 57. 1 Jac. & W. 550.

5. Of Agreements not to be performed within the Space of one Year from the making thereof.

This clause extends only to cases where, by express agreement of the parties, the contract is not to be performed within one year, and not to agreements depending on a contingency which may happen either within or beyond the year.

Therefore an agreement to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years; for it might have happened within the year, *Holt* C J., and the minority of the judges holding *contrà*, on the ground of the marriage actually happening after the year.

Anon. Salk. 280., recognised by *Wilmot* J. in 3 Burr. 1281.; and see Wells v. Horton, 4 Bing. 43.

So an agreement to bequeath to the plaintiff an annuity, payable yearly, from the testator's death, was held not within the statute, in an action brought against the executor, for the testator might have bequeathed the annuity by will within the year.

Fenton v. Emblers, Executor, 3 Burr. 1278. 1 Black. R. 353.; and see Smith v. Westall, Ld. Raym. 316

But where the plaintiffs agreed to publish an expensive work of art in numbers, one number at least to be published *annually*, and stated, they were confident they should be enabled to produce two numbers in the course of *every year*, and the defendant became a subscriber, and the first number was delivered to him within a year from the date of his subscription, it was held that the case was within the statute, as it appeared to be the clear understanding of the parties, that the agreement was not to be *completed* within the year; and the part performance within the year, by the delivery of the first number, made no difference, since the word "performed," in the statute, means a complete performance or consummation of the work.

Boydell v. Drummond, 11 East, 142. But though the subscriber in such case is not bound, without writing, to continue to take in the numbers, he is bound to pay for those he has accepted. Mavor v. Pyne, 3 Bing. 285.

And

Bracegirdle v Heald, 1 Barn. & A. 722. See Williams v. Jones, 5 Barn. & C. 108.

And accordingly, where the defendant verbally agreed, on the 27 *May*, to take the plaintiff into his service for a year from the 30th *June* following, it was decided, that this being a contract which would not be completely performed within the year, was within the statute, and void for want of writing.

Birch v. Earl Liverpool, 9 Barn. & C. 392.

A contract to hire a carriage for five years, paying an annual sum for it, and determinable at any time on paying a year's hire, is a contract not to be performed within a year, and requires writing.

As to the seventh section, respecting declarations of trust, which was improperly inserted here in former editions, see tit. "TRUSTS," (B) (C) Vol. VIII.‖

‖3. *Of Agreements mentioned in the Seventeenth Section.*‖

§ 17.

By § 17. it is enacted, "That no contract for the sale of any "goods, wares, and merchandize for the price of ten pounds "*sterling*, or upwards, shall be allowed to be good, except the "buyer shall accept of part of thegoods so sold, and actually "receive the same, or give something in earnest to bind the "bargain, or in part of payment; or that some note or memo- "randum in writing of the said bargain be made and signed by "the parties to be charged, or their agents thereunto lawfully "authorized."

‖1. What Agreements are within the Seventeenth Section.‖

Alexander v. Comber, 1 H. Black. R. 20. Towers v. Osborne, 1 Stra. 596. Clayton v. Andrews, 4 Burr. 2101. (*a*) Rondeau v. Wyatt, 2 H. Black. R. 63. 3 Bro. Ch. R. 154. S. C.

6. As to the clause respecting sales, it has been formerly thought, that it means only present and immediate sales, and does not include executory contracts, where goods are bespoken, and time is given by special agreement for the delivery of them, and payment of their value. But this construction has been denied in a recent determination of the Court of Common Pleas, *Wilson* J. dissent. (*a*), where an executory contract, merely a contract of sale, even though confessed by the defendant in his answer in Chancery, was determined to be within this provision. To this opinion, it may be added, Lord *Thurlow* intimated an inclination, when the case was before him in Chancery.

Cooper v. Elston, 7 Term R. 14.

‖The case of *Rondeau* v. *Wyatt* has been confirmed by subsequent cases. In one case a sale of wheat by sample, to be delivered by the defendant at a different place from the place of sale, was held to be within the clause of the statute, and the receipt of the sample by the buyer was held not a sufficient acceptance, the sample being no part of the wheat sold.

Garbut v. Watson, 5 Barn. & A. 614.

So also a contract for sale of flour not yet ground was held within the statute; and was distinguished from the case of *Towers* v. *Osborne*, *supra*, since there the chariot ordered would never, but for the order, have had existence, whereas the flour was sold, as part of the vendor's general stock.

Groves v. Buck, 3 Maule & S. 178.

A contract for a quantity of oak pins to be cut out of slabs and delivered to the buyer, was held not a sale of goods within the statute.

Smith v. Sur-

But where *A.*, being the owner of trees growing, agreed verbally

bally with *B.* to sell him the timber at so much per foot, it was held an agreement for sale of goods within the section. man, 9 Barn. & C. 561.; and see Watts v. Friend, 10 Barn. & C. 446. The case of Groves v. Buck is over-ruled by Garbut v. Watson, *supra*; see 9 Barn. & C. 561.

But the sale of growing underwood to be cut by the purchaser has, as we have seen, been held by the Court of Exchequer to confer an interest in land within the fourth section. Scorell v. Boxall, 1 Younge & J. 396.; and see 2 Brod. & B. 99.

The circumstance of a buyer agreeing to pay a higher price for goods in consideration of their being delivered at the vendor's expense, does not make the contract a mixed contract for the carriage as well as the sale, so as to prevent its coming within the seventeenth section as a sale of goods. Astey v. Emery, 4 Maule & S. 262.

A contract for the purchase of several articles at the same time, each under 10*l.* and at separate prices, but in the whole amounting to above 10*l.* is within the seventeenth section. Baldey v. Parker, 2 Barn. & C. 37.; and see Price v Lea, 1 Barn. & C. 156.

A contract to procure coals for plaintiff at *A.*, and convey them to *B.*, is not a contract for sale of coals to the plaintiff within the statute. Cobbold v. Caston, 1 Bing. R. 399.

2. Of Acceptance of Goods, and part Payment, within the Seventeenth Section.

Where goods are ponderous, and incapable of being at once handed over by actual delivery, the statute may be satisfied by that which is tantamount, as the delivery of the key of the warehouse where they are, or other *indicium* of property, or the exercising acts of ownership over them, as selling a part to another person. Chaplin v. Rogers, 1 East, 192.; and see 2 Espin. R. 598.

And the offering to sell them by the buyer to a third party, who refuses to purchase them, is such an act as ought to be left to a jury, to say whether it amounts to an acceptance or not. Blenkinsop v. Clayton, 7 Taunt. 597. 1 Moo. 328. S. C.

Where wine lying in the *London Docks* was sold without any written contract, and an order of delivery was given by the vendor to the vendee, it was held that the acceptance of this order by the buyer was not an acceptance of the goods within the statute, since, till the Dock Company accepted the order, they continued to hold the wine for the vendor. Bentall v. Burn, 3 Barn. & C. 423.

The acceptance of a sample of the goods, if part of the bulk sold, is a sufficient acceptance within the statute, but not if the sample form no part of the commodity. Hinde v. Whitehouse, 7 East, 558.; Cooper v. Elston, 7 Term R. 14.

Where the defendant contracted to purchase two horses of the plaintiff, and desired the plaintiff, who was a livery-stable keeper, to keep them at livery for the defendant, in consequence of which the plaintiff removed them out of his sale stable into another, it was held that this was a complete delivery to the defendant. Elmore v. Stone, 1 Taunt. 458.

But where the defendant verbally bought a horse of plaintiff, to remain for twenty days with the plaintiff without any charge, and no time was fixed for payment of the price, and at the end of the twenty Carter v. Toussaint, 5 Barn. & A. 855.

twenty days the defendant ordered the horse to be sent to grass, but entered as the *plaintiff's horse*, it was held that an action would not lie for the price, since there was no sufficient acceptance by the defendant.

Howe v. Palmer, 3 Barn. & Ald. 321.; see 2 Carr. & P. 532.

So where a quantity of tares were purchased by the defendant of the plaintiff, and they were to remain in the plaintiff's possession till the defendant fetched them away, the mere circumstance of the plaintiff's servant measuring them out and setting them apart in the plaintiff's granary for the defendant, was held not a sufficient delivery and acceptance within the statute.

Rohde v. Thwaites, 6 Barn. & C. 388.

But where *A.* agreed to sell to *B.* twenty hogsheads of sugar without any writing, and four hogsheads were delivered to and accepted by *B.*, and *A.* filled up and appropriated sixteen other hogsheads, and informed *B.* they were ready, and desired him to fetch them away, and *B.* said he would take them as soon as he could, it was held that the appropriation having been made by *A.* and assented to by *B.*, the property in the sixteen hogsheads passed to the latter.

Tempest v. Fitzgerald, 3 Barn. & A. 680. See Tarling v. Baxter, 6 Barn. & C. 360.

So where the defendant, while on a visit to plaintiff, agreed to purchase a horse for ready money, and to fetch it away about the 22d of *September*, and the defendant went away, and returned on the 20th of *September*, and then rode the horse, and gave directions as to its treatment, and requested it might remain another week in plaintiff's possession, and said he would return and pay for it about the 26th or 27th of *September*, and the defendant returned on the 27th to take the horse away, but in the mean time it had died, and the defendant refused to pay the price; it was held that there was no acceptance of the horse within the statute of frauds, for the sale being for ready money, the defendant had no right to take away the horse till the price was paid, and therefore his acts on the 20th *September* could not be considered as acts of ownership.

Hanson v. Armitage, 5 Barn. & A. 557.; *sed vide* Hart v. Sattley, 3 Camp. 528.

An acceptance of the goods by a wharfinger, in order to convey them to the buyer, is not an acceptance by the buyer within the statute; for the acceptance must be such as precludes the buyer from afterwards making any objection to the quantum or quality of the goods.

Baldey v. Parker, 2 Barn. & C. 44.; and see Thompson v. Maceroni, 3 Barn. & C. 1. Mayfield v. Wadsley, *Ibid.* 357.

As long as the lien of the vendor remains, the possession of the goods is not so transferred to the vendee as to amount to an acceptance of them within the statute.

Phillips v. Bistolli, 2 Barn. & C. 511.

In order to satisfy the statute, there must be a delivery of the goods by the vendor with an intention of vesting the possession in the vendee, and an actual acceptance by the latter with intention of taking the possession as owner. Therefore, where jewels were knocked down by the plaintiff to the defendant at an auction, at which the conditions were, that the purchaser should pay thirty per cent. upon being declared the highest bidder, and the residue of the price on removal of the goods, and the defendant received the jewels on their being knocked down, and three

three or four minutes afterwards objected that he had mistaken the price, when the plaintiff refused to receive them again, it was held, that as it could not be presumed that the vendor intended, contrary to the conditions, to part with the goods without the deposit or price being paid, there was very slight evidence to shew that the plaintiff intended to part with the control over the goods when he delivered them, and that the receiving the jewels for a few minutes before making his objection was very slight evidence of an acceptance by the vendee, and that it was a question for the jury whether there was a delivery and acceptance intended by both parties to transfer the possession.

If the purchaser of goods draw a shilling over the hand of the vendor, and return the money into his own pocket, which is called in the north of *England* striking of a bargain, this is not a part payment within the statute. Blenkinsop v. Clayton, 7 Taunt. 597.

3. Of the Memorandum in Writing, and the signing by the Party to be charged, or his Agent.

The language of the seventeenth section differs from that of the fourth, inasmuch as in the latter the "*agreement*" is required to be in writing, in the former, only a "note or memorandum in writing of the bargain" is required. Therefore, where an action was brought for not accepting goods according to the following memorandum—"We agree to give Mr. *Egerton* 19*d.* per lb. for 30 bales of *Smyrna* cotton, customary allowance, cash 3 per cent. *Matthews* and *Turnbull*," it was objected that no consideration appeared for the defendant's undertaking, and that there was no mutuality in the agreement; but the Court distinguished this from the cases on the fourth section, and held that there was a sufficient memorandum of the bargain to bind the *parties to be charged* and that *their* signatures were all that the statute required. Egerton v. Matthews, 6 East, 307

In the above case the name of the seller appeared in the memorandum, although the purchasers only signed it. But where the seller alone signed a memorandum of the bargain, and the buyer's name did not appear on it, it was held insufficient; since there cannot be a contract without two parties, and the memorandum would prove a sale to any other party as well as to the buyer. Champion v. Plummer, 1 New R. 252.; *sed vide* Allen v. Bennett, 3 Taunt. 167.

The memorandum may be made up of two separate writings, if they refer one to the other. Thus, in an action for not delivering gin bought of the defendants, it appeared that at the time the order was given by the plaintiff a bill of parcels was delivered to him by the defendants, headed in print thus: "Bought of *Jackson* and *Hawkins*, distillers;" and then followed, in writing, "1000 gallons of gin, 1 in 5 gin, 7*s.*, 350*l.*;" and the name of the buyer appeared on the bill of parcels. About a month after, the defendants also wrote the following letter to the plaintiff:—"Sir, we wish to know what time we "shall send your order, and shall be obliged for a little time in "delivering of the remainder. Must request you to return our "pipes. Yours, &c. *Jackson* and *Hawkins*." It was holden that Saunderson v. Jackson, 2 Bos. & Pull. 238.

that by connecting the bill of parcels with the subsequent letter of the defendants, the requisites of the statute were made out.

Jackson v. Lowe, 1 Bing. R. 9.

So, in an action for not delivering flour according to contract, it appeared that the plaintiff had sent a written notice to the defendant that certain flour delivered by the defendant to the plaintiff ("in part performance of the plaintiff's contract "with him for 100 sacks or bags of good English seconds "flour, at 45*s.* per sack or bag,") was so bad that the plaintiff would not accept it, and that he held the defendant answerable, and expected him to fulfil *the contract above alluded to* in the course of a week; and the defendant's attorney's clerk, by direction of the defendant returned an answer, stating that defendant considered he had performed *his contract* with the plaintiff as far as it had gone, and was ready to perform the remainder; it was held, that as the plaintiff's notice stated the terms of the contract, and the defendant's letter clearly referred to the same contract, the two papers together made a sufficient memorandum within the statute.

Cooper v. Smith, 15 East 103.; and see Boydell v. Drummond, 11 East, 142. Richards v. Porter, 6 Barn. & C. 437.

But where in an action for goods sold and delivered, the plaintiff offered in evidence an entry of the order for the goods, made in an order-book of the plaintiff's rider, which purported to be a mere *general* order of forty sacks of flour at 58*s.* per sack, and this order being insufficient as a memorandum for want of signature, the plaintiff endeavoured to satisfy the statute by connecting the order with a letter of the defendant, stating, that as the plaintiff had not sent the flour, the defendant was provided, and that he had expected to receive it *in a week*, it was held, that the letter of the defendant appeared to refer to a different contract, and could not be connected with the order, so as to form a memorandum within the statute.

1 Espin. 190. *per Eyre* C. J.; see Selby v. Selby, 3 Meriv. R. 2.

The place of signature of the memorandum is immaterial. If a person draw up an agreement in his own hand-writing, beginning, "I *A. B.* agree, *&c.*" and leave a place for signature at the bottom, but does not sign it, the agreement will be considered as sufficiently signed.

Saunderson v. Jackson, 2 Bos. & Pull. 238.

So it seems if a person be in the habit of printing instead of writing his name, he may be said to sign by his printed as well as by his written name.

Schneider v. Morris, 2 Maule & S. 286.

And where the name of the seller was printed in the common way on the bill of parcels, and he had written in the bill the name of the buyer, that was held to be a recognition of the contract and adoption of the printed name, so as to satisfy the statute.

Simon v. Metivier, 1 Black. R. 599.

The question whether sales of goods by auction were within the seventeenth section was long without a solemn determination. In one case Lord *Mansfield* C. J. and *Wilmot* J. were inclined to the negative, on the ground that the solemnity of that kind of sale, and the number of persons present, precluded perjury as to the fact of sale. But Lord *Ellenborough*, in *Hinde* v. *Whitehouse*, 7 East, 568., observed, that with all deference to these opinions he did not feel any sufficient reason for dispensing with the express requisition of the statute applying

ing to *all sales* of goods above the value of 10*l.* without exception, merely because the quantum of parol evidence in case of an auction is likely to render the danger of perjury less considerable; and in a late case the Court of King's Bench (*Abbott* C. J. and *Littledale* J. being absent,) expressly decided that such sales are within the seventeenth section. We have already seen (p. 155), that the auctioneer is the agent of both parties, and a memorandum made by him of the bargain binds both the seller and buyer.

Kenworthy v. Schofield, 2 Barn. & C. 945.

But the terms of the contract must sufficiently appear on the face of the memorandum, signed by the auctioneer. Therefore, where at a sale by auction of sugars, the auctioneer (having before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another paper containing the conditions of sale, which latter he read to the bidders as the terms on which the sugars were sold, but the two papers were neither externally annexed nor contained any internal reference to each other,) wrote down on the catalogue the name of the highest bidder, and the sum bid for each lot, it was holden that the minute on the catalogue (the catalogue not being incorporated with the conditions of sale) was not a sufficient memorandum of a bargain under those conditions.

Hinde v. Whitehouse, 7 East, 558. Kenworthy v. Schofield, 2 Barn. & C. 945.; but see Phillimore v. Barry, 1 Camp. 513. The note in writing must state the price of the goods in order to satisfy the statute. 8 Dow. & Ry. 343.

If the action is brought in the auctioneer's own name for not accepting goods knocked down at an auction, the statute will not be satisfied by the signature of the auctioneer as agent for the buyer; for the agent signing must be a third party, and not the other party to the contract on the record.

Farebrother v. Simmons, 5 Barn. & A. 333. Rayner v. Linthorne, 1 Ry. & Moo. 325. Wright v. Dannah, 2 Camp. R. 203.; and see 1 Moo. & Malk. 125.

In sales made by brokers acting between the parties buying and selling, the memorandum in the broker's book, and the bought and sold notes transcribed therefrom, and signed by the broker, and delivered to the buyer and seller respectively, are held a sufficient compliance with the statute to render the contract binding on each party.

Rucker v. Cammeyer, 1 Esp. R. 105. Hinde v. Whitehouse, 7 East, 569. *Per* Lord *Ellenborough.*

It was laid down by Lord *Ellenborough* C. J., that the entry signed by the broker is alone the binding contract, and that the bought and sold notes transcribed from it are only sent to the parties for their information. But in another case, where the bought and sold notes differed in terms, *Gibbs* C. J. denied this doctrine, and held that the parties were bound by the notes delivered by the broker, and if they differed there was no valid contract; and the Courts of Common Pleas and King's Bench in similar cases decided accordingly.

Heyman v. Neale, 2 Camp. 537. Cumming v. Roebuck, Holt R. 172. Thornton v. Kempster, 5 Taunt. 786. and see Grant v. Fletcher, 5 Barn. & C. 436. In Cumming v. Roebuck, and Thornton v. Kempster, it did not appear whether there was any entry signed by the broker in his book. *Qu.* whether such an entry *signed* will make a binding contract where the bought and sold notes differ? It is clear an unsigned entry will not. Grant v. Fletcher, *suprà.*

So, if a material alteration is made in the note by the broker at the instance of one party, without the assent of the other, it annuls the instrument.

Powell v. Divett, 15 East, 29.

Dickenson v. Lilwall, 1 Stark. 128.

In a late *Nisi Prius* case, the question arose whether the bought and sold notes alone would constitute a contract, without any entry at all in the broker's book; but it was not necessary to decide it.

Goom v. Aflalo, 6 Barn. & C. 117. *Sed vide* Smith v. Sparrow, 2 C. & P. 544.

But it has lately been held, that where the broker makes an entry in his book but *does not sign it*, and sends bought and sold notes, copied from the book and signed by him, to the parties, they form a sufficient memorandum.‖ If the broker's *clerk* sign the book it will not be sufficient; for the broker cannot delegate his authority. Henderson v. Barnwall, 1 Young & J. 387; see Blore v. Sutton, 3 Meriv. 237. Though the agent signing the contract has no authority from his principal at the time of signing, it will be sufficient if the principal afterwards ratifies the contract. Maclean v. Dunn, 4 Bing. 722.

(D) Of Cases where Equity decrees specific Performance of Agreements on the Ground of their being in Part performed.

There are several cases in which it has been holden, that a parol agreement in part executed shall be performed in the whole; but as those cases are not exactly stated or well reported, it will be sufficient to mention what seems to be the sense of them, and what with any justness can be collected from them. If an agreement be made concerning lands, though not in writing, and the party by whom it was made receive all or part of the money, equity will compel a specific performance of the whole agreement; because this is out of the statute, which designed to defeat such agreements only, no part whereof was carried into execution, and set up merely by parol; for that was the occasion of the statute, that persons used to swear verbal agreements upon others, and by such false oaths charge the parties in equity to perform such agreements, though they had never been made; and therefore the mere parol proof of such agreements concerning lands cannot be admitted in a court of equity: but where the price is paid, there it doth not stand upon the parol proof of the agreement only, but upon the execution of part of the agreement, which is evidence that the agreement was really made; and therefore there is the same reason that the plaintiff in equity should have the land for his money (*a*), as it is that he should deliver the goods where he hath received the money; but the doubt in these cases is, what shall be a proof of the receipt of the money. Thus far it seems certain, that if the defendant in his answer confess the receipt of the money for that purpose in the bill, or if he deny the receipt, and it be proved upon him by writing, as by letter under his hand, or other written evidence, he shall be obliged specifically to perform the whole agreement, because he hath carried part into execution: but if the defendant confess the receipt of the money, but say that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then the plaintiff must prove the receipt of the money by the defendant, for the purpose in the bill, by some written agreement. (*b*)

Leek v. Morrice, 2 Ch. Ca. 135. Alsop v. Patten, 1 Vern. 472. Gilb. H. C. 239.

Barnett v. Gomeserra, Bunb. 94. Binsted v. Coleman, Bunb. 65.

[(*a*) In Lacon v. Mertins, 3 Atk. 4. Ld. *Hardwicke* said, that payment had always been holden a part performance. But it seems that it is not so in the case of lands. Seagoode v. Meale, Pr. Ch. 560. Lord Pengall v. Ross, 2 Eq. Ca. Abr. 46. pl. 12. Simmons v. Cornelius, 1 Ch. Rep. 128. But see Voll v. Smith, 5 Ch. Rep. 16. Anon. 2 Freem. 128.]

‖In Clinan v. Cooke, 1 Scho. & Lef. 22. Lord *Redesdale* decided that, payment

ment of purchase-money was not a part performance, since the statute having expressly declared that it shall be so in case of goods, must have meant to exclude it in case of lands; and see O'Herlihy v. Hedges, *Ibid.* 123. and 4 Ves. 720. 14 Ves. jun. 388. *acc.* and the cases on the subject stated in Sugd. Vend. & P. (6th edit.) 104.; nor is payment of auction duty on a sale a part performance. Buckmaster v Harrop, 13 Ves. 456. and on a parol agreement for division of an estate by arbitration, acts done by the arbitrators as surveying, &c. are not a part performance. Cooth v. Jackson, 6 Ves. 41.‖ [Acts done in part performance, must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it. *Ex parte* Hooper, 19 Ves. 479. 1 Meriv. 7. They must be such, too, as would be a prejudice to the party who has done them, if the agreement should afterwards be vacated; and where no fraud is alleged, it seems, that the terms of the agreement must be certainly proved. Gunter v. Halsey, Ambl. 586. Whitbread v. Brockhurst, 1 Bro. Ch. R. 412. The giving of possession is to be considered as an act of part performance. Butcher v. Stepeley, 1 Vern. 363. Pyke v. Williams, 2 Vern. 455. Lockey v. Lockey, Pr. Ch. 519. Lacon v. Mertins, 3 Atk. 4. Floyd v. Buckland, 2 Freem. 268. Stewart v. Denton, Fonbl. Notes on Eq. Tr. 38.] Wills v. Stradling, 3 Ves. jun. 378. Bowes v. Cator, 4 Ves. jun. 71. Gregory v. Mighell, 18 Ves. jun. 328. Kine v. Balfe, 2 Ball & B. 343. Morphett v. Jones, 1 Swanst. 172.;‖ [but possession wrongfully obtained, or from persons not competent to give it, of however long continuance, will not avail. Hole v. White, cited in 1 Bro. Ch. R. 409. Ireland v. Rittle, 1 Atk. 541.] ‖And it must be a possession delivered in part performance; therefore, the mere continuing in possession of a tenant cannot weigh with the court on a bill by the tenant for specific performance of a parol agreement for a new lease. Wills v. Stradling, 3 Ves. 382.; and see 1 Ball & B. 282.; and the mere payment of additional rent by the tenant is an equivocal act, unless it appear that the landlord accepted it on the ground of the agreement, *ibid.*; and the laying out money in rebuilding a party-wall by a tenant does not take an agreement out of the statute, since it must be done independently of the agreement, either at the expense of the party or his landlord. Frame v. Dawson, 14 Ves. 386.; and see Lindsay v. Lynch, 2 Scho. & Lef. 1. O'Reilly v. Thompson, 2 Cox. 271.‖ [The giving directions for conveyances, and going to view the estate, are not considered as acts of part performance. Clerk v. Wright, 1 Atk. 12. Whaley v. Bagenal, 6 Bro. P. C. 45. Hole v. White, *suprà*. Nor will desisting from a purchase of lands in favour of another, upon certain terms, take an agreement in favour of the party desisting, as to part of the lands, out of the statute. Lames v. Bayley, 2 Vern. 627.; and see Vin. Abr. tit. Contract, &c. (H) pl. 32. 2 Eq. Ca. Abr. 45. 10. which seem to be the same case.] (*b*) For a parol evidence, as to the receipt of the money, seems to be as much excluded by the statute, as parol evidence relating to the agreement; *tamen quære*, Whether parol evidence may not properly be applied to the act of *receiving*; though not to the act of *contracting*. See 1 Pow. on Contracts, 306, 307, 308.

If a man, on a promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the lease, being executed on the part of the lessee, and the lessor shall not be allowed to take advantage of his own fraud, and run away with the improvements made by another; but if no such expense had been on the lessee's part, a bare promise of a lease, though accompanied with possession, would be within the statute of frauds.

Pr. Ch. 561. So lessee obliged where possessed six years. 2 Stra. 785. Earl of Aylesford's case. ‖See Wills v. Stradling, 3 Ves. 382. and Frame v. Dawson, 14 Ves. 386. Toole v. Medlicott, 1 Ball & B. 401.‖

One that could read made an agreement for a lease of twenty-one years; the lessor himself drew the lease but for one year, and yet read it for twenty-one years, and after the expiration of the year ejected the lessee; on a bill brought to be relieved upon this matter, which was proved, the court held it to be within the statute of frauds and perjuries, and dismissed the bill with costs, it being the plaintiff's own folly, being able to read; *secùs*, if he had been unlettered.

Skin. 159. pl6. Anon. [That a defect in a written agreement cannot be supplied, see Binsted v. Coleman, Bunb. 65. But on the ground of fraud or mistake it may. Joynes v. Statham, 3 Atk. 388.]

If a man purchases lands in another's name, and pays the money, it will be a trust for him that paid the money, though

2 Vent. 361. Vern. 366. S. P. where it

is said that the proof must be very clear, that he paid the purchase money; but for this *vide* head of *Evidence*, and *Trusts*.

there be no deed executed declaring the trust thereof; for the statute of frauds and perjuries extends not to trusts raised by operation of law.

Hales v. Vanherchem, 2 Vern. 617. Russell v. Russell, Bro. Ch. R. 269.

[Although parol agreements are bound by the statute, and agreements are not to be part parol and part in writing, yet a deposit or collateral security for the performance of a written agreement, is not within the purview of the statute.]

Abr. Eq. 20. pl. 5. 2 Freem. 269. 281. Skin. 143. 3 Atk. 389. 3 Wooddes. 429. [Where a man, in confidence of a parol promise, has omitted making that provision for others which he intended, such promise has been enforced in equity on the ground of fraud. Davenish v. Baines, Pr. Ch. 3. 2 Eq. Ca. Abr. 43. S. C. Sellock v. Harris, Vin. Abr. tit. Contract and Agreement (H), p. 31. Reech v. Kennigate, Ambl. 67. Harris v. Horwell, Gilb. Eq. R. 11.]

Where a parol agreement was concerning the lending of money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the deed of conveyance he refused to execute the defeasance, yet it was decreed against him on the point of fraud.

ALIENS.

(A) Who are Aliens, and this either by the Common Law, or by Statute.

(B) Of Naturalization and Denization, the Difference and Effect of them.

(C) Of the Disadvantages which Aliens lie under by our Law.

[(C 2.) How far the Laws of this Country attach upon Aliens.]

(D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend and one whose King is at enmity with us.

(E) Of Pleading Alienage.

(A) Who are Aliens, and this either by the Common Law, or by Statute.

7 Co. 18. a. In Calvin's case, those who were born in *Normandy, Gascoigne*, &c. while under actual obedience to the kings of *England*, were subjects born.

ALL those are natural-born subjects whose parents, at the time of their birth, were under the actual obedience of our king, and whose place of birth was within his dominions.

born. 7 Co. 20. b. Vaugh. 270. S. P. And this by the statute 42 Ed. 3. c. 10. is declared to have been the common law; but see Bro. Denizen, 14., but those born there now are aliens, those places not being in the actual possession of our king. 7 Co. 18. a.

If one of the king's ambassadors in a foreign country hath issue there by his wife, being an *English* woman, by the common law they are natural-born subjects. 7 Co. 18. a.

If the king of *England* make a new conquest, the persons there born are his subjects; but if it be taken from him again, the persons there born afterwards are aliens. Dyer, 224. Vaugh. 281, 282.

One born in *Ireland*, *Scotland* (*a*), or *Wales*, or any of the king's plantations, is a natural subject of *England*, because he is born within the ligeance of the king. Vaugh. 279. 301. 7 Co. 1—28. Molloy Bk. 3. c. 2. § 9.

(*a*) The *Antenati*, or those born in *Scotland* before the descent of the *English* crown to king *James* I. are aliens; for the uniting the kingdoms by a subsequent descent cannot make them subjects of that crown to which they were born aliens; but the *postnati*, or such as were born after, are not aliens; for being born within the allegiance, and under the protection of the king of *England*, they are his natural subjects, and not aliens. 7 Co. 1—28. Calvin's case adjudged, with the reasons at large.

If aliens come as enemies into the realm, and possess themselves of a town or fort, and one of them has issue born here, this issue is an alien; for it is not *cælum* or *solum* that makes a subject, but the being born within the allegiance, and under the protection of the king. 7 Co. 18. a.

If the king of *England* enter with his army in a hostile manner the territories of another prince, and any be born within the places possessed by the king's army, and consequently within his protection, such person is a subject born to the king of *England*, if from parents subjects, and not hostile. Vaugh. 281.

Those born on the *English* seas are not aliens. Molloy, b. 5. c. 2. § 9.

By a statute 25 Ed. 3. *de natis ultra mare*, it is declared, "that "the king's children, wherever born, ought to inherit: and that "all children in heritors, which from henceforth shall be born "without the ligeance of the king, whose fathers and mothers, "at the time of their birth be and shall be of the faith and allegi- "ance of the king of *England*, shall have and enjoy the same "benefits and advantages to have and bear the inheritance within "the same ligeance as other inheritors aforesaid, in time to "come, so always that the mothers of such children do pass the "sea by the licence and wills of their husbands." 25 E. 3. st. 2.

If an *English* merchant goes beyond sea, and takes an alien wife, the issue shall inherit him; so it is if an *English* woman goes beyond sea and takes an alien husband, the children there born shall inherit her; for though the statute be in the conjunctive (*b*), yet it hath been construed in the disjunctive to hinder this disability; and the word *and* taken instead of *or*, as sometimes it is, it being not reasonable that the child should not inherit the parent that is of ability, for the defect of the other that is not. Cro. Car. 601, 602. Bacon v. Bacon, adjudged. Lit. R. 22. 24. S. C. Sid. 198. S. C. cited. Vent. 427. S. C. cited; but it was holden, that if baron

and feme *English* go beyond sea without licence, or stay there beyond the time limited by the licence, and have issue, such issue is an alien, and not inheritable. Cro. Eliz. 3. Hyde v. Hill; *tamen quære, et vide* Lit. R. 27., and Bro. tit. Denizen, 6.; and see *infrà*. [(*b*) But *qu.* Whether the cases referred to warrant this construction; and see the case of Doe ex dem. Count

Count Duroure v. Jones, where it was determined that the son of an alien father, of an *English* mother born out of the king's dominions, cannot inherit an estate in right of his mother. The judgment of the court went upon the statutes of 4 G. 2. c. 21. and 13 G. 3. c. 21., which confine the privilege to the paternal heirs, and were conceived to be parliamentary expositions of the 25 E. 3. 4 Term R. 500.]

Dyer, 224. *in margine.*

Husband and wife dwelling in *Calais*, when it was taken by the *French*, fled into *Flanders*, where the wife was delivered of a son; the issue adjudged a denizen, because his parents were born in *Calais*, then reckoned part of the king's dominions, and because he himself was begotten there, though to avoid the rage of enemies born in another prince's territories.

7 Ann. c. 5.

By the 7 Ann. c. 5. § 3. it is enacted, "that the children of "all natural-born subjects, born out of the ligeance of her Ma- "jesty, her heirs and successors, shall be deemed, judged and "taken to be natural-born subjects of this kingdom, to all intents, "constructions, and purposes whatsoever.

4 G. 2. c. 22.

By the 4 G. 2. c. 21. the above clause is confirmed (*a*) with the following proviso, "that it shall not extend to any "children, so as to make them natural-born subjects of *Great* "*Britain*, whose fathers, at the time of the birth of such chil- "dren respectively, were or shall be attainted of high treason, by "judgment, outlawry, or otherwise, either in this kingdom or in "*Ireland*, or whose fathers at the time of the birth of such chil- "dren respectively, by any law or laws made in this kingdom, "or in *Ireland*, were or shall be liable to the penalties of high "treason or felony, in case of their returning into this kingdom "or into *Ireland*, without the licence of his majesty, his heirs "or successors, or any of his majesty's royal predecessors, or "whose fathers, at the time of the birth of such children re- "spectively, were or shall be in the actual service of any foreign "prince or state, then in enmity with the crown of *England*; "but that all such children are, were, and shall be and remain "in the same state, plight, and condition, to all intents, con- "structions, and purposes whatsoever, as they would have been "in if the said act of the seventh year of her said late majesty's "reign, or this present act, had never been made; but out of "this proviso are excepted (other than the children of such per- "sons who went out of *Ireland* in pursuance of the articles "of *Limerick*) the child of every such person before described, "who, at any time between the 16th day of *November* 1708, "and the 25th day of *March* 1731, hath come into *Great Bri-* "*tain* or *Ireland*, &c., and hath continued to reside in any of "those places for the space of two years, and during such re- "sidence hath professed the protestant religion; also every child "whose father came into *Great Britain* or *Ireland*, &c. and pro- "fessed the protestant religion, and died there between the "times aforesaid; also every child whose father continued in "the actual possession or receipt of the rents and profits of any "lands, *&c.* for the space of one whole year, at any time be- "tween the aforesaid times, or hath *bonâ fide*, and for valuable "consideration, sold, conveyed, or settled any lands. *&c.* in "*Great*

(*a*) The confirmatory clause here alluded to, differs from the statute of Ann. in this respect, that it restricts the privilege to the paternal line. The words are, "That all children born out of the ligeance, &c. whose *father* shall be natural-born subjects, &c."]

‖If the father has lost his character of natural-born subject before the birth of the child, the child is an alien. Doe dem. Thomas v. Acklam, 2 Barn. & C. 779.; and see *post*, 168.‖

" *Great Britain* or *Ireland*; and any person claiming title there-
" to under such sale, *&c.* who hath been or continued in the
" actual possession or receipt of the rents and profits thereof,
" for the space of six months, between the times aforesaid,
" then, *&c.*

[By the 13 G. 3. c. 21. the provisions of the above acts are extended to grand-children, still however adhering to the paternal line, with provisoes that nothing in that act "shall be con-
" strued to affect any of the limitations or restrictions of the act
" of 4 G. 2. c. 21. or to repeal or alter the act of 5 G. 1. c. 27.
" hereafter mentioned; or to repeal or alter any law or custom
" concerning aliens' duties, customs, and impositions, or to cause
" any privilege, exemption, or abatement relating thereto, in
" favour of any person naturalized by virtue of that act, unless
" such person shall come into this realm, and there inhabit and
" reside, and shall take and subscribe the oaths, and make, re-
" peat, and subscribe the declaration appointed by the act of
" 1 G. 1. c. 13., entitled an act for the further security, *&c.* at
" the places and times, and in the manner directed by that act,
" and also receive the sacrament of the Lord's Supper according
" to the usage of the church of *England*, or in some protestant
" or reformed congregation within the kingdom of *Great Britain*,
" within three months before his taking the oaths in the said
" act mentioned, and shall, at the time and place of taking such
" oaths, and of making, repeating, and subscribing the said de-
" claration, produce a certificate signed by the person administer-
" ing the said sacrament, and signed by two credible witnesses,
" whereof an entry shall be made of record in the court and
" courts respectively wherein such oaths shall have been made
" and subscribed, without any fee or reward. And it is further
" provided, that no person shall be by this act enabled to defeat
" any estate, right, or interest, which on the last day of that ses-
" sion should be had or vested in any other person, or to claim or
" demand any estate or interest which shall hereafter accrue, so
" as such claim or demand shall be made within five years after
" the same shall accrue." 13 G. 3. c. 21.

By stat. 14 & 15 H. 8. c. 4. it is enacted, that if an *English* subject go beyond the seas, and there become a sworn subject to any foreign prince or state, he shall, during his residence abroad, pay such impositions as aliens do: with a proviso, that if he returns, and lives here, he shall be restored to his liberties and privileges.] 14 & 15 H. 8. c. 4.

By the 5 G. 1. c. 27. it is enacted, " that if any manu-
" facturer or artificer of or in wool, iron, steel, brass, or any
" other metal, clockmaker, watchmaker, or any other artificer
" or manufacturer of *Great Britain*, shall at any time after the
" first day of *May* 1719, go into any country out of his ma-
" jesty's dominions, there to use or exercise, or teach any of the
" said trades or manufactures to foreigners: or in case any of
" his majesty's subjects now being, or who hereafter shall be in 5 G. 1. c. 27.

" any such foreign country out of his majesty's dominions as " aforesaid, and there using or exercising any of the said trades " or manufactories herein-before mentioned, shall not return " into this realm within six months next after warning shall be " given to him by the ambassador, envoy, resident, minister, or " consul of the crown of *Great Britain*, in the country in which " such artificer shall be, or by any person authorized by such " ambassador, *&c.* or by one of his majesty's secretaries of state " for the time being, and from thenceforth continually inhabit " and dwell within this realm; then and in such case every " such person shall be deemed an alien."

Fost. Cr.L. 59. Dyer, 298. b. 300. b.

[It should here be observed, that the duty of allegiance arising from birth is perpetual and unalienable, and that it is not in the power of any private subject to shake off his allegiance, and transfer it to a foreign prince; nor is it in the power of any foreign prince by naturalizing or employing a subject of *Great Britain*, to dissolve the bond of allegiance between that subject and the crown. But when, by treaty, especially if ratified by act of parliament, our sovereign cedes any island or region to another state, the inhabitants of such ceded territory, though born under the allegiance of our king, or being under his protection whilst it appertained to his crown and authority, becoma effectually aliens, or liable to the disabilities of alienage, in respect of their future concerns with this country. And similar to this seems the condition of the revolted *Americans*, since the recognition of their independent commonwealths.]

1 Wooddes. 382.

Doe dem. Thomas v. Acklam, 2 Barn. & C. 779.

‖This question has now been decided. The case was an action of ejectment, to recover premises at *Kingston-upon-Hull*, which came on to be tried before *Abbott* C. J. at the *York* summer assizes 1822. The jury found a special verdict, stating that *Elizabeth Harrison* died seised of the premises in 1813, without a will, and never having been married, and that *Frances Mary* (one of the lessors of the plaintiff), the wife of *Philip Thomas*, was her next heir, if she was capable of inheriting. *Peter Harrison*, the uncle of *Eliz. Harrison*, and the grandfather of *Frances Mary Thomas*, being a natural-born *British* subject, went to the *British* colonies in *North America*, and died there in 1775, leaving several children who all died without issue in the life of *Elizabeth Harrison*, except one daughter, *Elizabeth Harrison*, who in 1781 married at *Rhode Island*, one of the *British* Colonies, *James Ludlow*, a native subject, born in the *American* Colonies. *Eliz. Ludlow* died in *America* in 1790, leaving the lessor *Frances Mary* her only child, she having been born at *Rhode Island*, in the *United States*, on the 4th *February* 1784, after the recognition of the independence of the *United States* by the *British* crown, which recognition took place on the 3d *September* 1783. *James Ludlow* and *Elizabeth* his wife continued to reside in *America* after the recognition of independence. For the plaintiff it was contended, that the parents of *Frances Mary Thomas*, having been natural-born subjects of the *British* crown at the time

time of the separation of the colonies, did not cease to be so by that event, and that the lessor *Frances Mary Thomas* was therefore the child of a natural-born subject, and as such entitled to be considered a natural-born subject of the crown of *Great Britain* within the meaning of the statutes 25 Edw. 3. stat. 2 7 Ann. c. 5. § 3. 4 Geo. 2. c. 21. But the court held, that under the words of this last statute, a child was not to be considered a natural-born subject, unless the father were *at the time of the birth* a subject; and that as Mr. *Ludlow* had lost the character of a subject of *Great Britain* at the separation of the colonies from the mother country, his daughter born after that event was an alien, and incapable of inheriting, and judgment was accordingly given for the defendant. (In a case in the supreme court of the *United States*, it had previously been determined that natives of *Great Britain* were aliens, and incapable of inheriting lands in the *United States*. (*a*)

(*a*) Bright's Lessee v. Rochester, 7 Wheaton's Reports of Cases in the Supreme Court of the United States.

But, in a subsequent case, where the parents were natural-born *British* subjects residing in *America* before the recognition of the independence of that country, and on that event adhered to the *British* government, (by embarking with the *British* troops when they evacuated *New York*, and residing in *England* for two years, and by the father going to *America* under an appointment from the *British* government), it was held, that their children born after the recognition were capable of inheriting lands in this country. *Bayley* J. said, — There is a very plain distinction between this case and that of *Doe* v. *Acklam*. In that case it appeared that the parent, through whom the claim was made, put off his allegiance at the time of the treaty, which enabled him to do so; here the parent took no such step at that time, and the law did not enable him to do so at any future time.‖

Auchmuty v. Mulcaster, 5 Barn. & C. 775.

(B) Of Naturalization and Denization, the Difference and Effect of them.

ALIEN born may become a subject of *England* two ways, by denization and by naturalization: denization is by the king's letters patent; it receives him into the society as a new man, and makes him capable to purchase and to transmit (*a*) lands by descent, but not inheritable to any other relation; for though the king by his charter may admit him into the society, yet he cannot alter the law, which denied him to inherit any relations: but if he be naturalized by act of parliament, then he in all things inherits like a natural-born subject, because in an act of parliament every man's consent is included.

1 Inst. 8. a. 129. a. Palm. 13. Godfrey and Dixon. Cro. Jac. 559.

(*a*) His children born after such denization shall inherit, but not those born before; but all the children of one naturalized shall inherit, as well those born before as after. Co. Lit. 8. Style's R. 139.

A man may be made a denizen in tail, for life, years, or upon condition: so the king may make a particular denization, as if he grants to an alien *quod in quibusdam curiis suis Angliæ audiatur*

2 Jones, 12. Cro. Jac. 559. Co. Lit. 129. a.

atur ut Anglus, *et quod non repellatur per illam exceptionem quod est alienigena.*

Co. Lit. 129. a. 2 Roll. R. 95.

But one cannot be naturalized, either with limitation for years, life, or in tail, or upon condition; for it is against the absoluteness, purity, and indelibility of natural allegiance.

Carter, 185. 2 Keb. 601. 2 Jones, 12. 2 Vent. 2.

If a man is naturalized in *Ireland* by the parliament there, this is no naturalization as to *England*, for the parliament of *Ireland* hath no direct or consequential power of binding *England*; and naturalization is but a fiction, which can only bind those that consent to it.

But a naturalization in *England* makes a man a natural-born subject of *Ireland*. Vaugh. 291. He is here made a natural subject of the *British* dominions. [But *Qu.* since the statute of 25 G. 3. c. 28.]

Roll. Abr. 195. Manning's case. Lane, 58. S. C. [(*a*) This proviso is required by stat. 32 H. 8. c. 16. § 7.]

If an alien be made a denizen, and the letters of denization have a *proviso* (usual in such charters (*a*), that the denizen shall do his liege homage, and that he shall be obedient, and observe the laws of this realm; this *proviso* is not any condition, for though he never doth his liege homage, nor is obedient to all the laws of this realm, yet this will not make the denization void; for if he doth not observe the laws, he shall forfeit the penalties appointed by them.

7 Jac. 1. c. 2. ‖This provision was dispensed with as to Jews by the famous Jew Bill, 26 G. 2. c. 26.; but this statute was repealed by the 27 G. 2. c. 1.‖

By the 7 Jac. 1. cap. 2. it is enacted, "That no person or "persons of what quality, condition, or place soever, being of "the age of eighteen years or above, shall be naturalized or "restored in blood, unless the said person or persons have re- "ceived the sacrament of the Lord's Supper within one month "before any bill exhibited for the purpose; and also shall take "the oath of supremacy and the oath of allegiance in the parlia- "ment house, before his or her bill be twice read; which oath "the lord chancellor, or lord keeper, and the speaker of the "house of commons, have authority to administer."

Molloy, bk. 3. c. 3. § 14.

A denizen is not capable of nobility, or to sit in parliament; for that to have a power of making laws it is necessary he should be totally received into the society, which he cannot be without the consent of parliament.

[Co. Litt. 278. b.]

[If an alien be a disseisor, and obtain letters of denization, and then the disseisee release unto him, the king shall not have the land; for the release hath altered the estate, and it is, as it were a new purchase; otherwise it is, if the alien had been feoffee of the disseisee.]

Fish v. Klein, 2 Meriv. 451.; and see 5 Rep. 52. 2 Ves. 286. 538. 5 Bro. P.C. 91.

‖But where an alien trustee joins in a conveyance, and afterwards obtains an act of naturalization, by which it is declared that he is from thenceforth naturalized, and shall be and is enabled to "ask, take, have, retain, and enjoy all lands which "he may or shall have by purchase or gift of any person what- "soever," and "shall be, to all intents and purposes, as if he "had been a natural-born subject," this act cannot retrospectively confirm the title of the purchaser under the conveyance previous to the act.‖

12 & 13 W. 3.

By the 12 & 13 W. 3. cap. 2. it is enacted, "that no person "born out of these kingdoms, (although he be naturalized or "made a denizen,) except such as are born of *English* parents,

"shall

" shall be capable to be of the privy council, or a member of " either house of parliament, or to enjoy any office or place of " trust, either civil or military; or to have any grant of lands, " tenements, or hereditaments from the crown to himself, or to " any other or others in trust for him."

But this statute by the 1 Geo. 1. stat. 2. cap. 4. is explained so as not to extend to disable or incapacitate any person, who at or before his majesty's accession to the crown was naturalized, to be of the privy council, or a member of either house of parliament, *&c.*; and by this statute is is enacted, " that no " person shall hereafter be naturalized, unless in the bill exhi- " bited for that purpose there be a clause, or particular words " inserted, to declare that such person shall not thereby be en- " abled to be of the privy council, or a member of either house " of parliament; or to take any office or place of *trust* (*a*) either " civil or military, or to have any grant of lands, tenements, or " hereditaments from the crown, to himself, or any other in trust " for him; and that no bill of naturalisation shall hereafter be " received in either house of parliament, unless such clause or " words be first inserted or contained therein. (*b*)" 1 G. 1. stat. 2. c. 4.

[(*a*) A naturalized person is not eligible to the office of constable. 5 Burr. 2788.

(*b*) When any foreigner, distinguished by eminent rank or services, is naturalized, it is usual first to pass an act for the repeal of these statutes in his favour, and then to pass an act of naturalization without any exception. 4 Ann. c. 1. 7 G. 2. c. 3.

[And by 14 G. 3. c. 84. it is enacted, " that no naturaliz- " ation bill shall in future be received, unless there shall be a " clause in it, declaring, that the person to be naturalized shall " not thereby obtain, or become entitled to claim within any " foreign country, any of the immunities or indulgences in trade, " which are or may be enjoyed or claimed therein by natural- " born *British* subjects, by virtue of any treaty or otherwise, " unless such person shall have inhabited or resided within *Great* " *Britain*, or the dominions thereto belonging, for the space of " seven years subsequent to the first day of the session of parlia- " ment in which the said bill of naturalization shall have passed; " and shall not have been absent out of the same for a longer " space than two months at any one time during the said seven " years." (*c*) 14 G. 3. c. 84.

[(*c*) It was usual to insert a clause to this effect in naturalization bills before the passing of this act. The practice had obtained ever since the year 1752, in consequence of a petition to parliament at that time from the City of *London*, complaining of the great abuse of the privileges of naturalization in this respect. Debrett's Deb. 3 vol. 124.]

By statute 13 G. 2. c. 3. every foreign seaman, who in time of war serves two years on board an *English* ship by virtue of the king's proclamation, is *ipso facto* naturalized under the like restrictions as in 12 W. 3. c. 2.; and by statutes 13 G. 2. c. 7. 20 G. 2. c. 44. 22 G. 2. c. 45. 2 G. 3. c. 25. and 13 G. 3. c. 25. all foreign Protestants and Jews, upon their residing seven years in any of the *American* colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, or being three years employed in the whale-fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 G. 2. c. 21. shall 13 G. 2. c. 3. 12 W. 3. c. 2. 13 G. 2. c. 7. 20 G. 2. c. 44. 22 G. 2. c. 45. 2 G. 3. c. 25. 13 G. 3. c. 25.

shall be (upon taking the oaths of allegiance and supremacy, or, in some cases, making an affirmation to the same effect,) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or being of the privy council, and holding offices or grants of land, *&c.* from the crown within the kingdoms of *Great Britain* and *Ireland.* By statute 26 G. 3. c. 50. § 24. 27, 28. and 28 G. 3. c. 20. § 15. every foreigner who has established himself and family in *Great Britain*, and carried on the southern whale-fishery, and imported the produce thereof for the space of five years successively, is declared to be entitled to all the privileges of a natural-born subject.]

(C) Of the Disadvantages which Aliens lie under.

Vaugh. 227. 291. 7 Co. 16. Dyer, 2. pl. 8. [Some have thought that

AN alien cannot purchase (*a*) or inherit any lands [in this country, because an interest in the soil requireth a permanent allegiance, which would probably be inconsistent with that which he oweth to his own natural liege lord.]

the laws against aliens were introduced in the time of *Henry* the Second when a law was made at the parliament of *Wallingford* for the expulsion of strangers, in order to draw away the *Flemings* and *Picards* who were brought into the kingdom by the wars of King *Stephen.* Daniel, 67. Others have thought that the original of this law was far more ancient; and that it is an original branch of the feudal law; for, by that law, no man can purchase any lands without being obliged to fealty to the laws of whom they are holden; so that an alien, who owed a previous faith to another prince, could not take an oath of fidelity in another sovereign's dominions. Spelm. tit. Ligeantia, 368. Custumer, c. 43. Some restraints have been laid upon aliens by the laws of almost all countries. Among the *Romans*, the *cives Romani* only were at first esteemed freemen; afterwards, when their territories increased, all the *Italians* were made free, under the name of *Latins*, only they had not the privilege of wearing gold rings, which was altered by Justinian; at last, all born within the pale of the empire were citizens, *in orbe Romano qui sunt, ex constitutione Imperatoris Antonini cives Romani effecti sunt.* Vicinius, 27. Dig. Lib. 1. tit. 5. fo. 16. Dio Cassius relates the occasion of this constitution being made, in Excerpt. Vales. p. 751. The *Orbis Romanus* of Spanheim is a complete history of the progressive admission of *Latium*, *Italy*, and the provinces, to the freedom of *Rome.* Lord C. J. *Hale* saith, that the law of *England* rather contracts than extends the disability of aliens, because the shutting out of aliens tends to the loss of people, who, when laboriously employed, are the true riches of any country. Ventr. 427. 2 Roll. Rep. 94. (*a*) He may purchase, but cannot hold. Co. Lit. 2. b. Therefore, if tenant in tail, he may suffer a recovery, and dock the remainders. Goldsb. 102. 4 Leon, 82. Bro. tit. Denizen and Alien, 17. On a covenant to stand seised, an use will arise for an alien. Godb. 275. But by act of law, he cannot take, as by descent, courtesy, dower, guardianship. Ventr. 417. Molloy, 464. 7 Co. 25. By a special act of parliament, not printed, Rot. Parl. 8 H. 5. n. 15. women aliens marrying Englishmen, with the king's licence, were allowed in future to demand dower. But this act not extending to those married before, therefore, in Rot. Parl. 9 H. 5 n. 9. there is a special act of parliament to enable *Beatrice* Countess of *Arundel*, born in *Portugal*, to demand her dower. Hal. MSS. Hargr. Co. Litt. 31. b. n. 9. See *acc.* Roll. Abr. 675. The disability of an alien to hold lands for his own benefit is not to be considered as a penalty or forfeiture; but ariseth merely from the policy of the law; and therefore, it hath been adjudged in equity, that he cannot demur to a discovery of any circumstances necessary to establish the fact of alienage. Attorney-General v. Duplessis, Parker, 144. 5 Bro. P. C. 91.]

Sid. 193. 198. Vent. 413 to 429. Collingwood v. Pace. Hard. 224. Co. Litt. 8. *cont.*

And as an alien cannot inherit himself, so he cannot be inherited; the grandfather born in *England*, the son an alien, the grandson born in *England*, the grandson shall not inherit the grandfather, because he must then represent the father, who cannot be represented; but if the father be an alien, and

two

two brothers born in *England*, they may inherit each other, because the descent is immediate, and they do not take by representation of the father.

If the eldest son be an alien, the younger brother born in *England* shall inherit the father; otherwise it were if the eldest son were attainted, because the eldest son and all his descendants are before the younger brother, and the younger brother cannot inherit before that line is extinct; and it is a foreign presumption, to suppose that any of that line should come over and have children in *England*; but the person attainted is supposed to have all his children residing in the kingdom under the king's allegiance, therefore there is a line continuing before that of the younger brother. Vent. 417. 1 Inst. 8. a. Sid. 195. [The father being a natural-born subject, the son would be so now by force of the statutes of 7 Ann. c. 5. and 4 G. 2. c. 21.] Hard. 224.

For the same reason, if an alien hath four sons, the two eldest aliens, and the two younger naturalized, and one of the younger sons purchaseth lands and dies, the eldest brother having issue born within the realm, the younger brother, and not the issue of the eldest, shall inherit.

If an alien hath a son alien, and afterwards is made a denizen, and hath a second son, the second son shall inherit, though the eldest son be alive. Cro. Jac. 539. and so is 1 Inst. 8. a. to be understood.

If an alien hath issue two sons, *A.* born beyond sea, and *B.* born in *England*, and *A.* is naturalized, he shall inherit *B.* Palm. 3. Cro. Jac. 539. Godfrey v. Dixon.

And now by the 11 & 12 W. 3. c. 6. it is enacted, "that all "and every person or persons, being the king's natural-born "subject or subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit and be inheritable, as heir or heirs to any honours, manors, lands, tenements, "or hereditaments, and make their pedigrees and titles by "descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers or mothers, or other "ancestor of such person or persons, by, from, through, or "under whom he, she, or they shall or may make or derive their "title or pedigree, were or was, or is or are, or shall be born "out of the king's allegiance, and out of his majesty's realms "and dominions, as freely, fully, and effectually to all intents "and purposes, as if such father or mother, or fathers or "mothers, or other ancestor or ancestors, by, from, through, or "under whom he, she or they shall or may make or derive "their title or pedigree, had been naturalized, or natural-born "subjects." 11 & 12 W. 3. c. 6. [The reason why lands descending to an alien could not be taken by him, was, that the king could not oblige his person and services. But, as it seemed hard, that subjects within the allegiance, who claimed under him, should be disabled from conveying descent, by the operation of a reason of which the very reverse was true as to themselves, therefore this statute was made. Law of Forfeit. 84.] See 25 G. 2. c. 39. which obviates some doubts that may arise therein, and confines the benefit of this statute to such heirs as shall be living, and capable of taking the estate at the death of the person last dying seised. But in case the descent shall be cast upon a daughter, and there shall be afterwards a son born, or one or more daughter or daughters, the descent so cast upon the daughter shall, in the one case, be entirely divested in favour of the son, and the after-born daughter or daughters shall, in the other case, inherit in coparcenery with her.

If an alien purchases land, the king shall have it upon office found; for since the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be devested of Co. Litt. 2. b. n. 1, 2, 3. (14th edit.) Leon. pl. 61.

of him but by some notorious act, by which it may appear that the freehold is in another; but if an alien purchases lands and dies, then the freehold is in the king without office found, because no man can take it as heir to the alien, therefore the freehold is cast upon the king; but if an alien purchases, and afterwards is made a denizen, and then hath issue, and dies, the issue shall inherit till office found, because there is a person in being to take as heir to the denizen, upon whom the law casts the freehold, which is not to be devested out of him without the solemnity of an office.

Goldsb. 29. pl. 4. Leo. 47. pl. 61. Dyer, 283. pl. 51. *Note;* There are two sorts of offices, an office of entitling, which is under the great seal; and an office of instruction, which is under the seal of the Exchequer; the office of entitling is an inquest, which gives the king a title, as here in the case of aliens, &c. 5 Co. 52. Page's case. See Gilb. Hist. View of the Exchequer, 132, 133, 134. Gilb. Hist. Chan. 12. [The king has a title before office found; the office vests the possession. 5 Co. 52. Hob. 153. Parker, 152. Choses in action belonging to an alien enemy are forfeitable to the crown, but there must be an inquisition to entitle the king; and if a peace be made before the inquisition is taken, the cause of forfeiture is discharged. Attorney-General v. Weeden and Shales, Parker, 267.]

If an alien and a subject purchase lands to them and their heirs, the survivorship shall take place till office found, but the office found entitles the king, and severs the joint-tenancy; for the freehold is in the alien by the solemnity of livery, till it is devested out of him by solemn office found; and every person, who is resident in the kingdom, is supposed a natural-born subject, till the contrary be found by office.

Roll. Abr. 194. Hob. 214. Cro. Jac. 512. Allen, 14. Stile, 20, 21. 41. 76. Parker, 156.

If an alien purchases a copyhold in fee in the name of *J. S.* in trust for him and his heirs, though it be found that the copyhold was in trust for the alien, and that *J. S.* had the legal estate, yet the king must sue in Chancery to have the trust executed for his benefit.

Fish v. Klein 2 Meriv. R. 431.

‖An alien cannot hold property as a trustee, or make a good conveyance of it to a purchaser. Where an alien was a joint devisee in trust, and joined in a conveyance of the trust estate to a purchaser, and after the conveyance, in order to confirm the title, procured an act of naturalization, whereby he was authorized, "to take, retain, have, keep, and enjoy all manors, lands," *&c.* the Vice-Chancellor held, that the estate being out of the alien at the time of the conveyance, and the act being silent as to it, the vendee was not in a better situation than the alien himself. — *N. B.* The vendors had endeavoured to have retrospective words introduced into the naturalization-act, but a departure from the common form was found impracticable.‖

St. 13 & 14 Car. 2. c. 11. § 10.

[An alien infant, under the age of twenty-one years, cannot be a merchant trader within this realm, nor can he enter any goods in his own name at the custom-house.]

[Merchant strangers were first permitted to rent houses, and to buy and sell their own commodities themselves, without any in-

An alien cannot purchase a lease for years of lands, but he may, if he be a merchant (*a*), take a lease of a house for his habitation, for years only, and this is for the encouragement of commerce; for if an alien trade he must have an abode among us; but if he depart the kingdom, or die, it goes to the king, not to his executors or administrators (*b*); because it was only a personal privilege annexed to the alien, as a merchant,

chant, for the encouragement of commerce, and consequently must expire with him, without going to his executors or administrators.

terruption from the citizens, about the year 1284; for before that time they hired lodgings, and their landlords were the brokers, who sold all their goods and merchandizes for them. Rapin, 361. note 9. Fab. Chron. This indulgence, together with the loss of their brokerage, seems to have provoked the resentment of the citizens: for, in the Parliament Roll, in the 18th year of *Edward* the First, (*viz.* A.D. 1289), we find the following petition, and answer: "*Cives London. petunt quod alienigenæ mercatores "expellantur a civitate, quia ditentur ad depauperationem civium,*" &c. — Responsio: "*Rex "intendit quod mercatores extranei sunt idonei et utiles magnatibus, &c. et non habet concilium "eos expellendi.*" 2 Inst. 741.] (*a*) Poph. 36. Co. Litt. 2. b. and the notes in 14th edit. Roll. Abr. 194. must be a merchant. (*b*) Not if he goes beyond sea, and leaves servants in his house during his absence. Dyer, 2. b.

But by the 32 H. 8. c. 16. paragr. 13. it is enacted, "that "all leases of any dwelling-house or shop within this realm, or "any of the king's dominions, made to any stranger artificer, or "handicraftsman born out of the king's obeisance, not being "denizen, shall be void, and of no effect; and the person so "taking such lease forfeits 100*l.* and the person letting 100*l.* "more; one moiety to the king, and the other to him that will "sue for the same."

32 H. 8. c. 16. par. 13. [Sir W. Blackstone (1 Black. Com. 372.) says, that the statutes, prohibiting alien artificers to work for themselves, are generally held to be virtually repealed by the stat. 5 Eliz. c. 7.; but there doth not appear to be any other authority to that effect. 1 Wooddes. 375. note.] ‖The statute 32 H. 8. c. 16. § 13. is unrepealed, and surely requires the revision of the legislature. Though the statute avoids leases, &c. made to stranger artificers, yet if such artificer occupies a dwelling-house or shop under an agreement which does not amount to a lease, as if he be tenant from year to year, or for one year or a shorter time, an action for use and occupation lies against him. 2 Show. 135. And if an alien-amy occupy a dwelling-house of the yearly value of 10*l.* as such tenant, and reside in it forty days, he gains a settlement. The King v. Eastbourne, 4 East, 103.; and see Hargr. & But. Co. Litt. 2. b. notes 7, 8.‡ and 1 Will. Saund. 7, 8.‖

Upon this statute the case was, an action of debt was brought upon an obligation, and upon *oyer* demanded of the condition, it was recited, and it referred to indentures, which indentures were likewise recited *in hæc verba;* the indentures were upon a lease of a house in *Westminster*, reserving rent with covenants, *&c.*; the defendant pleaded 32 H. 8. c. 16. and that he was an alien, *&c.* and so would avoid the lease and the rent, and all the security; divers exceptions were taken to this plea. 1. He has not said where he was an artificer, but this was over-ruled; for it is a personal quality, and shall follow the person, and is universal. 2. The defendant ought to have set forth and pleaded the indenture; but *per Cur.*, — since the plaintiff has brought it into court, as must be intended, and set it forth, the defendant may plead upon it without setting it forth again. 3. The plea is, that *indentura prædicta vacua existit*, and this was likewise overruled; for the law is, that the indenture and bond make but one security, and if the covenant be released before breach, the bond will signify nothing. 4. This appears to be a messuage or tenement, but he has not averred it to be a mansion-house or shop, according to the statute; and upon this point the court at first were divided. *Keyling* held, that *messuagium* is *mansum, et quod clare constat non debet verificare. Morton:* Though *messuagium* be a word of art, and may be applied to other things by a large sense, as to a barn or chapel; yet in propriety it is a mansion-

Sand. 1, to 10. Sid. 308. S. C. 2 Keb. 102. 116. S. C. 2 Show. R. 135. S. C. cited, and agreed to be good law. [In this case two actions were brought; the one, debt for rent; the other, the action here mentioned. In both the statute was pleaded; it was in the first that the objection here made, for the want of the averment, was taken: for the other stood clear of that exception. The opinion of the court was not

on the point; for the defendant, believing that judgment would be pronounced.

mansion-house, and shall be intended so. *Twisden* and *Wyndham*, that it ought to have been averred; for he must bring himself precisely within the statute, especially in such a case as this, where he would avoid his own contract; but afterwards the defendant had judgment.

against him, submitted.]

2 Show. R. 135. Pilkington v. Peach, but no judgment. (*a*) But *per Cur.*,–there are other ways to evade it; as, to make an agreement for as long as you and I please, at the rate of 20*l.* per annum for an assumpsit for so much as it is worth.

A special verdict found, that the plaintiff made a lease of a house to the defendant, who was found to be an alien artificer, and that this lease was made by indenture between the plaintiff and defendant, and that there was no other security or promise made by the defendant; and that the defendant entered, and enjoyed so long, for which the plaintiff brought a *quantum meruit*; to which the defendant pleaded *non assumpsit*; and the matter being found *ut supra*, the court held, that an *assumpsit* would not lie. 1. Because this (*a*) would evade the statute. 2. A promise in law (*b*) never takes place where there is an actual agreement.

will lie thereon; or, you shall have my house for so long as you and I please, it is worth. (*b*) No such thing. 6 Mod. 131.

3 Mod. 94. Hil. 1 Jac. 2. Bridgham and Frontee.

Debt upon an obligation for performance of covenants in a lease of a house, *&c.*; the defendant pleaded the statute of 32 H. 8. c. 16. and set forth that he was a vintner, and alien artificer; and upon demurrer it was insisted upon for him, that a vintner is as much an artificer, and within the meaning of the statute, as a mercer, draper, or grocer. Chief Justice: — This statute refers to another made 1 R. 3. c. 9. *which prohibits alien artificers to exercise any handicraft in* England, *unless as servant to a subject skilful in the same art, upon pain of forfeiture of his goods*; now the mystery of a vintner chiefly consists in mingling wines, and that is not properly an art, but a cheat; so the plaintiff had judgment.

7 Co. 25. Co. Litt. 31. a. b. n. 9. Vent. 417. But by the law of the crown, if the king marry an alien, she shall be endowed, because princes cannot marry according to their dignity, unless to persons abroad; and now, by a special act of parliament, not printed, 8 H. 5. 12. 15. women aliens who marry with the king's licence, to *Englishmen*, shall be endowed; so of *English* women who marry aliens by the same licence; but this latter part can only be meant where the alien husbands are after made denizens, that their wives shall have dower of lands purchased before; for otherwise they, having no capacity at all to hold any lands of any estate of freehold, can derive no title of freehold to their wives, and this act never intended to put them in a better condition for that purpose than they were before; but it must be intended of land purchased before their denization; since as to land purchased after, they would not want the assistance of an act of parliament, being by the common law dowable of these. Roll. Abr. 675. If one marries a woman alien without such licence, and then sells his lands, and after the wife is made a denizen, she shall not be endowed, because her capacity began by the denization,

If a woman alien, be she friend or enemy, marry a subject, she shall not be endowed; because, by the policy of the common law, all aliens are disabled from acquiring any freehold amongst us: dower, too, is an estate created by act of law; and therefore the law, which *nil frustra agit*, shall not transfer an estate to one who cannot keep it; but must immediately, in respect of her legal disability, give title to another: and there is a diversity between such acts of law and the acts of the party himself; as if an alien makes an actual purchase, *&c.* so aliens shall not be tenants by the courtesy, by the same reason.

denization, and she was before absolutely disabled to hold any land; but if this marriage were by the king's licence, then it seems the wife may be endowed, because being married conformable to that act, her title to dower began presently, and cannot be defeated by any after-act of the husband's. Co. Litt. 35. a. 13 Co. 25.

Aliens seem not incapable [of the superior ecclesiastical preferments (*a*),] and though this practice, says *Watson*, has always prevailed, yet, says he, it proceeded rather from the pope's usurpation, and a submission to his pretended authority in church matters, than from any nice distinctions made use of between spiritual and laymen, that the former would less discover the secrets of the realm, or transport the treasure thereof to nourish the king's enemies, than the latter. Comp. Incumb. 213, 214. Hughes's Parson's Law. C. 10. 2 Roll. Abr. 348. 4 Inst. 338. Cotton. 41. 1 Wooddes. 377. 388.

(*a*) Aliens prohibited to take benefices without the king's licence. 3 R. 2. c. 3. 7 R. 2. c. 12. 1 H. 5. c. 7. [To the first of these statutes, it is said, in the old abridgment, that the Lords Spiritual did not assent.]

[By the statute of 24 G. 3. c. 35. the bishop of *London*, or any bishop appointed by him, is enabled to ordain aliens either as priest or deacons, without requiring them to take the oath of allegiance, provided that they do not officiate in any place within the king's dominions: and further, that in the letters testimonial of such orders, the name of the person so ordained be inserted, with the addition of the country to which he belongs, and the further description of his not having taken the oath of allegiance, being exempted from so doing by this act. 24 G. 3. c. 35.

Aliens are disqualified to serve on juries or inquests, except juries *de medietate linguæ*. 6 G. 4. c. 50. § 3. Alienage is a ground of challenge to a juror, and the objection must be taken when the party has an opportunity of challenging. And it seems not to be a ground of challenge to a special juror. See the King v. Sutton, 8 Barn. & C. 417.

By 56 G. 3. c. 86. various regulations are established respecting aliens arriving in or resident in this kingdom; but this statute, after having been continued by several subsequent acts, has now expired. By 7 G. 4. c. 54. (commencing 1st *July*, 1826) the above act is recited as being about to expire, and it is recited to be expedient, in lieu of its regulations, that provision should be made for a complete registration of all aliens, and it is enacted that every alien in the realm at the commencement of the act shall, within fourteen days, make a declaration of his abode, name, rank, *&c.*; and if a domestic servant, then also of the abode, *&c.* of his master or mistress, and of the country from whence he came, or of which he is a native, and of the time when he last came into the realm, and shall, within the said fourteen days, transmit the same to one of his majesty's secretaries of state, or, if in *Ireland*, to the chief secretary of the lord lieutenant. 7 G. 4. c. 54.

By § 2. the master of every vessel arriving from foreign parts shall immediately on arrival declare to the chief officer of customs at the port of arrival, whether there is any alien on board, and shall specify the number (if any) on board, or who have landed from his vessel, and their names, rank, *&c.* under penalty § 2.

of 20*l.* for every false declaration, and of 10*l.* for every alien whom he shall have neglected to declare.

§ 3. By § 3. every alien who shall, after the commencement of the act, arrive in the kingdom shall deliver to the chief officer of the customs at the port of debarkation any passport in his possession, and declare in writing the name of the vessel in which he shall arrive, and also his name, rank, *&c.* and the country from whence he shall have come, and the place to which he is going, and the name of the person (if any) in the realm to whom he is known; and if any alien shall neglect or refuse to deliver up his passport, he shall forfeit 5*l.*; and if he shall neglect to make such declaration, or shall wilfully make a false one, he shall (by § 9.), on conviction before two justices, forfeit 50*l.*, or be imprisoned not exceeding six months.

§ 4 & 5. By § 4 & 5. the officer to whom the passport shall be delivered and declaration made shall register the declaration, and shall deliver a certificate thereof to the alien, and shall, within two days, transmit the declaration and copy of the certificate to the alien office, *Westminster.*

§ 6. By § 6. every alien shall, within one week after his arrival, produce such certificate at the alien office, *Westminster*, and declare where he intends to reside, or, if the place to which he intends to go is more than five miles from *Westminster*, shall transmit such certificate and declaration by post to the alien office, or, in case of neglect, shall be punished as above.

§ 7. By § 7. every alien shall, on the first day of *January* and *July*, or within a week therefrom, make a declaration of his residence, and state therein at what place he intends in future to reside, and transmit the same to the alien office, under the penalties above mentioned.

§ 8. By § 8. one of the secretaries of state may require any alien to make a declaration of his actual place of residence, and of the place at which he intends to reside in future, at shorter intervals than those above mentioned; and if the alien shall refuse, he shall be punished as above.

§ 10. By § 10., on receipt at the alien office of any declaration in the cases aforesaid, a clerk nominated by the secretary of state shall, within three days, make out a certificate, setting forth the name, rank, *&c.* of the alien, and his place of abode, and shall transmit the same by post to such alien; and any alien being by his own default without such certificate, or residing without lawful excuse in any other place than that expressed in it, shall forfeit 20*l.*

(*For further provisions, see the act.*)‖

(C 2) How far the Laws of this Country attach upon Aliens.

1 Wooddes. 379. Fost. Cr. AN alien, whilst he resides here, is generally subject to our laws, and owes a local and temporary allegiance to the sovereign,

reign, by whose authority those laws are administered, and by whom his person and property are protected; consequently, if during such residence he commit an offence, which in the case of a natural-born subject would amount to treason, he may be dealt with as a traitor; and this whether his sovereign be in amity or at enmity with us. My Lord *Coke*'s position, therefore, that an alien enemy cannot be guilty of treason, must be taken with this restriction, namely, where he invades this country, and is taken in war: in which case, indeed, he is not punishable at all, according to the course or by the rules of the municipal institutions, but is to be dealt with according to the law of nations in martial affairs.

Law 185. 1 Hawk. P. C. c. 17. § 5. St. 9 Ann. c. 16. Hob. 271. 3 Inst. 4, 5.

It is declared by statute 32 H. 8. c. 16. § 9. That every alien, coming into the king's dominions, shall be bounden by and unto the laws and statutes of this realm.

But a *French* prisoner of war, being indicted for privately stealing in the shop of a goldsmith and jeweller a diamond ring, which by statute 10 & 11 W. 3. c. 23. is an offence punishable with death, the judge who tried him thought it improper to proceed capitally upon a local institution, and therefore advised the jury to acquit him of the circumstance of stealing in the shop, and to find him guilty of simple larceny to the value laid in the indictment.]

Fost. Cr. L. 188. note. Moliere's case. In this case, a learned writer observes, the humanity of the judge was at least more conspicuous than the soundness of the principle, as a point of mere law. 1 Wooddes. 382.

[‖Aliens are subject to be tried here for offences committed on the high seas, under the provisions of the 28 H. 8. c. 15.; but it appears that they are not liable to trial by special commission, issued under the 33 H. 8. c. 23. for offences committed on shore in foreign countries. Where a *Spanish* prisoner of war entered as a volunteer on board an *East India* company's ship, and, while remaining one of the crew of such ship, committed a manslaughter, at *Canton* in *China*, where the ship lay, and was indicted at the *Old Bailey* for feloniously killing and slaying, on the 43 G. 3. c. 113., a case was stated and argued before the twelve judges, on which no judgment was given; but the prisoner was afterwards discharged.‖

The King v. Depardo. 1 Taunt. 26. Aliens are entitled to be tried by a jury *de medietate linguæ*. See 6 G. 4. c. 50. § 47.

[Aliens are comprehended within the statute 25 E. 3. c. 4. for extending the benefit of clergy, according to a very old interpretation of that law.

2 Hawk. P. C. c. 33. s. 5. Bro. tit. Clergy. p. 20.

A *resident* alien, it hath been adjudged, is entitled to the benefit of a general pardon; but, if he is not in the kingdom at the time of the promulgation of the pardon, he is not within the benefit of it, for he is no otherwise a subject but *by his residence here.*

Courteen's case, Hob. 270.

Aliens are subject to, and shall have advantage of the statutes against bankrupts.

St. 21. Jac. 1. c. 19. s. 15.

The property of an alien resident abroad, consisting of stock in the public funds, or other personal effects in this country, is subject to the controul of the Court of Chancery. (*a*)

1 Atk. 19. ‖(*a*) That court will not protect the copyright of a foreigner. Delondre v. Shaw, 2 Sim. 237. Where both parties were subjects of *Denmark*, money belonging to the wife was ordered to be paid to the husband, the law of *Denmark* not requiring a settlement. Dues v. Smith, 1 Jac. 544.‖

Pipen v. Pipen, Ambl. 25. Burn v. Cole, *Id.* 415.

But if an alien resident abroad dies intestate, his whole property here is distributable according to the laws of the country where he so resided: but the residence must be stationary, not occasional, else the municipal institutions will not attach upon the property.]

Melan v. Duke of Fitz James. 1 Bos. & Pull. 138.; and see Talleyrand v. Boulanger, 3 Ves. 449.

‖ Where an alien in a foreign country entered into a contract which, according to the law of that country, did not subject his person to arrest, it was held by the Court of Common Pleas (*Heath* J. *dissent.*), that he was not liable to arrest upon it in this country.

De la Vega v. Vianna. 1 Barn. & Adolph. 284.; and see 8 Barn. & C. 638. 1 Jac. & W. 405.

But Lord *Ellenborough* in 2 East. 445. expressed his dissent from this doctrine, and it has lately been overruled by the Court of King's Bench, who have decided that a party may be arrested in this country for a debt contracted in a foreign country, though the law of such country do not allow arrest for debt.

38 G. 3. c. 50. § 9. The provisions of this act were repealed, but were re-enacted by subsequent acts, which were last continued by 3 G. 4. c. 37, and they are now expired.

By 38 G. 3. c. 50. § 9. it was enacted, That aliens in this country, who had quitted their countries by reason of the revolution and troubles in France, should not be liable to be arrested for any debt or cause of action contracted while such aliens were not within the dominions of his majesty; and in case of any such arrest, the alien should be discharged by his majesty's courts, or by a judge in vacation.

Sinclair v. Charles Philippe, Monsieur de France, 2 Bos. & P. 363.

Charles Philippe, Monsieur de France (afterwards *Charles* the Tenth), having contracted with *Sinclair*, at *Coblentz*, for raising troops for the service of the *French* princes, was held to bail in *England* for money paid here, and on an account stated here; but the Court of Common Pleas held, that the money paid, and the adjustments in *England*, were referable to the original contract abroad, and that the case was within the statute, and they discharged the defendant on a common appearance. ‖

(D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend and one whose King is at Enmity with ours.

Co. Lit. 119. b. Anders. 25. Dyer, 2. b.

AN alien friend may have personal actions (*a*), but not real; an alien enemy shall not have real, personal, or mixed action. The reason why an alien friend is allowed to maintain personal actions is, because he would otherwise be incapacitated to merchandize, which may be as much to our prejudice as his; but, as to the allowing of him to maintain real actions, there is no reason for it, because there is no necessity that he should settle amongst us: an alien enemy (*b*) is disabled, from the prejudice that may accrue to the king and kingdom, if he were allowed to maintain any action.

[(*a*) And this though resident abroad. Dyer, 2. b. But in such case the courts of K. B. and C. P. require security for costs; not, however, until bail is put in. 1 Term R. 267. 362. 2 H. Black R. 118. 4 Term R. 697.] (*b*) But who shall be said an alien enemy, and how it shall be tried; *vide* 9 Co. 31. a. That it shall be tried by the record in Chancery, whether his prince is at peace or enmity with ours, for every league

league is of record; and Cro. El. 142. Owen, 45. That open acts done by his prince are sufficient, and that it is not necessary that a war be proclaimed. *Turks* and Infidels are not *perpetui inimici*, nor is there a particular enmity between them and us; for the difference between their religion and ours does not oblige us to be enemies to their persons. Salk. 46. pl. 2. said to be the words of L. K. *Littleton*. 1 Atk. 51. *Vide* Skin. 167. 204.

A merchant stranger shall have an action for saying he is a bankrupt, for by law he may have personal actions, and these words tend to impair his credit in his trade. Yelv. 198. Tuerlcote and Morison. Bulst. 134. S.C.

[By an express law, *viz.* St. 31 H. 6. c. 4. redress is provided for aliens who are injured by the king's subjects on the sea, or in any part of the realm. 2 R. 2. s. 2. 3 Bulstr. 28.]

‖An alien enemy, father of a child born in *England* of an *English* wife, is entitled to the custody of the child; and the Court of King's Bench will not interfere with his right, unless they see reason to believe that he intends to abuse it, by sending the child out of the kingdom, or in some other manner.‖ The King v. De Manneville, 5 East, 221.

An alien friend, merchant, may upon a statute extend lands, which the king shall not have upon office, and for which he shall have an assize in case of ouster; for the main end and design of both the statute-staple and merchant was to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts at the day assigned for payment. 11 Ed. 3. Rot. 87. Dyer, 2. b in margin.

An abbot, prior, or prioress alien shall have action real, personal, or mixed, for any thing concerning the possessions or goods of their monastery here in England, because they sue in their corporate capacity, and not in their own right to carry the effects out of the kingdom. (*a*) Co. Lit. 129. a. b. Palm. 13. S. P. Molloy, 270. S. P.

[(*a*) Upon the same principle it hath been holden, notwithstanding the statutes of 5 R. 2. c. 5. 7 R. 2. c. 12. and 1 H. 5. c. 7. that an alien, incumbent on an ecclesiastical benefice, may maintain an action concerning the glebe, tithes, &c. Hughes's Parson's Law, c. 10. cites Dr. Seaton's case, M. 8 Jac. 1. C. B.]

So an alien friend may be an administrator, and shall have administration of leases, as well as personal things, because he hath them in another's right, and not to his own use. Cro. Car. 8. Sir Upwell Caroon's case. Vent. 417. S. C. cited.

But it has been long doubted, whether an alien enemy may maintain an action as executor: for on the one hand it is said, that by the policy of the law, alien enemies shall not be permitted to bring actions for the recovery of effects which may be carried out of the kingdom, to the impoverishment of ourselves, and enriching of the enemy; and therefore public utility must be preferred to private convenience: but on the other hand it is said, that these effects of the testator are not forfeited to the king by way of reprisal, because they are not the alien enemy's, he being to recover them for others; and if the law allows an alien enemy to possess the effects as well as an alien friend, it must allow him power to recover them; and if it were otherwise, it would be a prejudice to the king's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. Cro. Eliz. 142. Owen, 45. Wentworth's Office of Executors, 15. Molloy, 870. Cro. Eliz. 683. Mo. 431. Carter, 49. 191. Skin. 370. *Vide suprà*, tit. *Abatement* (B), 3.

‖Not only an action cannot be maintained by an alien enemy, but an action lies not in favour of one, though the plaintiff on Brandon v. Nesbitt, 6 Term R. 23.

the record be a subject of *Great Britain*. Thus, where an action was brought on a policy by the *English* agent who effected it, to which the defendant pleaded that the persons interested (whose interest was alleged on the record) were aliens born, and that before the ship sailed their sovereign was at open war with the king of *Great Britain*, the plea was held good; and a replication, that the persons interested were indebted to the plaintiff in more money than the value of the property insured, was held insufficient.

Flindt v. Waters, 15. East, 260.; and see 13 Ves. 71.

But where the plaintiff sued as the *British* agent effecting the policy, and the defendant pleaded the general issue, and it appeared that the parties interested only became alien enemies after the loss happened, but before the suit; it was held, that the defendant could not take advantage of that fact by a plea in bar, since the disability was only temporary, and might be removed by the war ceasing.

M'Connell v. Hector, 3 Bos. & P. 115.

An *Englishman*, residing and carrying on trade in an enemy's country, is regarded as an alien enemy, and disqualified to sue.

Omealey v. Wilson, 1 Camp. 481.

And the mere residence, without trading, would seem to take away his right to sue.

De Luneville v. Phillips, 1 New R. 97.

Roberts v. Hardy, 5 Maule & S. 533.

However, where an *Englishman* went to *America* with his family immediately after a declaration of war by that country against *Great Britain*, but before such declaration was known in *England*, and an act of congress enabled *British* subjects to quit *America* within six months from such declaration, but he remained in that country, but did not trade; it was held, that this mere residence did not, under the circumstances, amount to adhering to the king's enemies, so as to incur the disability of alien enemy.

Albrecht v. Sussmann, 2 Ves. & B. 323.

If an alien is carrying on trade in an enemy's country, he is it seems disabled to sue, notwithstanding he is resident in such country, as consul of a neutral state.

If a contract be made with an alien enemy while he is such, it cannot be enforced in *England*, even after peace is restored. Thus, where *A.*, an alien enemy having goods in the hands of *B.* in *England*, drew bills upon him, which *B.* accepted on account of the goods, and *A.* indorsed them to *C.*, a *British* subject residing in an alien's country, who did not sue till after peace was made; it was held, that as *A* could not get at his funds in this country directly, neither could he do it by indorsing the bills to a third party, who must have been cognizant of his object, and the plaintiff accordingly could not recover.

Willison v. Patteson, 7 Taunt. 439.; and see Brandon v. Curling, 4 East, 410.

Antoine v. Morshead, 6 Taunt. 237. 1 Marsh 558. S. C.; and see Daubuz v. Morshead,

Where bills were drawn by one *British* prisoner of war, detained in *France*, in favour of another on a *British* subject in *England*, and indorsed by the payee to a *French* banker, an alien enemy, who sued on them after the restoration of peace; it was held by the Court of Common Pleas, that the action was sustainable under the peculiar circumstances of the case, since the

the bills were not drawn in favour of an alien enemy, but by one *British* subject in favour of another, upon a *British* subject; and that the indorsement conveyed a good title to the plaintiff, on which the king might have sued during the war; and he not having so done, the plaintiff might sue after the proclamation of peace. 6 Taunt. 532. *Esp.* Boussmacker, 13 Ves. 71.

The plea of alien enemy is a bar to a bill for relief in equity, as well as to an action at law: but it would seem not sustainable to a mere bill for discovery; for, as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery. Albrecht v. Sussmann, 2 Ves. & B. 325.

If an alien enemy comes here *sub salvo conductu*, he may maintain an action; so if an alien amy comes here in time of peace *per licentiam domini regis*, as the *French* protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action, for suing is but a consequential right of protection (*a*); and therefore an alien enemy, who is here in peace under protection, may sue a bond; *aliter* of one commorant in his own country. Salk. 46. pl. 1. Wells and Williams. Ld. Raym. 282. Fost. Cr. Law, 186. Bro. tit. Propertie, p. 38. (*a*) But an alien enemy, who has such protection, must plead it. Farel. 150. Sylvester's case. Ld. Raym. 283. [But if alienage simply be pleaded, it is not necessary to reply, that the plaintiff is not an alien enemy. 2 Stra. 1082.]

[It hath been heretofore holden, that an alien enemy may maintain an action in this country for the recovery of a right claimed to be acquired in actual war; but that opinion hath been since over-ruled, and it hath been determined in the Exchequer Chamber, that by the municipal law of this country no such suit can be supported. Record v. Bettenham, 5 Burr. 1734. 1 Black R. 563. Cornu v. Blackburn, Dougl. 619. Anthon v. Fisher, Dougl. Ad. 30.

An alien enemy, prisoner of war, is not entitled, under any circumstances, to his discharge upon a *habeas corpus*.] Anon. 2 Black. R. 1324.

[Whether an alien enemy *born*, who is a prisoner of war, can maintain an action in the courts here, does not appear to have been decided, though judges have expressed strong opinions in the affirmative. In a case where the question was raised, no judgment appears to have been given. But where a native of a state in amity with *Great Britain* was taken prisoner while serving on board an enemy's ship, and by the authority of the king's officer was put on board a *British* merchant ship, then in want of hands, and did his duty like the rest of the crew on the voyage to *Great Britain*; it was held, that he might maintain an action for wages as a seaman for the voyage. Maria v. Hall, 1 Taunt. 33. Sparenburgh v. Bannatyne, 1 Bos. & Pull. 163.

[A foreigner is allowed to put in his answer to a bill in equity in his own language, but a sworn translation must be also filed with it. Simmonds v. Du Barre, 3 Bro. Ch. R. 263.

Interrogatories for the examination of witnesses who are foreigners must be in *English*; and being afterwards translated, their answers must be translated by sworn interpreters.] Lord Belmore v. Anderson, 4 Bro. Ch. R. 90.

(E) Of pleading Alienage.

Co Lit. 129. b. 7 Co. 26. 6 Co. 47. 2 Keb. 98. Leon. 78, 79. Carter, 50. Rast. Ent. 605. *quod vid.*

IF one born in *Jersey*, or elsewhere within the king's obedience, brings a real action, and the tenant pleads that the demandant is an alien born under the obedience of the *French* king, and out of the ligeance of, *&c.* the demandant may reply, that he was born at such a place in *England*, within the king's allegiance, *&c.* and such hath ever been the manner of pleading in such case. (*a*)

(*a*) *Qu.* If the best method would not be, to say, born within the king's obedience, *viz.* at, &c. the venue laid by the plaintiff in his declaration?

7 Co. 1. 9. Lit. Rep. 26.

In an assize *tempore* Jac. 1. the defendant pleaded, that the plaintiff was born *apud E. infra regnum Scotiæ ac intra ligeantiam dicti domini regis regni sui Scotiæ, ac extra ligeantiam dicti domini regis regni sui Angliæ;* and this was holden no good plea, because it referred ligeance and faith to *England*, and not to the king.

Sid. 357. Freeman v. King.

In debt on an obligation, which was for payment of rent reserved by lease for years; the defendant pleaded the 32 H. 8. c. 16. and that he was an alien artificer, *&c.*; the plaintiff replied that he was no alien artificer; but, having laid no place where he was born, the replication was held bad.

Carth. 302. Nicholas v. Powlet. But see Rast. Ent. 252. Hern. 361. Asht. 11. the like replications. If the plaintiff had concluded his replication with an averment only, the negative clause, *non alienigena*, had been only

The defendant pleaded in abatement, that the plaintiff was an alien enemy, born in such a place in *France;* the plaintiff replied that he is *indigena*, and born at such a place in the kingdom of *England, et non alienigena modo et formâ prout*, &c. *et hoc petit quod inquiratur per patriam:* upon demurrer to this replication it was holden to be ill; for that the plaintiff did not rely upon the first part of it, that he was born in *England*, and so conclude with an averment, that an issue might be taken by the other side, *viz.* that he was not born in *England*, and that this matter might be triable by a proper *visne;* but here he hath put *alien* or *not alien* in issue, *viz. non alienigena modo et formâ*, which cannot be tried for want of a *visne;* and therefore judgment was given that the bill should abate.

surplusage, and helped upon a general demurrer; so resolved, Carth. 265. Brodeck v. Briggs, *Vide* Comb. 212.

Comb. 394. Fortes. 222. *per Holt* C. J.

Where alienage is pleaded in abatement, and the plaintiff replies *indigena*, he may either take issue, or conclude *et hoc paratus est verificare;* but if in bar, he must take issue; and this is the reason of the difference in the two precedents in *Rastal.*

Bro. tit. Denizen, 3. 10. Rast. Ent. 252. 605. Cart. 49. Co. Lit. 129. a. b. (*a*) Not to be pleaded to a personal action

If alienage be pleaded to an alien in league, it must be pleaded in abatement or disability of the plaintiff; but if it be to an alien enemy, it may be pleaded either in abatement or in bar to the action, because it is forfeited to the king as a reprisal for the damages committed by the dominion in enmity with him. (*a*)

without alleging the plaintiff to be an enemy. 2 Stra. 1082. See 12 Mod. 125. [In an action by an alien enemy for a right acquired in actual war, the defendant, it seems, may avail himself of the objection of alienage without specially pleading it. Anthon v. Fisher, Dougl. Ad. 30.] ‖When the plaintiff is an alien enemy at the time of the cause of action arising, this

this may be given in evidence on the general issue, or pleaded in bar; but when he became so subsequently to the accruing of the cause of action, it only goes to his disability to sue, and must be pleaded in abatement. Doug. 649. note 132. 6 Term R. 24. 15 East, 260. 3 Camp. R. 152. The courts will not in general allow the plea of alien enemy to be pleaded with any other plea. 1 Bos. & Pull. 222. 2 Bos. & Pull. 72. 12 East, 206. 10 East, 326. And the plea being disfavoured, must aver that the plaintiff was born in a foreign country at enmity with this country, and came here without letters of safe conduct. 8 Term R. 166. If the plaintiff being an alien amy at the commencement of the suit, afterwards in the course of it becomes an alien enemy, and this appears on the record, judgment will be given that he cannot further maintain his suit. De Bret. v. Papillon, 4 East, 502.‖

[Alienage cannot be pleaded to a *scire facias* on a judgment; for the plaintiff having been admitted to be able to recover judgment, cannot be disabled from having execution upon it by matter which was precedent to it.] West v. Sutton, 2 Lord Raym. 853.

‖And where the plaintiffs had become alien enemies since the verdict, the court refused on application to stay the judgment and execution, saying, if the defendant had any remedy at law, he might avail himself of it.‖ Vanbrynen v. Wilson, 9 East, 321.

AMBASSADORS.

AN ambassador (*a*) is a person sent by one sovereign prince (*b*) to another, to transact in the place of his sovereign such matters as relate to both states. The manner of appointing and receiving public ministers, their duty, power, and privileges, *&c.* being chiefly regulated by the civil law, or law of nations, I must refer to other books for those matters, and shall here only insert what seems most worthy of notice in our law books; observing that our law herein pays the greatest regard to rules prescribed by the civil law and the law of nations.

(*a*) Difference between ambassador ordinary and extraordinary. Molloy, b. i. c. x. An agent represents the affairs only, but an ambassador the grandeur of his master. Molloy, *ibid.* (*b*) By the law of nations, none under the quality of a sovereign prince can send ambassadors. *Ibid.* And it is said by Lord *Coke*, that there can be no ambassador without letters of credence from his sovereign to another that hath a sovereign authority. 4 Inst. 153. But the electors and princes of the empire send or receive ambassadors, touching matters which concern their own territories. Molloy, *ibid.* And so the *Hans* towns, being free imperial cities, have the same *regalia* by prescription or grant. *Ibid.* But a king deprived of his kingdom and royalty, hath lost his right of legation. Molloy, bk. i. c. x. § 5. *in margin.* ‖Grotius states the rule that none but *summi imperii compotes inter se* can lawfully send ambassadors, but admits exceptions in the case of civil wars, when a nation is so divided that it is doubtful where the *jus imperii* resides, or where two claimants contend with doubtful right for the succession. De Jure B. et P. lib. ii. c. xviii. § ii. 3.; And Bynkershoek, in such cases, ascribes the power of sending embassies to that faction which has the *rei agendi potestas*, and therefore joins with Grotius in approving the censure of Tacitus, Histor. lib. iii. c. lxxx. on the violence offered by *Vespasian* to the embassy of *Vitellius*, since *Vitellius* and the senate then held the chief power of the state; — but had *Vespasian* sent ambassadors to *Vitellius* they would, says Bynkershoek, have been only the messengers of rebellious subjects, who have clearly no authority, according to the law of nations, to send embassies to their sovereign, as he shews with reference to instances in modern history. Bynk. Quæst. Jur. Pub. lib. ii. c. iii. A sovereign *de facto* enjoys this right without reference to

to his title. *Ibid.* And this author extends it to municipalities and provinces having competency to transact those matters which their embassy concerns. He even sneers at the punctilio of Queen *Elizabeth* in refusing to receive an embassy from the Duke of *Alba*, the object of the embassy being to obtain the restoration of a sum plundered. *Ibid.* p. 207.; and see Wicquefort Ambassadeur, lib. i. § 2.‖ If sent from a king or absolute potentate, though in his letters of credence he is termed an agent or *nuncius*, yet he is an ambassador or legate. 4 Inst. 155. Ambassadors were sent to the pope, being a temporal prince, and also his ambassadors received here, who were sworn not to attempt any thing prejudicial to the king or kingdom. 4 Inst. 156.

Hob. 78. 115, 114. Don Diego Servienti de Acuna, the *Spanish* ambassador, and Sir Richard Bingley.

An ambassador cannot, as procurator, exhibit a bill in our courts for a certain number of his fellow subjects, without an authority from them; for every procurator must sue in the name of the principal, and cannot be such without his allowance; nay, the king cannot make a procurator for all his subjects, without their consent, nor would a release, sentence or discharge against such a one be a discharge against the principal: also the office of an ambassador doth not imply a private procuration, but for the public; and not for a particular subject, otherwise than it concerns the king and his ministers to protect him in foreign kingdoms in nature of a negociation of state; and therefore, though he may prosecute and defend for a private subject at the council-table, which is a court of state, yet when he comes to settled courts he must observe the essential parts of their proceedings.

4 Inst. 152. Molloy, b. 1. c. 10. § 9. S. C. cited, and said, that ambassadors cannot,

In the bishop of *Ross*'s case, *ann.* 13 Eliz. the question being *an legatus, qui rebellionem contra principem ad quem legatus concitas, legati privilegiis gaudeat, et non ut hostis pœnis subjaceat*, it was resolved he had lost the privilege of an ambassador, and was subject to punishment.

by the law of nations, be defended when they act against the state, or person of the king with whom they reside; and *vide* 3 Bulst. 28. and Roll. Rep. 185. in which last book, the king's attorney makes a difference between a conspiracy to kill the king and other treasons committed by an ambassador. ——‖On the much contested question as to an ambassador's criminal responsibility to the courts of the country where he resides, the authorities of our common law are not quite in accordance with the writers on the law of nations, though the practice of this country has, in almost all instances, conformed to the principles laid down by the latter. The jurists who treat of the *jus gentium*, with one consent allow to the government to which the ambassador is sent, all such proceedings against him in case of his criminal machinations against the state as are justified by principles of *self-defence or preservation*. If he engages in hostile attempts with open force, he may be repelled with force as an open enemy, and his life may be taken, if necessary, to suppress his plots. If he is detected in secret conspiracies, he may be arrested and examined, and his papers seized, and his person confined as long as the necessity of the case requires it. But when the danger and necessity are past, or in cases of crimes not affecting the state (however atrocious), where such danger and necessity never exist, these writers are unanimous in asserting the ambassador's immunity from all proceedings for mere purposes *of punishment*; for as Grotius expresses it, "*securitas legatorum utilitati quæ ex pœna est præponderat:*" besides that the deserved punishment may be obtained through the medium of the ambassador's own sovereign, or if he refuses it, may be a just cause of war. Grotius de Jure B. et P. lib. ii. c. xviii. de legationum jure. Vattel, b. iv. c. vi., enforces the same principles by cogent reasonings drawn from the necessity of an ambassador's general exemption from municipal law; and Bynkershoek, *de Foro Legatorum*, c. xvii., xviii., xix. ransacks ancient and modern history for examples bearing on the question, which certainly shew the preponderating usage of nations, ancient and modern, to be consistent with the principles of the above writers; though some instances of punishment are not wanting, as that mentioned by Livy. lib. xxv. c. vii. of the *Tarentine* envoys, and by Sallust. Bell. Jugurth. c. 35. and others. On the other hand, among our own text authorities, Lord *Coke* broadly asserts, (4 Inst. 153. *post.* p. 188.) that an ambassador may be tried as a private alien for treason, felony, adultery, or any other crime against the law of nations —a doctrine which would render him liable for all such offences against municipal law as are *mala*

in

in se, including every criminal fraud. Lord *Coke* cites no authority for his position, which is quite collateral to the case of Pallache, of which he is then treating. Sir Matthew Hale, 1 Hist. Pl. C. 99. expresses himself doubtfully as to an ambassador's liability to punishment as a traitor for treasonable machinations, but holds him clearly amenable for other capital offences, as rape, murder, &c. on the technical ground that the indictment runs *contrà pacem regis* only, and not *contrà ligeantiæ suæ debitum*. *Foster* is clear that, as to *state crimes*, ambassadors are to be considered at worst but as enemies subject to the law of nations, never as traitors subject to the municipal law, unless, perhaps, in case of attempts against the king's life — a distinction also adopted by Blackstone, b. i. c. vii., upon the authority of a statement of Sir Francis Bacon as counsel, in 1 Roll. Rep. 185. and State Tri. vol. ii. p. 881. *Foster*, however, is clearly of the opinion of Lord *Hale* with respect to murder and other offences. The only instance which appears in our books in accordance with these doctrines, (for Pallache's case, 4 Inst. 152. and 5 Bulst. 27. is no authority one way or the other, since whether an ambassador or not (which was doubtful) his offence did not amount to piracy, and therefore he was not triable,) is that of the *Portuguese* ambassador's brother, Don Pantaleone de Sa, who was tried and beheaded for murder during the protectorate 1654. (See the case at length, Stat. Tri. v. 5. 462.) This person, as appears from the account of Doctor *Zouch* one of the commissioners appointed to try him (see the preface to his tract *Solutio quæstionis de Legati delinquentis competente Judicio*, 5 Sta. Tri. 482.) was not himself invested with any ambassadorial character, though Hume, v. vii. 237. erroneously states him to have been joined in the commission with his brother. The case is not therefore an example of the punishment of an ambassador; though it must be admitted that, as part of the ambassador's retinue, the individual would, according to Grotius, Vattel, and Bynkershoek, be entitled as a *comes legati* to the same immunity as the ambassador himself, — and the threats of violence by which *Cromwell* compelled the ambassador to deliver him up, were contrary to the express authority of Grotius, that a person in the retinue of an ambassador committing the gravest delinquency ought only be demanded at his hands, but not taken by force. Lord *Hale* mentions the case in support of his doctrine above stated: — neither *Foster* nor *Blackstone* condescend to notice it. Bynkershoek mentions the fact without comment, de Foro Legatorum, c. 17. *Clarendon* calls it an "exemplary piece of justice," which it might be, and nevertheless be contrary to the voluntary law of nations. Hume, V. vii. 237. and Burnet, Hist. own Times, vol. 1. consider it as a violation of that law; and though it appears to have been quoted by the Emperor of *Germany* as a precedent to justify carrying off an offensive plenipotentiary from a congress at *Cologne* (5 Sta. Tri. 486.), yet, perhaps, considering the period and circumstances of the case, and the weak condition of *Portugal*, which was then purchasing a peace of *Cromwell*, it hardly affords a very authoritative decision even as to the responsibility of an ambassador's attendant for an atrocious crime against natural law; and as to the case of an ambassador himself, or of a crime against the state, it clearly affords no precedent at all. Vattel, *ubi sup.* § 124. mentions an instance from Sully's Memoirs, v. vi. c. 1. of a *French* gentleman in the suite of the Duke *de Sully* (then Marquis *de Rony*) ambassador in *England*, who, having committed a murder, was tried by the ambassador and some gentlemen of the embassy, and found guilty, and sentenced to lose his head, and afterwards delivered up to the *English* for execution — a proceeding which Vattel appears to approve, since, though he admits the right of trial, he pronounces an ambassador to have no power to execute a criminal in the country where he officiates. The case of the Bishop of Ross in the text is merely an opinion of the civilians consulted, for no *judicial* proceedings were taken against the bishop, who was sent to the Tower, and afterwards ordered to depart the kingdom. 5 Sta. Tri. 501, 502. Similar instances of *restraint* and *dismissal* (but none of *punishment*), have occurred from the earliest periods of our history down to the seizure of the Count *Gyllenberg* the *Swedish* minister, and his papers in 1716 (see them collected, 5 Stat. Tri. 492.); and they fall strictly within the principle of *prevention*, as stated above from the writers on the law of nations. Even *Cromwell* himself, when his life was conspired against by the *French* minister *De Bas*, who refused on the ground of privilege to answer interrogatories of the council, contented himself with ordering the minister to depart the kingdom in forty-eight hours (see the case stated from Wicquefort and Thurloe in 5 Sta. Tri. 512.), as Queen *Elizabeth* had done in the case of a similar conspiracy. See Camden, Eliz. Ann. 1587.‖

If *A.* is sent as ambassador of the king of *Morocco* to the *States*, and by them accepted as an agent, and there being war between the king of *Morocco* and the king of *Spain*, the king of *Morocco* makes a commission to *A.* to take *Spaniards*, and their goods; and

4 Inst. 152. Resolved in Pallache's case, by the Ch. Just. Master of the

Rolls, and the Judge of the Admiralty, upon a reference to them by the Lords of the Council upon the prayer of the *Spanish* ambassador, to proceed against him as a pirate upon the stat. 28 H. 8. c. 15. Roll. Rep. 175. S. C. cited. 5 Bulst. 27, 28. S. C. cited.

and the king of *England* grants him letters of safe conduct as a public minister, and the *States* license him to levy men, to furnish ships, *&c.*; and there being a league between *England* and *Spain* and *England* and the *States*, and war between *Spain* and the *States*, *A.* takes at the *Canaries* a *Spanish* ship laden with goods, and by stress of weather is driven to *Plymouth*, he shall not be tried as a pirate here (*a*); for by the law of nations an ambassador ought to be safe and sure in every place. (*b*)

(*a*) But *per* Roll. Rep. it was agreed by the civilians, that he ought to proceed *civiliter* for the goods, because *in solo amici*; and 3 Bulst. 29. A suit being in the Court of Admiralty against several merchants that had bought goods, the civilians held, because they were bought *in solo amici*, proceeding might be for them in the Court of Admiralty; and it is said, that accordingly the court denied a prohibition: But, *per* 4 Inst. 154. though this was the opinion of some of the civilians in Palache's case, yet the contrary had been resolved, 2 Jac. 1. ‖(*b*) But Pallache's case seems to have been decided on the ground that, whether he were an ambassador or not, his acts did not amount to piracy, because there was enmity between his master the King of *Morocco* and the king of *Spain*, and one enemy cannot be a felon for taking the goods of another enemy.‖

4 Inst. 153.

If a man that is banished is sent ambassador to the place from which he is banished, he cannot be detained or offended there. (*c*)

‖(*c*) But it is clear that the sovereign of such individual might refuse to receive him as an envoy; and if he afterwards came into the country, he might be dealt with as a subject. In *France*, the government refuses to admit native subjects as ministers of foreign powers. Vattel, b. iv. c. viii. s. 112.; and in 1681 the states-general of *Holland* passed a decree, refusing to receive as ambassador or minister any native subject, except on condition of his retaining his character of subject, both as to civil and criminal jurisdiction. Bynkershoek, de Foro Legatorum, c. xi. And I believe the practice of the *British* government is against receiving native subjects in such capacity; it seems they refused to receive Sir *B. Thompson* Count *Romford*, as minister from the elector of *Bavaria*. 5 Sta. Tri. 504. If a sovereign, however, does admit such subject as an envoy, and without any condition expressed, Vattel, *ubi suprà*, considers that his character of subject is suspended, and that he is entitled to all the immunities of an ambassador.‖

2 Vern. 317. Pilkington v. Stanhope. Formerly it was held treason to kill the king's ambassador. *Vide* 5 Inst. 8. *Vide* Co. Lit. 130.

A bill was exhibited in Chancery against one, then ambassador at the court of *Spain*: an order was obtained, that all proceedings should cease until his return from his embassy; and, on motion to discharge the order, it was agreed on debate, that a protection lies for an ambassador, *quia profecturus*, or *quia moraturus*, and that at law he may cast an essoin for a year and a day, and may afterwards renew it if occasion continues; and the court ordered the proceedings to stay for a year and a day, unless the defendant should sooner return into *England*.

4 Inst. 153. Molloy, b. i. c. x. § 12. Same rule cited. Roll. R. 175. Same rule agreed by the civilians.

If a foreign ambassador (being *pro-rex*) committeth a crime which is *contra jus gentium*, as treason, felony, adultery, *&c.* he loses the privilege and dignity of an ambassador, and may be punished here as any othr private alien, and is not to be remanded to his sovereign but of courtesy. (*a*)

So, 3 Bulst. 28. Hawk. P. C. 51. S. P. Fost. Cr. L. 187, 188. [In the case of the King against Guerchy, the attorney general, under the direction of the Court of K. B., granted a *noli prosequi* on an indictment against the *French* ambassador for an attempt to assassinate M. *D'Eon*. It does not appear from the report whether this direction was given upon the naked ground of the defendant's protection from his character as ambassador, or whether the judgment of the court were not influenced by the special circumstances of the case, which induced a suspicion that the prosecution was a gross calumny upon the defendant, and instituted and kept on foot merely for the purpose of defaming him. 1 Black. R. 545.

‖(*a*) See note on this subject, *suprà*, p. 186.‖

So

So, upon contracts which are good *jure gentium*, he must answer. 4 Inst. 153.

But in Molloy, b. i. c. x. § 16. it is said, that most certainly by the civil law, his moveables, which are accounted an accession to his person, cannot be seized on as a pledge, or for payment of debt, though by leave of the king or state where he resides; for all coercion ought to be far from an ambassador, as well that which touches his necessaries as his person: if, therefore, he hath contracted a debt, he is to be called upon kindly; and if he refuses payment, letters of request are to go to his master, so that the same course may be taken with him as with debtors in another territory; and notice is taken of the opinion of my Lord *Coke*, which seems to the contrary; and 3 Bulstr. 28. it is agreed by the civilians, that the person of an ambassador cannot be arrested. [An ejectment brought, and left at the house of the ambassador, conceived no breach of privilege in the case of Mons. Colbert for York-house. M. 28. Car. 2. *B. R.* Molloy, b. i. c. x. § 15. in margin.] ‖It is not very clear what Lord *Coke*, in the passage in the text, intends by contracts good *jure gentium*. All the authorities on the law of nations, and the almost universal practice of *European* states, pronounce public ministers free from civil proceedings for debts and contracts, &c. in the ordinary courts, unless in case of ministers trading. See Grotius de Jure B. et P. lib. ii. c. xviii. § 9, 10. Bynkershoek de Foro Legatorum, c. x. xiv. Vattel, b. iv. c. viii. And this was the rule of our common law before the statute of *Anne*, which is only declaratory. Com. Dig. Ambassador (B). Ca. temp. Talbot, 280.‖

But if a thing be only *malum prohibitum* by act of parliament, private law or custom of the realm, and not *malum in se jure gentium*, *nec contra jus gentium*, an ambassador residing here shall not be bound by it. 4 Inst. 153. Molloy, b. i. c. x. § 13. Same rule cited. Roll. R. 175.

The same rule agreed by the civilians. ‖Lord *Coke*, in the passage in the text, must, it would seem, be understood to mean that an ambassador *is not amenable to the ordinary tribunals* of the country for breach of mere positive institutions; for that he is *bound by them*, and held by the *jus gentium* to observe them, clearly appears from the writers on that law. Vattel lays it down that his independency does not excuse him from conforming to the laws and customs of the country in all his external actions, so far as they are unconnected with the object of his mission and character; and he instances the cases of prohibitions to pass in a carriage near a powder magazine, or over a bridge, or to inspect the fortifications of a town, which an ambassador is bound to respect. Vattel, b. iv. c. vii. § 93.‖

And now by the 7 Ann. c. 12. it is declared, "that all writs "and processes that shall at any time be sued forth or prose- "cuted, whereby the person of any ambassador, or other public "minister of any foreign prince or state, authorized and received "as such by her majesty, her heirs or successors, or the do- "mestic servant of any such ambassador (*a*), or other public "minister, may be arrested or imprisoned, or his or their goods "or chattels (*b*) may be distrained, seized, or attached, shall be "deemed and adjudged to be utterly null and void. 7 Ann. c. 12.

(*a*) A certificate that the person was a *menial* servant, not good. Barnes, 370.

On motion to supersede a process on this statute, the court held, that it was not necessary to shew that he actually lived in the house, but that he must shew the nature of his office, that the court may judge of it; also that he is not such a one as comes within the description of any of the statutes against bankrupts. Fitzgib. 200. 2 Stra. 797. Ld. Raym. 1524. Ca. tem. Hardw. 3, 4. 5 Burr. 1677. See 10 Mod. 4, 5. [He must also swear to the actual performance of the service. 3 Burr. 1731. But where one swore positively to an actual engagement as *English* secretary to the *Bavarian* minister, and to the actual performance of that employment, the Court of K. B. thought themselves bound to allow his privilege, though it appeared that he had formerly been a trader, and there were several other suspicious circumstances. 3 Burr. 1478. Lord *Mansfield* was clear, that an officiating land-waiter at the custom-house could never be esteemed a *bonâ fide* domestic of a foreign minister. 1 Burr. 401. Nor can a purser of a man of war. 3 Wils. 33. Nor a trader residing at his own house, his supposed master being abroad. Barnes, 374. Nor can an ambassador take one into his service for the purpose of screening him from his creditors. 3 Burr. 1676. Therefore, the person claiming privilege must swear that he was in the service at the time of the arrest. 4 Burr. 2015. *Qu.* Whether an ambassador can retain one in the character of physician? *Ibid.* A secretary to a foreign minister is privileged, though his name be not registered in the office of either of the secretaries of state, the statute requiring that only for the purpose of proceeding against the parties criminally. 3 Term R. 79. 4 Burr. 2017. S. P.

Therefore,

Therefore, though his name be not registered, the sheriff must execute the process, notwithstanding the production of a certificate. 1 Wils. 20.] ‖This last passage is unintelligible; and the report is hardly less so: the meaning appears to be, that if the party is not registered, the sheriff should execute the process, since he cannot harm himself in so doing. (*b*) Where a servant of an ambassador resided in a private house, not the ambassador's, and let out a part of it in lodgings, it was held that his goods in such house were not exempt from distress for poor's rate, such goods being in no way necessary for the convenience of the ambassador. Novello v. Towgood, 1 Barn. & C. 554.‖

"Provided, that no merchant or other trader whatsoever "within the description of any of the statutes against bankrupts, "who hath or shall put himself into the service of any such "ambassador or public minister, shall have or take any manner "of benefit; and that no person shall be proceeded against "as having arrested the servant of an ambassador or public "minister, by virtue of this act, unless the name of such servant "be first registered (*c*) in the office of one of the principal secre- "taries of state, and by such secretary transmitted to the sheriffs "of *London* and *Middlesex* for the time being, or their under "sheriffs or deputies; who shall, upon the receipt thereof, hang "up the same in some public place in their offices, whereto "all persons may resort and take copies thereof without fee or "reward.

"The persons who, by suing out writs, *&c.* violate this law, "which is declared a public act, to be punished at the discre- "tion of the two chief justices and lord chancellor, or any two "of them."

‖(*c*) If not actually a servant, though his name be registered, he is not within the act. Fitzg. 200.]

Abr. Eq. 350. pl. 4. Goodwin and Archer, Pasch 1729. 2 Wil. Rep. 452. And a like order said to be made by my Lord *Cowper*, after answer put in, Trin. 1709. between Barret and Buck.

One protected by the *Genoese* ambassador brought a bill in Chancery, and was ordered, though after an answer put in (*d*), to give security to answer the costs, in the same manner as if he were a foreigner (*e*); because, by the above statute, all processes against ambassadors and their servants are made void; so that if the bill should be dismissed, no process could issue against him.

(*d*) But it has been denied in the Exchequer, even before answer, where the bill was for an injunction to stay the defendant's proceedings at law in ejectment, because the plaintiff was in a manner forced into this court, (*viz.* the Exchequer,) and did not come in originally. Bunb. Rep. 272. pl. 349. If the motion be before answer, the defendant will not be obliged to put one in, until the plaintiff give bond with a surety to the senior six clerk not towards the cause in 40*l.* penalty for answering costs. 2 Will. 452. pl. 142. Mosely, 175. pl. 89. (*d*) A deposit in money will not be permitted instead thereof. Bunb. Rep. 55. pl. 53.

Barbuit's case, Ca. Tem. Talb. 281.

[A consul, or any person acting in an office of that kind, it seems, is not entitled to privilege.

Ibid. ‖The question of a consul's privilege from arrest as a public minister, was discussed in Marshal v. Critico, 9 East, 447. and Clarke v. Critico, 1 Taunt. 106.; but it was not necessary to decide the point. It was however determined in Vieash v. Becker, 5 Maule & S. 284., on the authority of Vattel and Wicquefort, that he is not a public minister entitled to privilege from arrest on mesne process. The authority of Bynkershoek de Foro Legatorum c. 10. accords with this decision.‖

The privilege of a public minister is annexed to his situation; it is the privilege of the state that sends him, and not that of the individual: he cannot therefore wave it, or forfeit it, by becoming a trader, *&c.*]

AMENDMENT AND JEOFAIL.

(A) Of Amendments at Common Law.
(B) The several Statutes of Amendment and Jeofail.
(C) Whether the Statutes of Amendment extend to the King, or to any Criminal Proceedings.
(D) In what Cases the Proceedings in Civil Causes are amendable, and the Manner thereof, as by amending one Part of the Record by another: and herein
1. *Of the Original Writ and Process.*
2. *Of the Imparlance Roll.*
3. *Of the Plea Roll.*
4. *Of the Jury, Process, and* Nisi Prius *Roll.*
5. *Of the Verdict.*

(E) What Defects may be amended, or are aided after Verdict: and herein
1. *Of the Want of sufficient Certainty in the Plaintiff's Declaration in not setting forth his Cause.*
2. *Of Repugnancy and Surplusage.*
3. *Of Insufficiency in the Defendant's Bar.*
4. *Of immaterial and informal Issues.*

(F) Of amending the Judgment.
(G) At what Time the Amendment must be made; and therein of Records removed out of inferior Courts, and the paying of Costs.
(H) Where Records defaced by Design or Accident will be set right and amended.
[(I) Of Amendments in Equity.]

(A) Of Amendments at Common Law.

AT common law there was but little room for amendments, as appears by the several statutes of *amendments and jeofails*, and likewise by the constitution of the courts; for, says *Britton*, the

Britt. 2. 8 Co. 156. (a) This ordinance of

E. 1. was so strictly observed, that when Ch. Just. *Ingham*, in his reign, moved with compassion for the circumstances of a poor man who was fined 13*s.* 4*d.* erased the record, and made it 6*s.* 8*d.*, he was fined 800 marks. 4 Inst. 255.

the judges are to record the parols deduced before them in judgment; also, says he, E. 1. (*a*) granted to his justices to record the pleas pleaded before them, but they are not to erase their records, nor amend them, nor record against their enrolment, nor any way suffer their records to be a warrant to justify their own misdoings.

9 H. 7. 16. b. 4 H. 6. 16. b. 8 Co. 157. 2 Hawk. P. C. 192.

Hence it appears, that regularly at common law, neither false *Latin*, the omission of a word, syllable or letter, or other defect or variance from the approved and legal forms, were amendable.

8 Co. 157. Blackmore's case.

But out of this general rule there are the following exceptions: 1. All mistakes were amendable the same term, because it is a roll of that term, and so in the breast of the court during the whole term, and then a new roll might be brought in the cause, and consequently the same roll may be amended.

8 Co. 156. b. 7 H. 6. 45. *Vide* Cro. Car. 144. Sand. 317.

That part of the count which records the writ was amendable at common law, though of a subsequent term; because the recording of the writ was surplusage, and the judges were not to record against a former record.

[In penal actions, while the proceedings are in paper, mistakes are amendable at common law; and it has been done where several terms had elapsed since the commencement of the suit, and issue had been joined. 2 Burr. 1099. So where the record had gone down to trial, and been afterwards withdrawn. 5 Burr. 2633.] But this is a matter of discretion in the court, and a similar application has been refused. 2 Term R. 707.] ‖There is no difference as to amending at common law between penal and other actions; 1 Stra. 137. 2 Stra. 1227. 1 Wils. 256. 1 Burr. 402. 2 Ken. 82. 3 Maule & S. 450. Nor between civil and criminal cases; 1 Salk. 51. Ld. Raym. 1068. 6 Mod. 285. 4 East, 175. Tidd, 711, 712. (9th edit.)‖

2 H. 4. 4. Fitz. Amendment, 7. 61. Bro. Amendment, 26.

An essoin, if the plaintiff's name were mistaken, or if it was made as guardian, when there was no guardian in the writ, was amendable at common law, because such an essoin was contrary to the writ, and consequently an enrolment of it would contradict a former writ.

8 Co. 156. b. Roll. Abr. 899. *Vide* for this Cro. Eliz. 619. Stile, 339. Yelv. 155. 2 Mod. 316. 12 Mod. 8. 684. Stra. 139. 2 Stra. 754.

Continuances could be amended at common law; as where *A.* brought a bill against *B.* who vouched *C.* who entered into warranty, and pleaded to issue; a *venire facias*, and a *jurat. inter A.* and *B.* was put in, which *jurat.* ought to have been between *A.* and *C.*; and because it appeared by the record of the issue, and the award of the *venire facias*, and the *venire* itself, that the *jurat.* ought to have been between *A.* and *C.* this was was amended, otherwise it would have been an enrolment against a former record.

8 Co. 156. *Vide infrà*, letter (C).

In the case of the king, the writ was amendable where the fault was in the form, as in a *quare impedit* brought by the king, the writ was *presentere* instead of *presentare*; and it was amended; for it could not be intended that the original institution of the court was to destroy or lessen the prerogative of the king.

Tidd's Prac. 697. (9th edit.) and cases there cited.

‖At common law, when the proceedings were *ore tenus* at the bar of the court, if any error was perceived in them, it was presently amended: afterwards, when the pleadings came to be *in paper*, it was

was thought reasonable, that the parties should have the like indulgence; and hence it is now settled, that whilst the proceedings are in paper, and before they are entered of record, the court or a judge will amend the declaration, plea, replication, *&c.* in form or substance, on proper and equitable terms; and declarations in actions on bail-bonds may be amended (in the Common Pleas) as well as any others. Amendments are commonly made by summons and order at a judge's chambers, and now by a judge at *Nisi Prius*, or on the Circuit, by virtue of 1 G. 4. c. 55. § 5.

The declaration may be amended even after a plea in abatement of misnomer. 1 Salk. 50. 1 Ld. Raym. 669. 7 Term R. 698. 3 Maule & S. 450. 2 Chitt. R. 8. 28

Or of the statute of additions. 2 Stra. 739. 2 Ld. Raym. 1472.; but see 1 Salk. 50. 2 Ld. Raym. 859.

Or of *nul tiel* record. 1 Wils. 87. 7 Term R. 447.

Or after verdict, by increasing the damages according to the truth as found by the jury, a new trial being granted to enable the defendant to resist the enlarged demand. 7 Term R. 132. 2 Chitt. R. 27.

So after a nonsuit was set aside in prohibition, the plaintiff had leave to amend the suggestion. Franklin v. Holmes, Tidd's Pract. 697.

And the Common Pleas has permitted a new trial, and amendment of the record after a nonsuit for a variance, in an undefended cause. 3 Taunt. 31. 2 Bos. & Pull. 243. 9 East, 335. 5 Barn. & A. 896.; but see 5 Moo. 164. 2 Bro. & B. 397. S. C. *contrà*.

Though in the King's Bench formerly the plaintiff was not allowed to add a new count (or a new cause of action, which was considered the same,) to his declaration, after plea pleaded, or after the second term from the return of the writ, (that being the time within which he is bound to declare,) it is now the practice in the King's Bench to permit a new count to be added after the end of the second term, when the cause of action is substantially the same, but not if different. And though formerly the Common Pleas would not allow new counts to be added after the end of the second term, yet the rule is now the same as in the King's Bench, — that they may be added, provided they contain a fresh cause of action. Tidd's Prac. 697. (9th edit.) and cases there cited.

But the Common Pleas will not allow such an amendment to affect bail discharged; and in an action against a sheriff's officer for extortion on one statute, they refused to allow the addition of counts on another statute for the same offence. 6 Taunt. 483. 5 Moo. 350.

But admitted the declaration to be amended from *assumpsit* to debt, in an action for money lost by stock-jobbing on the statute 7 G. 2. c. 8. 6 Taunt. 419. 2 Marsh. 124. S. C.; and as to amendments in real actions, see Tidd's Prac. 755. (8th edit.), and of Fines and Recoveries, see *ibid.*, and tit. *Fines and Recoveries*, Vol. III.

Before plea in general no costs are payable on amending the declaration, except costs of the application; and in the King's Bench the declaration may be amended in matter of *form* after

the general issue pleaded, and before entry, without paying costs, or giving an imparlance. (a) But if the amendment be in matter of substance, or after the general issue is entered, or a special plea pleaded, the plaintiff must pay costs, or give an imparlance at the election of the defendant. (b)

In the Common Pleas it is a rule, that before the declaration is actually entered, the plaintiff may amend it, paying costs, or giving an imparlance at his election, by order of a judge or prothonotary; and even after it is entered, if the amendment be but a small matter that does not deface the roll, it is amendable, before issue or demurrer entered, by rule of court, upon payment of costs, and liberty to plead with a new or further imparlance.

When amendments are made at the trial, they are made without costs, if the action is to be defended on the merits. (c) On amending the declaration in the King's Bench, after plea pleaded, the defendant is at liberty to plead *de novo* (if his case require it) in two days after amendment made, and payment of costs (d); and if a rule to plead has been entered the same term, though before the amendment, it is sufficient, otherwise a new rule must be entered. (e)

But in the Common Pleas the defendant is entitled, in all cases on amendment of the declaration, to a new four-day rule to plead (g), and he may plead *de novo*, if he has occasion, but he is not obliged to vary his first defence. (h)

The reason for not permitting a new count or right of action to be added after the second term, being that the plaintiff is obliged to declare within two terms, does not apply to pleas, replications, &c.; and they therefore may in general be amended at any time, so long as they are in paper. (i)

5 Barn. & Ald. 896. Tidd, 709. (9th edit.)

After a demurrer, the courts would not formerly give leave to amend without consent of the adverse party. (k) But it is now settled, that after demurrer, or joinder in demurrer, either party is at liberty to amend while the proceedings are in paper (l), and even after the proceedings are entered on record, and the demurrer has been argued, the courts will give leave to amend where the justice of the case requires it, upon payment of costs. (m) But, in the Common Pleas, after a party has once amended on demurrer, the court will not give him leave to amend again on second demurrer. (d) On similar grounds, the courts will sometimes give a party leave to withdraw his demurrer after argument, and plead or reply *de novo*, to let in a trial of the merits (n) but, in such cases, they will always take care that the opposite party is not delayed or prejudiced. (o) The giving or withholding leave to withdraw demurrer is entirely discretionary in the court, and they refused it to the plaintiff in an action against bail, whom they are inclined to favour. (p)‖

(a) Tidd, 707. (9th edit.)
(b) 2 Stra. 890. 950. Lofft. 155. Tidd, 707.
Tidd, 707. 2 Stra. 950.
(c) 3 Taunt. 81. Tidd, 708. Ry. & Moo. 380.
(d) Tidd, 708.
(e) 2 Salk. 517, 518. 520. 8 Term R. 87. 2 Chitt. R. 332.
(g) 2 Black. R. 785. Tidd, 708.
(h) Barnes, 273.
(i) 1 Wils. 223. Barnes, 22. 1 H. Black. 238. 1 Stark. Ca. 312. 2 Chitt. R. 28.
(k) Ld. Raym. 310. 668. 679. 1 Salk. 50.
(l) 2 Salk. 520. Gilb. C. P. 114.
(m) 1 Barnard. K. B. 213. 220. Barnes, 8. 2 W. Saund. 402. (5th edit.) 2 Stra. 735. 954. 976. 1 Burr. 321. 2 Chitt. R. 292. Tidd, 710.
(d) 2 H. Black. 561.; *sed vide* 8 Taunt. 515. 2 Moo. 566.
(n) Dougl. 385. 452. 1 Ken. 335. Say. R. 316.; and see 2 Chitt. R. 5.
(o) 2 Burr. 756. 1 East, 572.
(p) S R. 116. 1 East, 135. 5 Price, 412. 7 Dow. & Ry. 41. Tidd, 710, 711.

(B) The several Statutes of Amendment and Jeofail.

THE tying down the courts so strictly not to alter their records after the first term was found very inconvenient, and many judgments were reversed by the misprison of clerks, *&c.* wherefore it was enacted,

By 14 Ed. 3. c. 6. "that by the misprision of a clerk in any "place wheresoever it be, no process shall be annulled or dis- "continued by mistaking in writing (*a*) one syllable or one "letter too much or too little; but as soon as the thing is per- "ceived by challenge of the party, or in other manner, it shall "be hastily amended in due form, without giving advantage "to the party that challengeth the same because of such mis- "prision."

14 E. 3. c. 6. (*a*) The judges construed this statute so favourably for the suitors, that they extended it to a word. 8 Co. 158. a. But they were not agreed whether they could make these amendments as well after judgment as before, 8 Co. 157. b., which occasioned the 9 H. 5. c. 4., by which it is declared, that the judges shall have the same power as well after as before judgment, as long as the record or process is before them; and this statute is confirmed by 4 H. 6. c. 3. with an exception that it shall not extend to process on outlawry, or to records or processes in *Wales*. But according to 2 Sand. 40. this last exception, and the like exception in 8 H. 6. c. 15. seem to be annulled by the statute of 27 H. 8. c. 26. by which it is enacted, that the laws of *England* shall be used, practised, and executed in *Wales*.

Though these statutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but processes, which they did not construe in a large signification, so as to comprehend the whole proceedings, but confined it to the mesne process and jury process: wherefore to enlarge the authority of the courts,

8 Co. 157. a. An original, or other writ in nature thereof, not included within the word process.

By the 8 H. 6. c. 12. it is enacted, "that for error assigned "in any records, process, or warrant of attorney, original writ, "or judicial panel or return, by razing or interlining, or by "addition, subtraction, or diminution of words, letters, titles, "*&c.* no judgment or record shall be reversed or annulled, "but the judges, in any record, process, word, plea, warrant of "attorney, writ, panel or return in affirmance of judgment, may "amend all that which to them seems to be the misprision "of the clerk, (except appeals, indictments of treason, felony "and outlawries of the same, and the substance of the proper "names, sirnames and additions left out in originals and exi- "gents, contrary to the 1 H. 5. c. 5. and other writs containing "proclamation;) and if certified defective, the parties in affirm- "ance of judgment may allege the variance between the re- "cord and certificate, and if found and certified it shall be "amended."

8 H. 6. c. 12. 8 Mod. 314. 12 Mod. 523. Ld. Raym. 565.

By the 8 H. 6. c. 15. "the judges in any records or processes "before them, by error or otherwise, or in returns of sheriffs, "coroners, bailiffs of franchises, or others, may amend the mis- "prision of the clerks of the courts, or of the sheriffs, coroners, "their clerks and other officers whatsoever, in writing a letter "or syllable too much or too little."

8 H. 6. c. 15.

‖(a) The above are strictly speaking the only statutes of amendment; the rest commencing with 32 H. 8. c. 30.

As these statutes (a) extended only to what the justices should interpret the misprision of their clerks and other officers, it was found, by experience, that many just causes were overthrown for want of form, not aided by any of these statutes, though they were good in substance: wherefore, for further relief of suitors,

are statutes of jeofails. 1 Salk. 51. They extend to penal as well as other actions. 2 Stra. 1227. Dougl. 114. 1 Marsh. 180. 2 Chitt. R. 25.; but not to criminal cases. 1 Salk. 51. 2 Ld. Raym. 1307.; nor as it should seem to process in inferior courts. Willes. 122.; but see Mr. Durnford's note, *Ibid.*, and Tidd, 712.‖

32 H. 8. c. 30. On this statute a careful and exact collector has the following notes, *vide* Danv. Abr. 352. (b) But yet an issue upon the *vi et armis* is not within the act; but it must be one joined upon the special matter alleged.

The 32 H. c. 30. enacts, "that if (b) any issue be (c) tried (d) "by the oath of twelve men, for the (e) party plaintiff or de- "mandant, or for the party tenant or defendant, in any courts "of record, judgment shall be given, any mispleading, lack of "colour, insufficient pleading, or jeofail, any miscontinuance "or (g) (h) (i) (k) discontinuance or (l) misconveying of (m) (n) "process, misjoining of the issue (o), lack of warrant of attorney "of the party (p) against whom the issue shall be tried, or other "negligence of the parties, their counsellors, or attornies, had "or made to the contrary thereof notwithstanding; and the "judgment shall stand according to the said verdict, without "reversal."

Cro. Jac. 599., and *vide* Sand. 81, 82. (c) But if in replevin the plaintiff is nonsuit after evidence, and the jury assess damages for the avowant, this is no trial within the act; for the inquiry of the jury is only in nature of an office of inquest. Cro. Eliz. 339. adjudged, 412. adjudged, and *vide* Gouls. 49. Hob. 69. (d) So that an issue upon *nul tiel record* is not within the act. 11 Co. 8. a. Cro. Jac. 304. (e) In trespass against *A.* and *B.*, *A.* pleads not guilty, and *B.* confesses the action, and a writ of enquiry is awarded upon the roll, but after *quoad B.* there is no continuance entered, and after the issue is found for the plaintiff, admitting there is a discontinuance *quoad B.*, yet it is aided by the statute; for *B.* was party to the original, and is privy to the verdict, being liable to the damages. Sir John Haydon's case, 11 Co. 6. b. adjudged. Roll. R. 31. adjudged, and *vide* Cro. Jac. 304., and *vide* Cro. Car. 315.— But an issue between the demandant and vouchee is not within the act. And Kelw. 207. b. 5 Co. 36. b. 11 Co. 6. b.; but *per* Hob. 281. this opinion is questioned, it not being said party to the original. (g) If as to part the defendant joins issue, but says nothing as to the rest, and this issue is found for the plaintiff, he shall have judgment. Gomersal and Gomersal, 11 Co. 6. b. 2 Leon. 194. Godb. 55. So 2 Roll. R. 161. Cro. Jac. 355. Hob. 187. 3 Lev. 39.; and *vide* Gouls. 109. Bulstr. 25. Cart. 51. — But if the matter is pleaded to the whole, though in fact but in answer to part, this is a bad plea, and not helped by the statute. Hardr. 331. (h) This extends as well to those on the part of the plaintiff as on the part of the defendant. 2 Roll. R. 161. (i) Discontinuances after, as well as those before, verdict are within this act. Cro. Eliz. 489. Cro. Jac. 528.; and *vide* Cro. Car. 256. Cro. Jac. 211. Cro. Eliz. 320. (k) Discontinuances are helped by the statute, but not imperfect verdicts. 2 Leon. 196. Cro. Eliz. 133. Godb. 57. 3 Lev. 55. (l) But if upon an information of usury the court awards a *subpœna* against the defendant, this is not a misconveying, but a disorderly process, and not aided by the statute. Topliff and Waller, And. 48. adjudged. Kelw. 214. adjudged, and there said this is no more helped by the statute than if in *ejectment* the court should award a *pet cape*, or in a real action a distress or attachment; for such disorders were never intended to be redressed by the statute; and *vide* Cro. Jac. 89., where one process does not warrant the other. —So when a *venire* is awarded to a wrong officer, and he returns it, and thereupon a trial had, this is a mis-trial, and not helped. Brownl. 134. Cro. Eliz. 574. 586. Moor, 556. pl. 48. Yelv. 15. 5 Co. 36. b. — But that mis-trials, as where the *venue* was awarded of a wrong place, &c. were not aided by this statute. *Vide* Cro. Eliz. 468. Gouls. 38. Winch. 69. 4 Leo. 85. Cro. Jac. 647. Lit. R. 365. Moor, 91. pl. 212. Kelw. 212. 5 Co. 36. b. (m) But there be any defect in an original, or in the return thereof, it is not helped by this act. Kel. 207. And. 27. (n) As if a *distringas* is awarded where it should be an *habeas corpora*. Savil. (o) *Vide* Leon. 175. Cro. Eliz. 145. 153. where the entry was, that the defendant *obtulit per Higgins attor. suum*, without shewing his christian name; and it was argued that it was hel

helped by this statute; and in Cro. Eliz. 153., it was said, that if there were any warrant of attorney, and his name appears, then it may be amended by it. But for this *vide* Roll. Abr. 389. Leon. 175.; and *vide* 18 Eliz. c 14., by which a provision is made against the want of any warrant of attorney. (*p*) But if the judgment is not given upon the verdict, it is not within the act; as in debt against an heir upon the bond of his ancestor, he pleads *riens per descent*, except twenty acres in *D.*, and the plaintiff replies he hath more in S., upon which they are at issue; and it is found for the defendant, but the plaintiff takes judgment upon the confession of the assets. Molineux and Molineux, Yelv. 169., reversed by reason of a discontinuance. Cro. Jac. 236.; reversed accordingly, and said the statute must be intended where the verdict is the occasion of the judgment; and *vide* Cro. Jac. 211. Cro. Eliz. 339. 412. [*N. B.* This last point was determined on the statute of 18 Eliz. c. 14.]

This statute, though much more extensive than the others, and though it very much enlarged the authority of the judges in amendments in mistakes, yet it remedied no omission but one, which was the party's own neglect in not filing his warrant, which should not after verdict prejudice the right of the party that had prevailed; therefore to remedy the omissions which the prevailing party might have been guilty of, as well as the other side.

By the 18 Eliz. c. 14. it is enacted, "that after verdict given "in any action, suit, bill, plaint, or demand in any court of "record, judgment (*a*) thereupon shall not be stayed or re- "versed for want of form touching false *Latin* or variance from "the *register*, or (*b*) other faults in form, in any writ original "or judicial, count, declaration, plaint, bill, suit or demand; "or for (*c*) (*d*) want of any writ (*e*) original or judicial, or "by reason of (*g*) any (*h*) imperfect or (*i*) insufficient return "of any sheriff or other officer, or for want of any warrant of "attorney (*k*), or for any fault in process, upon or after any "aid prier and voucher."

18 Eliz. c. 14.

(*a*) But if in trespass against *A. B.*, and *C. A.* pleads not guilty, and it is found for him, but against the other two, there is judgment by default, the want of an original may be assigned for error; for the verdict being found for *A.* he is out of the case, and it is as if the action had been brought against the other two only; but if the verdict had been for the plaintiff, the want of the original *quoad* the other had been cured. 1 Lev. 210. (*b*) But the omission of *vi et armis* in a declaration of trespass is substance, because that is the inducement for the king's fine. Cro. Car. 407. March, 140. Cro. Jac. 443. 526. 536.; but *vide* Cro. Jac. 130. 2 Roll. R. 285. — So is the assignment of a breach upon a recognizance for good behaviour. Cro. Jac. 412. (*c*) Leon. 30, 31. *Vide* where the original was determined and not revived. (*d*) An ill writ in substance, or a good writ which warrants not the declaration, is not aided by the statute. Cro. Eliz. 722. Goul. 126. Yelv. 108. 209. Sid. 84. 5 Co. 37. b. 3 Bulstr. 224. Roll. R. 432. — When the variance is such that it shall be taken as no original. Cro. Eliz. 204. Hob. 251. Cro. Jac. 654, 655. Cro. Car. 327. Cro. Eliz. 286. 3 Mod. 136. 10 Mod. 318. 338. 11 Mod. 68. pl. 3. 171. 230. 240. 12 Mod. 235. Fitzg. 96. 2 Roll. R. 382. 5 Co. 37. b. — But not so where the vicious writ is certified to be the writ upon which the proceedings were, and that there is no other. Cro. Jac. 185. 479. 664. 675. Palm. 428. Brown. 96, 97. Cro. Car. 272. 281. Jones, 304. Latch. 116. Yelv. 109. — But where it appears there was a good original, no averment shall be taken that the proceedings were on the vicious one. Cro. Jac. 597. Palm. 428. — And in *ejectment*, where the declaration recited the original to be *summonitus est*, there being none upon the file, the court would not intend a vicious one; but that there was a good one, which is lost; and that the plaintiff's clerk mistook in the recital thereof. Redman and Edolph. Sand. 317. ‖No advantage can now be taken of a variance between the original and the declaration, for the court will not grant oyer of the original, (Ford v. Burnham, Barnes, 340. Boats v. Edwards, Doug. 227.); nor will they set aside proceedings for irregularity on the ground of such variance. Spalding v. Mure, 6 Term R. 363. And as to a writ of error for a defective original, the Master of the Rolls will grant a new original or order an amendment. Carr v. Shaw, 7 Term R. 299. Deshons v. Head, 7 East, 353. Murray v. Hubbart, 1 Bos. & Pull. 645. Gray v. Sidniff, 3 Bos. & Pull. 645. 1 Saund. 317. a, b. (5th edit.)‖ So the want of a *venire, distringas, &c.* is aided, but not a vicious one; and where a vicious one shall be taken as one, *vide* Cro. Eliz. 467. Owen, 59. Moor, 465.

Noy, 57. Moor, 684. pl. 944.; and *vide* Cro. Eliz. 215. 257. 259. 422. 433. 781. Cro. Jac. 65. 162. 396. Cro. Car. 90. Moor, 402. pl. 535. 623. pl. 852. 696. pl. 967. Godb. 194. Leon. 329. Bulst. 130, 131. 3 Bulst. 180. Brownl. 78. 97. Yelv. 69. Roll. R. 22. Stile, 8. 483. March, 26. 2 Roll. R. 285. (*e*) The want of a bill on the file, which is in the nature of an original, is aided by the equity of this act. Hob. 130. 134. 264. 282. Jones, 304. Cro. Car. 282. Stile, 91.; and Cro. Jac. 109. to the contrary is not law. — *Quære* of the want of a plaint in inferior courts; but, however, an erroneous plaint is not helped. Cro. Jac. 108, 109. Stile, 115. Roll. R. 338. (*g*) But if there be no return, as if the writ be *album breve*, or the name of the sheriff not indorsed, this is not helped, Roll. R. 295. 5 Co. 41. Cro. Eliz. 310. 509. Yelv. 110. Cro. Jac. 188, 189. (*h*) *Vide* Stile, 91. 2 Roll. R. 247. In the return of the *venire*, the words *quilibet juratorum per plegiat.* were wanting; and Cro. Jac. 534., *per curiam*, it was held not as a blank or no return, but as an insufficient one, and helped. 2 Roll. R. 87. adjudged, because by the appearance of the jurors it was salved, and said it was not like Dr. Hussey's case, where pledges where wanting upon an original, which *vide* 3 Bulst. 275, 276, &c. Roll. R. 445—447. Cro. Jac. 414., where it is said, that not finding pledges upon an original is merely the neglect of the party, and so not helped. — If a *venire* is awarded to the coroners, and returned by two of them only; whereas at the time of the award and return thereof, there were two more; this is only a mis-return and aided. Lamb and Wiseman, Cro. Jac. 383. adjudged. Hob. 70. adjudged; and yet if one sheriff of *London* makes a return without the other, this is not helped, being no return at all; for they make but one officer, and the court knows that in one sheriff there is two persons. Hob. 70. *Qu.* Of this reason? (*i*) Upon the return of a *venire de medietate linguæ*, it did not appear which were denizens, and which aliens. Cro. Eliz. 841. *per curiam*. It is an insufficient return, and aided by the statute. — Upon the *venire* twenty-three only were returned, but the *habeas corpora* was awarded against the twenty-three and *A.*, and eleven of the other and *A.* were sworn, and tried the cause. Fines and North, Jones, 302. adjudged, it was not helped; for *A.* was not returned by the sheriff. Cro. Car. 278. 5 Co. 36. b. 37. a. Cro. Eliz. 194. Brownl. 274. Jones, 357.; and *vide* Sid. 66. — So if the trial had been by eleven of the twenty-three, and one of the *tales de circumstantibus*. Sankill and Stocker, Cro. Car. 223. adjudged *per curiam cont. Croke*. Jones, 245.; but *vide* Brownl. 274., where it was adjudged according to the opinion of *Croke*. *Vide* Latch, 54. But if twenty-five are returned, and the twenty-fifth is sworn, and tries the cause, it is not helped, because a mis-trial. Cro. Jac. 647.; but if tried by twelve of the other, it is helped. Cro. Jac. 647. This was before forty-eight were returned on the panel. (*k*) In a *scire facias* upon a recognizance against the heirs and ter-tenants of the conusor, the sheriff returns *J. S.* ter-tenant, but says nothing as to the heir, and *J. S.* pleads to issue, and it is found against him. Cro. Car. 295. adjudged by three judges against *Croke*, that *quoad* the heir, there being no return, it is not helped by the statute; but, *per Croke*, the defendant having pleaded to issue, and that being found against him, he shall not now take advantage of the heir's not being returned summoned; and Cro. Car. 312, 313. it was adjudged for the plaintiff, because *quoad* the heir, it was only a discontinuance, which is aided by the 32 H. 8. c. 30. Jones, 319. adjudged. ‖(*k*) And a variance in the name of the plaintiff between the warrant of attorney and the declaration, is no ground of error. De Tastet v. Rucker, 3 Bro. & Bing. 65.‖

2 Sand. 258.

These statutes extended only to the courts above, but the subsequent statutes extend to all courts of record, and remedy several defects and omissions not included in the former.

21 Jac. 1. c. 13. (*a*) Sid. 61. (*b*) Cro. Car. 162. 284. 480. Jones, 395. Stile, 201. 206. Raym. 67. (*c*) This statute aids not, unless the venue arises from several places, and one of those places is truly named. Sid. 20. — But

By the 21 Jac. 1. c. 13. it is enacted, "that after verdict "for plaintiff or demandant, defendant or tenant, baily in "assize, vouchee, praiee in aid, or tenant by receipt, in any "action, suit, bill, plaint or demand, in any court of record, "judgment thereupon shall not be stayed or reversed for any "variance, in form only, between the original or bill and the declaration, plaint and demand, or for lack of the averment of any "life (*a*), so it be proved the person living, or because the *venire*, "*habeas corpora* or *distringas* was awarded to a wrong officer "upon any insufficient suggestion, or (*b*) for that the visne is "in (*c*) some part mis-awarded, or sued out of more or fewer "places than it ought to be (*d*), so as some one place be right "named, or for mis-naming any of the jurors in surname or "addition (*e*), in any of the writs, or returns thereof, so as they "be

" be proved to be the same as were meant to be returned; or for " that there is no return upon any of the writs, so as a panel " be returned and annexed thereto; or for that the sheriff or " other officer's name is not set to the return of such writ, so as " it appear by proof the writ was returned by him; or for that " the plaintiff in ejectment (*g*), or other personal action, being " under age, appeared by attorney, and the verdict passed for " him."

if it arises from several places, though in several counties, and it is tried by one only, it is helped. 2 Lev. 122. *per Hale.*

(*d*) By the opinion of the greater part of the judges, where, by particular custom, a trial was to be *de vicinet.* of the four wards next adjoining, and the *venire* is awarded *de vicinet.* of two of them only, it is helped by the statute. 2 Sand. 258. But Sanders *dubitavit*, whether it should extend to aid any proceedings except such as were according to the course of the common law. (*e*) But this extends not to any mistake in the christian name. Cro. Car. 202. ‖See Willes, 488. 12 East, 6 Tanut. 229. 460.‖ (*g*) Stile, 216.* 218. *per Rolle* C. J. If the party appear by attorney, where he ought to appear by guardian, it is error, and not helped by this statute. Danv. Abr. 2 v. tit. Error. fol. 12. pl. 13., and Roll. Abr. 1 v. 747. pl. 13. S. C., where he says the judgment was reversed, because the party plaintiff appeared in person. See 2 Sand. 212, 213. It seems the general opinion, that when the plaintiff appears by attorney, unless it is pleaded in abatement, it is cured after verdict for him, by the stat. 21 Jac. 1. c. 13. the words being express. The cases in the books *contrà* (except that in Stiles) were *before* the statute. ‖If an infant defendant appears by attorney the court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian. Hindmarsh v. Chandler, 7 Taunt. 488.; and although an infant defendant against whom judgment has been given may assign for error that he appeared by attorney, yet if judgment be given in favour of an infant defendant, the plaintiff cannot avail himself of the infant's appearance by attorney as a ground of error. Bird v. Pegg, 5 Barn. & A. 418.‖

The main design of this statute was to help any mistake in the jury process, but there were several things still to be supplied, and several others to be adjudged from, which were always construed to be matters of substance, and consequently not aided by any of the former statutes: wherefore the 16 & 17 Car. 2. was made, the act which *Twisden* called *The Omnipotent Act.*

1 Vent. 200.

By the (*a*) 16 & 17 Car. 2. c. 8. it is enacted, " that after " verdict in any action, suit, bill or demand, in the courts of " record at *Westminster*, county palatine of *Chester* or *Durham*, " or of the great sessions in *Wales*, judgment thereupon shall " not be stayed or reversed for want of form or pledges, sheriff's " name, returned upon the original, or for want of pledges upon " any bill or declaration, or for want of a *profert in curia* of any " deed, or of letters testamentary, or of administration, or for " the omission of *vi et armis*, or *contra pacem*, or for the mistake " of the christian or surname of either party, sums, day, month " or year, in any bill, declaration and pleading, being right in " any writ, plaint, roll or record preceding, or in the same, to " which the plaintiff might have demurred and shewed the same " for cause, or for want of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or *prout patet per recordum*; or " for that there is no right venue; so as a trial was by a jury of " the (*b*) proper county or place (*c*) where the (*d*) action is laid; " nor shall any judgment after verdict, confession by *cognovit* " *actionem* or *relicta verificatione*, be reversed for want of a " *misericordia* or a *capiatur*, or because one is entered for the " other; nor for that *ideo concessum est per curiam* is entered for " *ideo consideratum est*, &c. or for that the increase of costs after

16 & 17 Car. 2. c. 8. (*a*) This act was only for three years, but is made perpetual *per* 22 & 23 Car. 2. c. 4. (*b*) But this extends not to any trial in an improper county. Mod. 57. 199. 2 Mod. 24. (*c*) In debt upon a bond in *London*, conditioned for the performance of covenants, one of which was for the enjoyment of *Shrubwalk*, in the forest of *W.* in *com. N.*, and the defendant

pleaded performance generally; and the plaintiff replied, that the Earl of *N.* having title by grant, &c. entered, and ousted him; and the defendant pleaded

" verdict in an action, or upon a nonsuit in replevin, are not " entered to be at the request of the party for whom the judg- " ment was given, nor by reason that the costs in any judgment " whatsoever, are not entered to be by consent of the plaintiff; " and that all such omissions, variances and defects, and (*e*) other " matters of like nature, not being against the right of the matter " of the suit, nor whereby the issue or trial are altered, shall " be amended where such judgments are or shall be removed by " writ of error."

the Earl of *N.* had no title; and thereupon issue was joined, and tried by a *visne* of *Shrub-walk*, and found for the plaintiff; and though no *visne* could arise of the walk, and it could not be intended a vill, being only collaterally alleged as a thing granted, and not as a place where any fact was done; yet being tried by a jury of the county where the matter of the issue arose, it was adjudged for the plaintiff by three judges *con.* Twisden, who said it was not within the words; and being a new law, it should not be taken according to the intent, against the words; and after, error was brought; but the parties agreed, the defendant making the plaintiff satisfaction. Lev. 207. Sid. 326. adjudged *per totam Cur. præter Twisden*, though objected, the action being laid in *London*, the issue should have been there tried, unless some other place had been shewed in the record; and *vide* 1 Lev. 122. (*d*) The plaintiff declared that the defendant *apud London* said of the plaintiff, that he had stolen plate at *Oxford*; and the defendant justified, that he did steal plate at *Oxford*, *per quoad* he spoke the words at *London*; and the plaintiff replied, *de injuriâ suâ propriâ*, &c. and thereupon issue was joined, and tried in *London*, and found for the plaintiff; and though it was adjudged, that the only point in issue was, whether the felony was committed, which was triable at *Oxford*; yet the plaintiff had judgment. Croft and Boite, Sand. 247, 248. by three judges, who said, that the issue being tried by a jury of the proper county, it was within the express words of the statute; but Twisden *fortment cont.*; and by the reporter, this judgment was given, not only against the opinion of Twisden, but of several others, as he was informed; and being of counsel with the defendant, he agreed the meaning of the statute was, that the issue should be tried in the proper county where it arises, else it would be impossible, by any plea, to remove the trial from the county where the action is laid. Raym. 181. adjudged, that it was helped by the statute; but said, that the defendant might have demurred upon it. 2 Keb. 496. adjudged, Vent. 263. cited to be adjudged; so Adderly and Wise, 2 Lev. 164, 165. adjudged, Vent. 263. cited, and *vide* Raym. 392. where the like point was in question, *et adjorn.*; so, 2 Jones, 82. *et adjorn.* And in the case of Jenning and Hunking, Vent. 263. (where the court said it was within the words, but not the meaning of the act; for the intention was so, that the trial was in the county where the issue did arise,) but in regard of these precedents cited, they would not stay judgment; but by the report of this last case, 2 Lev. 121. it does not appear how the judgment was; but *Hale* C. J. there said, the meaning of the statute was, if the issue was tried in the county where the matter thereof arose; for it is not reasonable to believe the parliament intended to alter the whole course of trials, and to have things tried in foreign counties, *et adjornatur*; and by the report of the same case, 3 Keb. 350. 371. 509. the parties agreed to amend, and lay the whole matter in the county where the action was laid; and said, the court inclined strongly against the judgment cited. (*e*) Raym. 398.

Carth. 66. Skin. 49. pl. 3.

The above statutes being chiefly calculated to aid imperfections after verdict, and the statute 27 Eliz. c. 5. aiding defects in form only on a general demurrer, it was thought advisable to enlarge the authority of the courts further in favour of suitors; and therefore,

4 Ann. c. 16. Note: This act is said to have been penned by the great Lord *Somers*. See 2 Bishop Burnet's Hist. of his own Times, p. 439.

By the 4 Ann. c. 16. for the amendment of the law, it is enacted, " that where any demurrer shall be joined and entered " in any action or suit in any court of record, the judges shall " proceed and give judgment according as the very right of " the cause and matter in law shall appear unto them, without " regarding any imperfection, omission, or defect in any writ, " return, plaint, declaration, or other pleading, process, or course " of proceeding whatsoever, except those only which the party " demurring shall specially and particularly set down and ex-

" press

" press together with his demurrer, as causes of the same, not-
" withstanding that such imperfection, omission, or defect might
" have heretofore been taken to be matter of substance, and
" not aided by the 27 Eliz. c. 5. so as sufficient matter appear in
" the said pleadings; upon which the court may give judgment
" according to the very right of the cause, and no advantage or
" exception shall be taken of or for an immaterial traverse, or of
" or for the default of entering pledges upon any bill or declar-
" ation, or of or for the default of alleging the bringing into
" court any bond, bill, indenture, or other deed whatsoever,
" mentioned in the declaration or other pleading, or of or for
" the default of alleging of the bringing into court letters testa-
" mentary or letters of administration, or of or for the omission
" of *vi et armis*, *et contra pacem*, or either of them, or of or
" for the want of averment of *hoc paratus est verificare*, or *hoc*
" *paratus est verificare per recordum*; but the court shall give
" judgment according to the very right of the cause, as afore-
" said, without regarding any such imperfections, omissions, and
" defects, or any other matter of like nature, except the same
" shall be specially and particularly set down and shewn for
" cause of demurrer." —— *And*, "That all the statutes of *jeofails*
" shall be extended to judgments which shall be entered upon
" confession, *nihil dicit*, or *non sum informatus*, in any court of
" record, and no such judgment shall be reversed, nor any
" judgment upon any writ of enquiry of damages executed
" thereon, be stayed or reversed for or by reason of any imper-
" fection, omission, defect, matter, or thing whatsoever, which
" would have been aided and cured by any of the said statutes
" of *jeofails*, in case a verdict of twelve men had been given in
" the said action or suit, so as there be an original writ, or bill,
" and warrants of attorney duly filed according to the law as is
" now used."

In the construction of this statute it has been adjudged, that it extends to protect judgments by default, against such objections only as are remedied after a verdict by the statutes of *jeofails*, and not against objections which are cured by a verdict at common law.

1 Stra. 78. Vandeput v. Lord, S. C. 2 Vin. Abr. 399. MS. 2 Stra. 933. Hayes v. Warren. 2 Burr. 899. Collins v. Gibbs.

It becomes, therefore, necessary in order to ascertain the nature of the defects, which are aided after a judgment by default since the statute of *Anne*, to distinguish with accuracy between such imperfections as are cured by a verdict by the common law, and those which are now remedied after verdict by the several statutes of *jeofails*. With respect to the former case it is to be observed, that where there is any defect, imperfection, or omission in any pleadings, whether in substance or form (*a*), which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict,

See Cro. Car. 497. Hall v. Marshall. Sir T. Raym. 487. Hitchins v. Stevens. Carth. 304. Alston v. Buscough. *Ibid.* 389. Blackall v. Eale. 1 Mod. 292. Wootten v. Hele. 1 Lev. 308. Mannington v. Guil-

lims, S. C. 1 Vent. 109. 1 Sid. 423. Goswick's case. 1 Salk. 365. Crouther v. Oldfield. Com. Rep. 116. May v. King. 6 Mod. 302. Scrimshaw v. Westley. 2 Ld. Raym. 1060. S. C. Holt's R. 567. 3 Wils. 275. Roe v. Hersey. 7 Brown P. C. 555. Rann v. Hughes. Dougl. 679. Rushton v. Aspinall. 1 Term R. 141. 145. Spiers v. Parker. *Ibid.* 545. Johnstone v. Sutton. 3 Term R. 25. Nerot v. Wallace. *Ibid.* 147. Clark v. King. 4 Term R. 472. Bishop v. Hayward. 7 Term R. 518. 523. M'Murdo v. Smith. Cas. temp. Hardw. 116. Wicker v. Norris, 10 East, 559. Bowdell v. Parsons. 2 Bos. & Pull. 265. Ward v. Harris. (*a*) 13 East, 407. Higgins v. Highfield. That was an action for mesne profits; and the declaration did not state any time when the defendant entered, but only that he kept the plaintiff ejected *for a long space of time*. After judgment by default, the court held, that this omission was cured by the statute 4 Ann. c. 16., and seemed to consider that all defects of form only were cured by that statute. The case of Blackall v. Heal, Com. Rep. 12. Carth. 389. S. C. was cited in argument, where the same omission was held to be cured after verdict; but whether under the statute of jeofails, or at common law, does not appear, though the language of the court in giving judgment seems to lean to the latter. The case in 13 East, 407. is, however, decisive upon this point.

verdict, such defect, imperfection, or omission is cured by the verdict by the common law; or, in the phrase often used upon the occasion, such defect is not *nny jeofail* after verdict.

2 Show. 233, 234. Hitchins v. Stevens. 1 Stra. 78. Vandeput v. Lord, S. C. 2 Vin. Abr. 399. (*b*) It should be observed, that Serjeant Williams (from whom this passage is taken) is here speaking of a conveyance of a reversion made previous to the statute of *Anne*, and pleaded after that statute, the second section of which extends the statutes of jeofails to judgments by default, and the ninth and tenth sections of which abolish the necessity of attornment.

As where in debt for rent, by a bargainee of a reversion, the declaration omitted to allege the attornment of the tenant, which before the statute 4 Ann. c. 16. § 9. was a necessary ceremony to complete the title of the bargainee, and, upon *nil debet*, pleaded there was a verdict for the plaintiff, such omission was cured by the verdict by the common law; but is a fatal objection after a judgment by default, since the statute of 4 Ann. c. 16. § 2. (*b*)

Hutt. 54. Lightfoot v Brightman, 1 Term R. 145. Spiers v Parker. (*a*) But it seems that livery need not be pleaded in any case, for it is a necessary circumstance implied by law. Co. Litt. 303. b. Plowd. 149. Throckmorton v. Tracey; which was on demurrer to a plea in bar.

And this construction seems agreeable to the *spirit* as well as the *letter* of that statute: for it is clear that, unless the tenant had in fact attorned, the plaintiff was not entitled to recover. It is not alleged in the declaration that the tenant had attorned; it is at least as probable that he had not attorned as that he had; and it does not appear which is the fact; upon what ground then can the court *presume* any attornment? The judgment by default affords none, for that only admits such facts as are alleged. Therefore if such defects should be held to be aided after a judgment by default, it might frequently happen that the court would give judgment for the plaintiff, where he is not entitled to recover. But where a *verdict* has established the grant, *that* is a sure ground whence the court can presume attornment, because without proof of it the plaintiff could not have made out his title as bargainee of the reversion. So where a grant of a reversion, a rent charge, an advowson, or any other hereditament which lies *in grant*, and can only be conveyed by deed, be pleaded, but is not alleged to have been *by deed*; or if a feoffment be pleaded without livery (*a*); so that the grantee or feoffee does not shew in himself a perfect title; yet, if the grant or feoffment be put in issue, and found by the jury, the verdict cures such imperfection by the common law. But such defect is a fatal objection after a judgment by default, for the reason above given.

Also

Also where a promise depends upon the performance of something to be first done by him to whom the promise is made, and in an action upon such promise the declaration does not aver performance by the plaintiff, or that he was ready to perform, and there is a verdict for the plaintiff; such omission is cured by the verdict by the common law, but is a fatal objection after a judgment by default, for the objection holds exactly the same as if it had been upon demurrer.

2 Burr. 899. Collins v. Gibbs,

So in an action for a malicious prosecution, it is necessary to allege in the declaration that the prosecution is at an end. The want of this averment is cured after verdict. But is fatal upon demurrer, or after a judgment by default: for the original prosecution may either be determined, or it may still be regularly going on; and how can the court say which of the two is the fact? But where there is a *verdict* for the plaintiff, it is a necessary inference that it was proved on the trial that the original prosecution was at an end. (*b*)

2 Rich. 3. 9 Hob. 267. Naterer v. Freeman. 10 Mod. 209, 210. Parker v. Langley. 2 Vin. Abr. 55. MS. Blackgrave v. Oden. Dougl. 215.

Fisher v. Bristow. 2 Term R. 225. Morgan v. Hughes. Skinner v. Gunton. 1 Sid. 15. Wine v. Ware. (*b*) See also 1 Bro. & Bing. 224. Dalby v. Hirst. 9 East, 473. Amey v. Long. 5 Barn. & Ald. 634. Pippet v. Hearn; in which case it was held, that a count for maliciously indicting the plaintiff for perjury without setting out the indictment, is good after verdict; but this, it should seem, is by the statutes of jeofails.

But where there was any defect, omission, or imperfection, though in form only, in some *collateral* parts of the pleading, that were not in issue between the parties, so that there was no room to presume that the defect or omission was supplied by proof, a verdict did not cure them by the common law. As in the case from Croke's Reports, where the replication did not aver that the cattle were *levant and couchant* upon the plaintiff's land, a verdict in favour of the prescripion did not cure this defect; for the only point in issue was the prescriptive right of common, and, therefore, the fact of the cattle being levant and couchant upon the plaintiff's land, or not, was not at all necessary to be proved before the jury. But as it was an extremely hard case, that after a cause had been tried upon the merits, judgment should either be stayed or reversed for defects in form in such collateral matters, such defects were helped after verdict by the statutes of *jeofails*, and are now after judgment by default, by virtue of the statute of Queen *Anne*. (*a*) So where an administrator brings debt on a bond, and does not allege in the declaration *by whom administration was granted*, and defendant pleads *non est factum*, and there is a verdict for the plaintiff, the verdict does not cure this defect by the common law, because it was not necessary to be proved on this issue, the title of the administrator not being in question. But this defect is remedied after verdict by the statute of *jeofails*, 16 & 17 Car. 2. c. 8. and, therefore, after a judgment by default since the statute of *Anne*. (*b*) Upon the same principle, a verdict did not at the common law cure other defects in form, such as the want of giving colour, misjoining of the issue, discontinuance, *&c.* which are helped after verdict by statute 32 H. 8. c. 30. nor the want of an original

(*a*) See Gilb. H.C.B. (5d ed.) 137. 159. 141, 142. (*b*) 1 Salk. 37. Gidley v. Williams. S. C. 1 Ld. Raym. 634. 4 Mod. 133. Mason v. Hanson. (*c*) And by stat. 5 G. 1. c. 13. any defect, whether in form or substance, in an original writ or bill, is cured after verdict. (*d*) It must be observed, that two of the instances

mentioned in the text, *viz.* the want and the imperfection of an original writ, are expressly excepted in the statute of *Anne*, the words of which are, "So as there be an original writ or bill, and warrant of attorney duly filed according to the law as is now used." See 1 Saund. 318. a.; and 2 Saund. 101. r.

original or judicial writ; nor the insufficient return of the sheriff, which are remedied after verdict by the statute 18 Eliz. c. 14.; nor a variance between the original writ and declaration, which was aided after verdict by the statute 21 Jac. 1. c. 13.; nor did a verdict cure any immaterial traverse, the omission of a *profert*, of *vi et armis*, of *contra pacem*, of *hoc paratus est verificare*, of *prout patet per recordum*, all which defects, with many others, are helped after verdict by the statute 16 & 17 Car. 2. c. 8. (*c*); and the benefits of these statutes is extended to judgments by default by the statute of *Anne*. (*d*) But still if the plaintiff either states a defective title, or totally omits to state any title or cause of action, a verdict will not cure such defect, either by the common law or by the statutes of *jeofails*; for the plaintiff need not prove more than what is expressly stated in the declaration, or is necessarily implied from those facts which are stated. (*e*)

(*c*) Doug. 658. Rushton v. Aspinall, Cowp. 825. 2 Salk. 662. Buxendin v. Sharp, 1 Salk. 365. Crouther v. Oldfield, 3 Burr. 1728. Weston v. Mason, *per Yates*, J. 3 Wils. 275. 1 Term R. 141. 146. Spieres v. Parker, 4 Term R. 472. Bishop v. Hayward, Gilb. H. C. B. 141, 142. So, where in an action on the case for an injury to the plaintiff's reversion in a yard, the declaration stated injuries in terms which most aptly applied to the possession only, and there was no allegation that the plaintiff had been injured in his reversionary estate in the premises, the court, after verdict for the plaintiff, held, that the omission was not cured, and judgment was arrested. 1 Maule & S. 234. Jackson v. Pesked. So in debt on 2 & 3 Ed. 6. c. 1. for not setting out tythes, an omission to state that the tythes had been payable within forty years next before the act, was held fatal after verdict for the plaintiff. 4 Barn. & Ald. 655. Butt v. Howard. The distinction is one which has been often remarked between a defective statement of a title or cause of action, and a statement of a defective title or cause of action. The former is cured by verdict, or by the statute of jeofails; the latter is not.

The King v. Bishop of Landaff, 2 Stra. 1006.

Notwithstanding it is, as we have seen, so material to distinguish between defects helped after verdict by the common law and by the statutes of *jeofails*, in order to apply them to cases of judgments by default, yet we very often find that there is no sort of distinction made between the two cases by many of our reporters and writers upon the subject. In a *quare impedit*, the declaration alleged a seisin in the crown of the advowson, but no presentation. The seisin was traversed, and a verdict thereon for the crown. The question was, whether the want of alleging a presentation was cured by the verdict. The court was of opinion it was; but Lord *Hardwicke* is made to say that it was so cured, by virtue of the 16 & 17 Car. 2. c. 8. But it should seem that the report is inaccurate, because from the whole of Lord *Hardwicke*'s argument, it is plain that the ground upon which the court gave their opinion was, that a presentation must of necessity have been proved upon the trial, otherwise the jury could not have found a seisin in the crown; which is the principle upon which the defects are held to be cured by a verdict by the common law. And in this light is the case considered in the law of *Nisi Prius*, 122. So, Sir *William Blackstone* in his Commentaries states with correctness the principle upon which defects are held to be aided by a verdict by the common law; but the two examples which he adduces to illustrate the principle, are both of them

Black. Com. 394, 395. See 1 Will. Saund. 227. *et*

them instances of defect, aided after verdict by the *statutes of jeofails.*‖ *seq. notis*, (5th edit.).

Notwithstanding the great enlargement of the power of the judges, by the above recited statutes in amending writs, processes, *&c.* yet none of them were thought to extend to writs of error; and the rather, because such amendment would not be in affirmance of the judgment; but it being found that defective writs of error occasioned great delay of justice. Carth. 158. 367. 520. Ld. Raym. 71. 151. 564. 5 Mod. 16. 69. Comb. 354. Salk. 49. pl. 9.

By the 5 G. 1. c. 13. it is enacted, "that all writs of error "wherein there shall be any variance from the original record, "or other defect, may and shall be amended and made agree- "able to such record, by the respective courts where such writ "or writs of error shall be made returnable; and that where "any verdict hath been or shall be given in any action, suit, "bill, plaint, or demand, in any of his majesty's courts of "record, the judgment thereupon shall not be stayed or reversed "for any defect or fault, either in form or substance, in any bill, "writ, original or judicial, or for any variance in such writs "from the declaration or other proceedings." 5 G. 1. c. 13. ‖See Tidd's Prac. 1218. (8th edit.)‖

[By stat. of 4 G. 2. c. 26. for turning all law proceedings into *English*, it is provided, § 4. that every statute of *jeofails* shall extend to all forms and proceedings in *English* (except in criminal cases), and that this clause shall be taken and construed in the most ample and beneficial manner for the ease and benefit of the parties, and to prevent frivolous and vexatious delays.] 4 G. 2. c. 26. § 4.

‖As to amendments of the record under Lord *Tenterden*'s act, 9 G. 4. c. 15., see tit. "PLEAS AND PLEADING," (B) 3., and 3 Carr. & P. Ca. 485. 394. (4 *id.*) 22. 24.‖

(C) Whether the Statutes of Amendment extend to the King, or to any criminal Proceedings.

IT has been a great question whether any of these statutes extend to the case of the king, either to remedy the party where he has prevailed against the king, or the king against the party; but as it has been ruled in both cases, and seems now established that these statutes do not extend to the king, it will be needless to enter minutely into this enquiry; for though only indictments, appeals, and informations on penal statutes are excepted in all the statutes from 8 H. 6. c. 12. yet because the first statute says it shall be amended on the challenge of the party, in which the king cannot be included, the subsequent statutes are supposed to be made on the same platform; and that this exception is only *ex abundanti cautelâ.* Gilb. Hist. C.P. 116. *Vide* Cro. Car. 144. 3 Mod. 7. 167. Fitzgib. 56. 122. 265. Stra. 62. Hob. 328. 4 Mod. 396. [Penal actions are not considered as criminal proceedings, and therefore within the statutes of jeofails. Cowp. 382. 1 Wils. 125.

Thus in a *quo warranto quare* the defendant claims a warren, the defendant prescribes for a warren within the manor of *Ridge*, and the *venire* was awarded from the villa of *Ridge*, and not from the manor of *Ridge*, and a verdict for the defendant; the court awarded Jones, 320. Cro. Car. 312.

awarded a new *venire* (*a*), because they held the king was not within the statute of J. 1. c. 13.

(*a*) *Vide* Stat. 9 Ann. c. 20. § 7. [The *venire* is now to be awarded of the body of the county, *vide* the stat. 4 Ann. c. 16. § 6., and 24 G. 2. c. 18. § 3. *Vide* head of Juries.]

So in an information for a seditious libel, the *venire* was returnable 13 *October*, and the *distringas* tested 24 *October*, this was a discontinuance, because not returned in the presence of the party; and notwithstanding the queen had a verdict, the court would not amend it, though such amendment would have been warranted by the roll, where the *distringas* was well awarded.

Salk. 51. pl. 14. 6 Mod. 268. S. C. 2 Lord Raym. 1061. 1472. Mich. 3 Ann. The Queen v. Tuchin, by three judges, *hesitante Gould.*

But it has been adjudged, that the several provisoes in these statutes, which except appeals and indictments of felony, *&c.* and that they shall not extend to any writ, bill, action or information upon any popular or penal statute, do not (*b*) extend to those cases in which a remedy is given by way of recompence to a party; as upon the statute of *waste*, for not setting forth tythe, forcible entry, *&c.*

Cro. Jac. 414. Sid. 66. Stile, 307. 2 Sand. 258. (*b*) But a writ of ravishment of ward upon the statute of *Westm.* 2. c. 35. is within the proviso. Dr. Hussy and Moor, 3 Bulst. 275, 276. Hob. 101.

Also by the 4 Ann. c. 16. for amendment of the law, it is enacted, "that all the statutes of *jeofails* shall extend to all "suits in any of her majesty's courts of record at *Westminster*, "for recovery of any debt immediately owing, or any revenue "belonging to her majesty, her heirs or successors, and shall "also extend to all other courts of record." (*c*)

[4 Ann. c. 16. (*c*) An information was laid, that teas were imported between, &c. and the day of exhibiting the information, which was the day of the seizure, and of course would have been excluded; leave was therefore given to amend, by extending it to the next day. Bunb. 49. p. 80. An information on the act of navigation was amended, by substituting the words *India goods* instead of *silks*; but the addition of other goods was not allowed, for that would have been to have made a new information. *Id.* 252. p. 327. In one case an amendment was permitted, which made quite a new offence; this was in an information of seizure for importing brandy and rum in casks under *sixty* gallons, by making it, as to the rum in casks, under twenty gallons. *Id.* 334. p. 415. But where an indenture of appraisement was dated before the writ of appraisement, the court inclined to think it might be amended. *Id.* 58. p. 99.]

And by the 9 Ann. c. 20. § 7. it is enacted, "that the "statute for the amendment of the law, and all the statutes of "*jeofails* shall be extended to [all writs of *mandamus* and] informations in nature of a *quo warranto*, and proceedings thereon for any the matters in the said act mentioned."

9 Ann. c. 20. § 7. *Vide* tit. *Informations.*

‖By 9 G. 4. c. 15. Lord *Tenterden*'s act, the record may be amended on which any trial is pending, in any indictment or information for misdemeanor, when any variance shall appear between any matter, in writing or print, produced in evidence and the recital thereof on the record.‖

See 3 Carr. & P. Ca. 594. 4 Carr. & P. Ca. 22. 24. 79.

(D) In

(D) In what Cases the Proceedings in Civil Causes are amendable, and the Manner thereof; as by amending one Part of the Record by another: and herein,

1. *Of the Original Writ and Process.*

THE original writ is made amendable by 8 H. 6. c. 12. and other statutes, when it is not made out pursuant to the instructions given to the cursitor; and likewise in those misprisions which appear to be *vitia scriptoris*, and are not of the substance of the writ; as where the instructions to the cursitor are for a *præcipe* against *Lenthorp Frank*, *Melite*, and the cursitor makes the original *Lenthorp Frank*, *Generoso*, the writ (*a*) shall be amended according to the instructions given the cursitor.

8 Co. 156. Cro. Eliz. 644. S. P. Litt. Rep. 50. S. P.; but if the instructions were wrong, it is not amendable. 2 Vent. 46. 49. 150. S. P. Sid. 412. S. P.

(*a*) So *devisit* for *demisit*, Roll. Abr. 198. Hob. 249. Brownl. 150. *Vacariam* for *Vicariam*, Hob. 128. were amended, because the instructions to the cursitor in both cases were right. [A *ca. sa.* amended after it had been executed, by the award of the writ on the roll. 2 Black. R. 836. A bill of *Middlesex* filed as of record of 24 G. 2. when it ought to have been of the 25th, amended by the *præcipe*. 1 Term R. 782. A bill of *Middlesex*, by a common informer in debt *only*, amended by inserting "in a plea of trespass with an *ac etiam* in debt. 1 Black. R. 462.]

So if instructions are given to the cursitor for drawing a writ against *Westby*, and he by mistake makes it *Westly*, and so are all the proceedings afterwards, this shall be amended; and accordingly the court ordered the cursitor to attend, who satisfying them that his instructions were right, they ordered the original to be amended in court, without any application to the Chancery, or order thence, and they amended all the proceedings after.

2 Vent. 152.

So when there are two defendants, and the writ is *præcipe* to them both, *quod teneat conventionem*, this shall be amended, because the instructions beginning against several, the cursitor had not pursued them.

2 Lev. 173. So where in a writ, it was *reddat* instead of *reddant*. 2 Saund. 58.

A *quare impedit* was brought *ad præsentand. ad ecclesiam de Watton*, where it should have been *ad vicariam ecclesiæ de Watton*, though this be an error in substance, the vicarage being distinct from the parsonage; yet because the instruction to the cursitor was right, and this a peremptory writ, it was allowed to be amended.

Cro. Car. 74. Turner and Palmer.

So if the party, in order to have a formedon in descender, draws instructions that the land descended to him as son and heir of the donee, and the clerk draws the writ that the land descended to him as son, and omits heir, if the clerk shews his instructions, and will make oath thereof, it shall be amended.

8 Co. 159. b.

Also the writ was holden amendable if there was false *Latin* (*a*), or a word that was no *Latin*, if it were only in the (*b*) form of a writ; but if it were of the substance of the writ it could not; for by the statutes the courts are allowed, where they have sufficient authority, to amend the form of that authority, but not to make

(*a*) For a diversity between false Latin and no Latin, *vide* Lev. 2. 2 Vent. 173. (*b*) There

is a diversity between the negligence and the nescience of the clerk; for the negligence (as if he had a copy of the bond, and does not follow it) shall be amended; but his nescience or ignorance in the legal form and cause of originals, is not amendable; for if this were allowed, it would introduce error and barbarity into legal proceedings. 8 Co. 159. a. Lev. 2.

make an authority for themselves, by altering the substance of the writ.

8 Co. 159. b. Moor, 5. pl. 17.

Therefore if the writ be *imaginavit* for *imaginatus est*, or *avæ* for *aviæ*, it shall be amended. (*a*)

S. P. N. Bendl. 33. S. P. cited. And. 24. S. P. cited. (*a*) But in Blackmore's case, 8 Co. 159. b. *hos breve* for *hoc breve* is held not amendable; but *quære, et vide* 2 Vent. 173. which seems to hold otherwise.

Lev. 2. Heath and Paget.

But the essential part of a writ is not amendable; as in assize, where the *teste* was *duodecno regis* for *duodecimo*, the writ was abated; (*b*) because it would have been erroneous to have proceeded on a wrong writ; for this could not have been pleaded in bar of a new assize; and the court could not amend it, because the cursitor was judge of the day when the writ issued, and there were no instructions to amend the writ by.

(*b*) *Districtionem* when it should have been *destructionem* in a writ of *waste* not amendable.

Freeman's case, 5 Co. 43. adjudged. Cro. Eliz. 462. adjudged, the word there being *distructionem* with an *i*, and not an *e*. 2 Bulstr. 51. cited, and *vide* Hut. 56. *indicari* for *indictari*; and 2 Roll. R. 255.

8 Co. 159. a. 5 Co. 56.

So if a writ be brought against executors in the *debet* and *detinet*, that shall not be amended, because the action is misconceived, giving the court authority to proceed against executors *jure proprio*, when they are not so chargeable by the law.

8 Co. 160.

But the negligent (*c*) omission of what the clerk in course ought to have inserted (as the omission of *dei gratiâ*) in the style of the king, shall be amended.

(*c*) So in a writ of partition, the omission of the words *ostensurus quare non fecerit*, was supplied. 8 Co. 160. a. — In a *quare impedit*, the word *ad* was omitted and amended. Gouls. 78. Cro. Eliz. 119. — In a *formedon* of lands in *L.* the word *in* was omitted and amended. Noy, 73. [Teste of a capias amended, as *vitium clerici*, and contrary to implied instructions. 2 Black. R. 918. 1 Term R. C. P. 291. A replication amended after verdict, by inserting the *similiter* instead of, &c. Sayer v. Pocock, Cowp. 407.] ‖And in Wright, *q. t.* v. Horton, 2 Chitt. R. 25. the court, on the authority of Sayer v. Pocock, amended the record in a penal action after a verdict for the plaintiff, by adding a *similiter*, though the objection was taken at the trial; and see 1 Stark. 400. and Holt, N. P. C. 458. S. C. and Grundy v. Mell, 1 New R. 28. But in a subsequent case, in the C. P. where the avowant in replevin had taken the record down to trial without adding the *similiter* to the conclusion of the plea in bar, the verdict was set aside without costs. Griffith v. Crockford, 3 Bro. & B. 1.; and see also Ferrers v. Weall, 2 Moo. R. 215. Cooke v. Burke, 5 Taunt. 164.‖

(*d*) So is the want of a *venire, distringas*, and other process. *Vide suprà* the notes on 18 Eliz. c. 14. and 2 Salk. 454. 2 Ld. Raym. 1143. (*e*) *Vide suprà* the notes on 18 Eliz. (*f*) That the want of bill upon the file, which is in nature of an original, is aided by the equity of the act. Hob. 130. 134. 264. 282. Jones, 504. Cro. Car. 282. Style, 91. (*i*) Cro. Eliz. 722. Yelv. 108. Sid. 84.

And here it may be proper to observe, that the want of an original (*d*) is helped (*e*) after the verdict by 18 El. c. 14. so is the want of a bill upon the file (*g*), but the statute does not extend to help a vitious writ. (*i*)

Sand. 317. 3 Mod. 3. Redman and Edolph.

But if the original be misrecited on the roll, as in ejectment, if it be *summonitus* instead of *attachiatus*, after verdict, if on search no original is found, it will not be error, for the statute helps the want of an original to all intents, as if there had been a good one on the file; and if there had been a good one, such misrecital

misrecital would not have been erroneous; and if the recital of the original be but form, it was not necessary after verdict to amend the bill.

‖ Where the plaintiff held one defendant to bail on a special capias, and proceeded to outlawry against the other, but by a wrong name, the court on motion, gave leave to amend the capias, in order that a new original might be procured, and the bail be held liable. Carr. v. Shaw, 7 Term R. 299.

And where one of two obligees in a bond sued out a capias in his own name alone, against the obligor, and took a recognizance of bail, and afterwards discovering the mistake, sued out a new original in the name of the two obligees, and applied to the court to amend the capias and recognizance according to the new original, the court granted the application as to the capias, but refused to amend the recognizance, as the bail could not be made liable without their consent. Tabrum v. Tenant, 1 Bos. & Pull. 481.

So a special capias omitting the Christian names of two of the defendants, was amended, by inserting them, although there was nothing to amend by, on payment of costs. 2 Smith R. 392.

If there be less than fifteen days between the teste and return of process by original, it may be amended in the Common Pleas. Boucher v. Wittle, 1 H. Black. 291

And where a capias is made returnable on a day certain, instead of a general return day, that court will allow it to be amended on payment of costs; but not if it is to the prejudice of the bail. Walker v. Hawkey, 5 Taunt. 853. Inman v. Huish, 2 New R. 153.

So where an attachment of privilege was made returnable after the essoin day, and before the *quarto die post*, instead of being returnable on a day certain in full term, an amendment was allowed. Adams v. Luck. 3 Bro. & B. 25. 6 Moo. 113.

But where the defendant was arrested on a bill of *Middlesex*, returnable on a *dies non*, the court held the writ void, and not amendable, and the defendant was discharged.‖ Kenworthy v. Peppiat, 4 Barn. & A. 288. As to amendments affecting bail, see tit. *Bail, post*.

2. *Of the Imparlance Roll.*

After the first term it is allowed in *C. B.* to amend the imparlance roll by the office paper-book, because that is instructions to the prothonotary to enter up the imparlance roll, and therefore that is equally amendable as the original is by the instructions given the cursitor; but this must be on affidavit that the paper-book has not been altered since the defendant's attorney has put his hand to it. Roll. Abr. 198. Hob. 246. 2 Roll. R. 152. Moor, 892. Hut. 85. Litt. Rep. 278. In the King's Bench they will amend both the bill and the roll by the office paper-book, because this is instructions for making them both; but they cannot amend from any other paper-book, because such book is not instructions left in the office to make up both the roll and the bill; but where there is no office-book, as where the general issue is pleaded, it seems they should amend either the bill or the roll by the declaration, of which they gave the defendant a copy, because such declaration is the only instruction to the clerk of the office.* —— * In *B. R.* a bill is seldom filed, unless against a privileged person. — Where a bill is not filed, the court will permit a right hill to be filed, without enquiring into the time of filing, and give the plaintiff leave to amend his plea-roll, by the

the bill filed. Gardener against Browne, Trin. 15 G. 3. *B. R.* 2 Stra. 1151. [But an amendment shall not be made in this manner after verdict, if it change the record in a substantial point. 2 Wils. 147.]

Litt. Rep. 278. Hetley, 142. Datch. 165. Roll. Abr. 207. Cro. Jac. 165. Cro. Eliz. 258. 2 Leon. 120. 2 Mod. 316. 12 Mod. 684. Stra. 139. 2 Stra. 754. 2 Ld. Raym. 1441. 2 Stra. 947.

If the bill on the file be with blanks, or the imparlance roll be with blanks for dates or quantities, yet it may be amended by the paper by the clerks themselves, until a *recordatur* be ordered of the verdict returned on the *nisi prius* roll; but after such *recordatur* it can only be amended by the court; for the roll lies with the prothonotary to be made up according to the paper-book, until the *recordatur* of the verdict be allowed; but if after the *recordatur* be entered, it is ordered on the roll *in statu quo tunc*; and then the court is supposed to take conusance of it, in what manner it then was; and if the clerks might afterwards alter the roll after entry of the verdict, they might amend it in the verdict which is on the *nisi prius* roll, which was settled by the judge of *nisi prius*, and cannot be altered but by rule of court.

Roll. Abr. 191. Hob. 251. And note: If the count varies in form, the defendant may plead it in abatement, for he has abated his own writ by prosecuting it in a different manner; but if it varies in substance, the defendant may move in arrest of judgment, because the court has no authority to proceed, having prosecuted a different matter from that which the writ has given authority to the court to take cognizance of. Jon. 304. Cro. Eliz. 722. Cro. Jac. 654.

The imparlance roll cannot be amended by the original writ, because the original writ is the authority on which the court proceeds, which the plaintiff must prosecute, for otherwise he does not proceed in that cause.

Roll. Abr. 207. Cro. Car. 92. Lit. Rep. 72. Hut. 92. Hetl. 59. 3 Bulst. 227. Hob. 76. Latch. 165.

The imparlance roll cannot be amended by the plea roll or *nisi prius* roll; for the imparlance roll is the original declaration and the ground of all.

Roll. Abr. 199.

But if the declaration be against *H. B.* and he imparls by the name of *R. B.* but pleads by his right name *H. B.* this is no material fault, because it is only a continuance from one term to another, and by pleading by his right name he acknowledges he imparled by a wrong name.

2. *Of the Plea Roll.*

Hob. 76. Roll. Abr. 207. ‖As to the plea roll, see Tidd's Prac. 786. (8th edit.)‖

The plea roll may be amended by the imparlance roll, which is no more than a recital of the imparlance roll, and begins with an *alias prout patet*, being the count of the second term, to which the defendant pleaded *ore tenus*.

Moor, 711. [(*a*) In the case of Richards *qui tam* v. Brown, the Court of K. B. gave leave to do the very reverse to what was done in this case, viz. to alter the name in the warrant of attorney to that in the declaration, and this after error brought, and that variance assigned for error. Dougl. 114.]

If there be a mistake in the attorney's name, it may be amended by the warrant of attorney; for the warrant of attorney being precedent, will amend the plea roll, and the court will take notice that it is the same that appeared. (*a*)

Yelv. 38. Cro. Jac. 13. [The decision here referred to, is

But if the name of a stranger be put into the plea, this will be error, for it cannot then appear to the court that the same man that appeared did plead, and then there was no plea pleaded; and so

so if the defendant's name be mistaken in the putting in his plea, as if in an *audita querela*, the plaintiff surmises that he entered into a statute of 300*l.* to the defendant, for the payment of 50*l.* per annum for six years, to *John Bush*, a stranger, if the defendant comes, and *protestand., &c. pro plac. idem Johannes Bush*, instead of the defendant; this is erroneous, because it does not appear to the court that the plea was put in by the stranger, to whom the payment was to be made, and not to the defendant; but if the plea had been, that the *prædict.* plaintiff *venit et dicit*, instead of the defendant, this will be construed to be the misprision of the clerk, for it is apparent that the plaintiff could not be the defendant; but it shall be supposed to be put in by him that appeared, since there is no other person.

that of the court of error: and the reason given by *Yelverton* why an amendment could not be made in this case, is, that the mistake had been specially shewn for cause of demurrer in the court below, and the judgment of the court had passed upon the cause so shewn, and therefore all amendments were ousted.] Cro. Eliz. 904.

4. *Of the Jury Process, and* Nisi Prius *Roll.*

If the *venire* be of the same place, and in the same action, and between the same parties, all other faults will be amended.

Vide head of *Juries.*

But if the place be totally misawarded, this is not helped by any statute; but if it is only misawarded in part, this is helped by the express words of 21 Jac. 1. c. 13.

Vide 4 Ann. c. 16. § 6, 7. and 24 G. 2. c. 18. §3. That the award is to be at large of the body of the county; and 3 G. 2. c. 25. Head of *Juries.*

In ejectment, where the *venire* was *de placit. transgressionis*, omitting *et ejectionis firmæ*, the court held the *venire* to be ill, because it was not in the same action, for an action of trespass and ejectment are different, and there might be an action of trespass between the same parties; but if the *distringas* had been right, they would have judged this *venire* to have been null, and the want of a *venire* is aided by the statute.

Jones, 302. Godb. 194. Cro. Eliz. 259. Cro. Jac. 528. *Quære.*

If the *jurata* mentions the issue to be *de placit. transgressionis*, where the action is debt, and the award of the *venire* and *distringas* debt, this shall be amended; for the *jurata* is an award of the *distringas*, in pursuance of the award of the *venire*, and the *venire* being right, the secondary process (*a*) ought to be made accordingly.

Cro. Car. 275. Danv. Abr. 334, 335. (*a*) The award on the roll being right, shall amend the *venire*, and the *venire* being right, shall amend the *distringas*, which is the proper process for convening the jurors in the King's Bench: So of the *habeas corpora*, which is the Common Pleas process. Lit. Rep. 252, 253.

So if the sheriff return *nomina jurat. inter partes prædict. de placit. transgressionis*, where the *venire* is *de placit. debit.* this shall be amended; for *in dorso brevis* he says *executio istius brevis patet, &c.* which could not be if it was not in the same action.

Roll. Abr. 202. Cro. Car. 275.

The award of the *venire* must be to a day in the same term, or to the next term, but it must be in term, otherwise it is erroneous.

Mo. 465. 710. Danv. Abr. 335.

But if the *distringas* be without the day of *nisi prius*, or mention a wrong day, if the *jurata* roll be right, the *distringas* may be amended by the *jurata* roll.

3 Mod. 78. 10 Mod. 88. 12 Mod. 107. 274. Ld. Raym. 95. 511. 2 Ld Raym. 1144.

Cro Eliz. 760. 820. Owen, 62. Cro. Jac. 162. Cro. Car. 38. 2 Roll. Abr. 200.

So if the return of the *venire* be mistaken, this may be amended by the roll; and if the *teste* of the *venire* be out of term, or before plea pleaded, it is no error; for the *teste* of judicial writs being only matter of form, shall not vitiate if mistaken.

Vide head of *Juries*.

If the number or qualifications of the jury be omitted in the *venire*, it may be amended by the roll, and the rather, because these matters are ascertained by the law.

Danv. Abr. 330. Cro. Eliz. 202. 563.

If there be a mistake in the christian name of a juror, it is incurable (*a*), for the statutes do not extend to it, but only extend to cure surnames and additions, for there can be but one name of baptism, but there may be various surnames and additions; and therefore if it can be proved what person the sheriff meant by his surname or addition, it may be amended and set right.

(*a*) But if the christian name be wrong in the *distringas*, or in the panel returned, or in the panel of the jury sworn, if it can be proved to be the same man that was intended to be returned in the *venire*, having there his right christian name, it may be amended. Roll. Abr. 196. 197. 3 Bulstr. 18. Hob. 64. Brownl. 174. See 2 Stra. 1214. ‖See Willes R. 488. 12 East R. 229. 6 Taunt. 460. and tit. *Juries* (I).‖

Vide for this head of *Juries*.

If the court on an insufficient suggestion awards the process to an improper officer, yet this is aided after verdict, for that only makes an insufficiency in the return of the jury, and insufficient returns are aided; for it was the design of the statute, that if the cause was tried by a right jury, that it should not be material what officer got them together.

8 Co. 166. Moor, 681. Carth. 506. 5 Mod 211. Salk. 48, 49.

As to the *nisi prius* roll, which is only a transcript of the plea roll to carry the issue into the country, if it differs from the plea roll in any matter which does not alter the issue it may be amended; but if it differs in any matter which alters the issue it cannot be amended by the plea roll, because it does not give the judge of *nisi prius* authority to try the matter which is in issue between the parties on the plea roll. (*b*)

(*b*) Variance in the *nisi prius* roll amended by the plea roll in indictment for forgery. Barnard. K. B. 152. 2 Ld Raym. 1518. 2 Stra. 843.

8 Co. 166.

As if the issue be on the addition of the defendant's name, whether *J. S.* was husbandman *die impetrationis brevis*, and the *nisi prius* roll be, whether he was husbandman generally, omitting the words *die impetrationis brevis*, this is not the issue on the plea roll; and therefore cannot be tried.

Brownl. 47.

So in a bond conditioned for the payment of a certain sum at the first ——— next ensuing the date, and on the *nisi prius* roll the date be omitted, this is not the same issue as on the plea roll.

Dyer, 260.

But where the defendant's name is omitted in joining of issue, this shall be amended by the plea roll, because the issue is not varied, and the justices of *nisi prius* have authority to try it by the *distringas*.

Roll. Abr. 202, 203.

So where in an action on the case upon *assumpsit*, the defendant (upon the plea roll) pleads *non assumpsit*, and on the *nisi prius* roll it is *non culpabilis*, after verdict the *nisi prius* roll shall be amended by the plea roll, for both pleas traverse the gist of the action; and the defendant has the same advantage in the *non culpabilis*,

culpabilis, as in the *non assumpsit*, and the issue is the same in substance.

So in ejectment against *seven* defendants, who entered into the common rule, and pleaded to issue, the plea roll, *venire*, *distringas* and *jurata* were right; but the issue on the *nisi prius* roll was between the plaintiff and *five* defendants only; after verdict for the plaintiff this was amended, for the lessor's title was the gist of the action, and the only thing inquirable of by the jury. Salk. 48. pl. 5. Ld. Raym. 94. 12 Mod. 107. Comb. 393.

‖So also in *assumpsit* against two defendants where one had pleaded the general issue, and the other had suffered judgment by default, but the *nisi prius* roll stated by mistake that the same defendant pleaded *non assumpsit*, and also came and said nothing, *&c. &c.* and it did not appear that the other had come in at all, Lord *Ellenborough* C. J., on consent of parties, directed the clerk of *nisi prius* to make the proper amendment. Murphy v. Marlow and another. 1 Camp. R. 57.

So also the court gave leave to amend the *nisi prius* roll by inserting a special title to the declaration of a day subsequent to the defendant's coming of age, he having been a minor on the first day of term. Boys v. Edmeads, 2 Chitt. R. 22. Dickinson v. Plaisted, 7 Term R. 474.

So also after a nonsuit for a variance in an undefended action, the Court of Common Pleas permitted the record to be amended and a new trial had.‖ Halhead v. Abrahams, 3 Taunt. 81.; As to amending the record to cure variances under the 9 G. 4. c. 15. see *Pleas and Pleading* (B) 3., and 1 Moo. & Malk. 359. 253. 3 Car. & P. Ca. 485. 594. 4 *id.* 22. 24. Tidd (9th edit.) Suppl. 127.

5. *Of the Verdict.*

If the jury find a certain verdict, and it is entered uncertainly on the record, if the judge who tried the cause remembers certainly how the jury found it, it shall be ascertained by the memory of the judge (*a*), and the verdict may be made certain as the jury found it.

(*a*) Where the *postea* is amendable by the notes of the verdict taken by the clerk of assize. Moor, 689. Cro. Eliz. 112. Where the mis-entry of the verdict shall be amended. *Vide* Cro. Eliz. 677, 2 Jones, 211. Special verdict amended after argument without costs. Ld. Raym. 335. See Stra. 514. 1 Lev. 131. *Postea* amended by judge's notes. 2 Stra. 1197. 1 Will. 33. [Where there is a general verdict on a declaration, consisting of different counts, some of which are inconsistent, or bad in point of law, and evidence has been given on the good or consistent counts only, the verdict may be amended by the judge's notes. Dougl. 561. 718. *Aliter*, it seems, if evidence has been admitted on the bad or inconsistent counts. *Id.* 562.] ‖And accordingly the Court of King's Bench refused to amend the verdict in an action of slander, where one count out of four was bad, since the evidence applied equally to all the counts. Holt v. Scholefield, 6 Term R. 691. But where evidence was given on both counts and the first count was bad, but it appeared, from the judge's notes, that the damages were calculated merely on evidence applicable to the second count, which was good, the Court of Common Pleas refused to arrest the judgment. Williams v. Breedon, 1 Bos. & Pull. 329.‖ [An amendment by the judge's notes, it was formerly holden, could not be made after judgment. *Id.* 703. But it seems now, that it may be made at any time, even after final judgment, and a writ of error brought. 3 Term R. 749. A mistake in not entering up a verdict on one of the issues, allowed to be amended by the judge's notes, after error brought for that reason, and joinder in error. *Id.* 659.] ‖But when the application was made after a lapse of eight years from the trial, and the defendant had since reversed the judgment on error for the badness of one count of the declaration, the Court of King's Bench refused the amendment. Harrison v. King, 1 Barn. & A. 161. But in a late case in *assumpsit* some of the counts were bad and some good; and the jury having found a

verdict for the plaintiff with general damages, upon evidence applicable to all the counts, the Court of Common Pleas after error brought, and argument in K. B., amended the *postea* by the judge's notes, by entering the verdict for the plaintiff on the first count, and for the defendant on the others. Richardson v. Mellish, 11 Moo. 104. 3 Bing. 334. And they amended the judgment roll by the amended *postea*, after the judgment had been reversed, and the reversal entered of record in the court of error. 11 Moo. 119. 3 Bing. 346.; and see 7 Barn. & C. 819. S. C. After verdict in ejectment brought for a messuage and *tenement*, and pending a rule to arrest the judgment, the court will give leave to enter the verdict according to the judge's notes for the *messuage* only, without obliging the plaintiff to release the damages. Goodtitle v. Otway, 8 East R. 357. The court will not amend a verdict according to the notes of an arbitrator. 1 Chit. R. 283. The application to amend by the judge's notes should be made to the judge who tried the cause, and not to the court. *Ibid.*, and 1 Barn. & A. 161.; and see tit. *Verdict* (D) and (L).‖

Cro. Car. 338. Eliot and Skypp, adudged.

As if in debt for 19*l.* 10*s.* the plaintiff declares upon a lease of copyhold lands, rendering 38*l.* per annum, and upon a lease of freehold land, rendering 20*s.* per annum, and demands 19*l.* for half a year's rent of the copyhold, and 10*s.*, for the freehold; and upon *nihil debet* pleaded it was found for the plaintiff, *quoad* the 10*s.* for the freehold, and for the defendant *quoad* the 19*l.* for the copyhold; but in the *postea* it was returned, that they found for the plaintiff *quoad* 10*s.* part of the said 19*l.* 10s. and *quoad* the residue *nil debet*, so that it was altogether uncertain which of those rents were paid; yet if the judge that tried the cause remembers that, *quoad* the copyhold rent, the jury found for the defendant, and *quoad* the freehold for the plaintiff, the *postea* shall be amended accordingly.

Roll. Rep. 82. Roll. Abr. 207. Hetl. 52. Lit. Rep. 61. Cro. Car. 144. 4 Co. 52. Salk. 47. pl. 4. 48.

Also a special verdict may be amended by the minute or notes taken by the counsel or clerk of assize (*a*), after a writ of error brought.

(*a*) But though a verdict, general or special, may be amended by the notes in the book of the clerk of assize, if there be a misprision; yet this cannot be done in a criminal case. Salk. 53. pl. 19. 47. S. P. Ld. Raym. 141. 11 Mod. 84. ‖and Stra. 844. 2 Hawk. P. C. 922. *contra*.‖ [And see Dougl. 362. where a mistake in the verdict in a criminal case, was corrected from minutes signed by the jury. In Bunb. 283. a mistake in a special verdict on an information of seizure, amended by minutes, after one argument.] ‖See tit. *Verdict* (D).‖

[The point in this clause was not touched upon in any of the passages referred to in the former editions.]

But nothing can be added to the minute or notes, though never so strongly proved by the evidence, because that would be to subject the jury to an attaint for a fact that was never found by them.

‖Attaints are now abolished by 6 G. 4. c. 50. § 60.‖

(E) What Defects may be amended or aided after Verdict: and herein,

1. *Of the Want of sufficient Certainty in the Plaintiff's Declaration, in not setting forth his Cause.*

For this *vide* head of *Error*; ‖and see *antè*, p. 201. *et seq.*, and 1 Will. Saund. 227. *et seq. notis* (5th edit.‖

A VERDICT cures not only such defects as may be called artificial defects, and come within the purview of the several statutes of amendments and *jeofail*, but also natural defects, or the omissions of the parties in their allegations, which must be presumed to have been given in evidence to the jury; otherwise they could not have found a verdict for the party.

The

The chief intent of all the statutes of *jeofails* seems plainly to be, that the wrong pleading of any collateral matters not essential to the action, should, after the expense of a trial, and verdict for the party, be aided, but not to extend to matters of substance, or whatever is essential to the gist of the action; for this would have ruined all proceedings in the courts of justice; besides, had such essential part been set forth, it might occasion a contrary verdict; neither can the jury be attainted for a false verdict on the uncertain allegations of the parties, for it cannot appear whether the damages given by the jury be proportionable to the demand or not.

[After verdict, the insertion in some of the counts of the defendant's name instead of the plaintiff's rejected as surplusage. 3 Wils. 43.]

Whatever therefore appears to be essential to the gist of the action cannot be cured after verdict; for the law requires that all substantial facts shall be laid in proper time and place, so that the defendant may traverse them distinctly if he pleases; for as he may traverse the whole, so he may traverse each substantial part, in order to put the weight of the cause on any one thing that will put an end to the cause.

Vide tit. *Pleas and Pleadings* (B), 5 Mod. 286. ‖and tit. *Verdict* (X).‖

But as this matter is more fully treated of under the heads of *Error* and *Pleas and Pleadings*, we shall here only observe, that the difference in all the cases on this head turns upon what is *substance*, and what is *form*; which must be determined in every action according to its nature.

2. *Of Repugnancy and Surplusage.*

Surplusage does not vitiate after verdict, according to the maxim, *utile per inutile non vitiatur*; and therefore, if such surplusage is repugnant to what is before alleged, it is void; as if in trover the plaintiff declares that he was on the 4th of *March* possessed of goods, and that afterwards, *scilicet* the 1st of *March*, they came to the hands of the defendant, who converted them.

‖*Vide* tit. *Pleas and Pleadings* (I), 4.‖ Cro. Jac. 97. 428.

So in ejectment, the plaintiff declared on a lease made to him the 3d of *May*, and that the defendant *postea*, *scilicet* 1st of *May*, ejected him; this was held good after verdict; for by the *postea* it appears, that the defendant committed a *tort* on the plaintiff's title; and when he says a repugnant day, it is as if he had laid none; and if no day be laid, it shall be intended after verdict, that the *tort* was committed before the action brought; for it would be very foreign, after verdict, to intend that the action was brought by the spirit of prophecy, for a wrong to be committed afterwards; besides, the jury could not take cognizance of any fact done since the action brought, for that was not in issue.

Yelv. 94. Carth. 288, 289.

In debt on an obligation, the defendant pleads payment of 50*l.* 14 *Junii* 11 *Jac.* according to the condition; the plaintiff replies *quod non solvit* 50*l. prædict.* 14 *August. anno* 11, *suprad. quas. ad eundem diem solvisse debuisset, et hoc*, &c., the verdict found *quod non solvit prædict.* 14 *Junii prout* the defendant had alleged; the objection here was, that no issue was joined, because they do not meet in the time the money was paid; but the word *August* is plainly surplusage, for when he said *quod non solvit prædict.* 14 *die*,

Cro. Jac. 549. [See Cro. Jac. 585., where such a variance in the *quantum* of the demand was holden to be fatal.]

die, it is a sufficient traverse without the word *August*, and *August* is plainly repugnant to the word *prædict.*, for *prædict.* refers to *June*; and such surplusage being a repugnancy to what was before material, was idle and void.

Where the plaintiff may release such repugnant part, *vide* Sand. 282. 886., and head of *Pleas and Pleadings*.

But if there be a repugnancy in any point material, there it is not helped by a verdict, unless the verdict appears to have been given on a different part of the declaration.

Cro. Jac. 264. Sand. 116.

If the replication be repugnant to the declaration, it makes the declaration bad, because the subsequent pleading falsifies the declaration; as if a man declares on a bond made 1 *Martii*, if the plaintiff replies that the bond was delivered 30 *Martii*, this falsifies the declaration; because it could not be made the first; so if the rejoinder falsifies the bar, the bar is vicious.

3. *Of Insufficiency in the Defendant's Bar.*

Cro. Eliz. 778.

As the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be substantially good; and if the gist of the bar be naught, it cannot be cured by a verdict found for the defendant; but it found for the plaintiff, he shall have judgment, either for the badness or falsehood of the bar; but if it be bad only in form, a verdict will cure it: and if the gist be traversed, all collateral circumstances will be intended after a verdict.

5 Co. 43. Mo. 692. Cro. Jac. 377. S. C. cited.

Thus in an action of debt on a single bill, the defendant pleads payment without an acquittance, and it is found for the defendant, yet he shall not have judgment, because the gist of the plea is bad, since the obligation is in force till dissolved *eo ligamine quo ligatur*, and the acquittance under the seal of the plaintiff is the gist of the bar; but if it had been found for the plaintiff, he should have judgment, because the bar was not only bad in substance, but found false.

Vide head of *Pleas and Pleadings* (I).

But if the bar be only bad in form, a verdict will supply it: as if in debt on a bond conditioned for payment of 100*l.* 25 *Junii prox.*, and the defendant pleads payment on the 20th of *June*, and it is, according to the plea, found that he did pay it the 20th; though this bar be bad in form, because it does not follow the condition, and the plaintiff might have taken advantage of it on a special demurrer, yet the verdict having found payment *before* the day, that in law is payment *at* the day, and the substance is found.

4. *Of immaterial and informal Issues.*

‖ *Vide* tit. *Pleas and Pleadings* (M). ‖ Lev. 32. Carth. 371. (*a*) An *immaterial* issue is where what is materially alleged by the pleadings is not traversed, but an issue taken upon such a point as will not determine

A verdict cannot help an *immaterial* issue (*a*); for if what is material in the pleadings be not put in the issue, it is not made necessary to be proved on the trial; or if it be alleged and proved, yet if it appear insufficient, so as not to be decisive between the parties, the verdict will be no good foundation for the judgment; but an *informal* issue is helped by the verdict.

determine the merits of the cause; and an *informal* issue is where it is not traversed in a right manner. Brownl. 229. Cro. Eliz. 227. 2 Mod. 137. 10 Mod. 19. 11 Mod. 2. Ld Raym. 168. 2 Stra. 933. 2 Barnard. K. B. 55. 2 Stra. 1011. ‖3 Bos. & Pull. 548.‖

If the plaintiff declares on a promise to find the plaintiff, his wife, and two servants, with meat and drink for three years, on request; the defendant pleads that he promised to find the plaintiff meat, *&c. absque hoc*, that he did promise to find, *&c.* for three years next following, and *hoc petit*, *&c.* and verdict for the plaintiff; yet he shall not have judgment, because the promise in the declaration is laid to be on request, which promise is not traversed in the same manner; besides the plaintiff in his replication alleges a promise next after he was married, which is not the same the defendant traversed; so that they are not at issue a point traversed in bar, since the bar is for a contract for three years on request, and the replication for a contract for three years next ensuing the marriage, and *non constat* by the verdict, which of the contracts was proved on the trial.

5 Leon. 66. Kirlee and Lees. 2 Leon. 195. S. C. cited. Godb. 56. S. C. cited.

So in trespass, the defendant pleads an accord between the plaintiff and *J. S.* of the one part, and the defendant of the other part; the plaintiff replies *quod non habetur talis concord.* between the plaintiff and defendant, *qualis* the defendant had alleged; and issue joined and verdict for the plaintiff; yet he shall not have judgment, because he does not traverse the same accord that is set out in the defendant's bar, but puts another accord in issue, not alleged in the defendant's bar, *viz.* between the plaintiff and defendant only.

Roll. Rep. 86.

So in debt on a bond conditioned for the payment of 105*l.* the defendant pleads payment of 100*l.* *secundum formam et effectum conditionis*; the plaintiff replies, *non solvit prædict.* 105*l.* this is an immaterial issue (*a*), not aided, for the plaintiff has not traversed the same payment that is in the defendant's plea.

Cro. Jac. 585. Sandbank and Turvy, Cro. Car. 593. S. P. adjudged upon error. Hob. 173. S. P. adjudged.

(*a*) But where an issue is decisive between the parties, though not so apt, it shall be cured after verdict. *Vide* 2 Jon. 184. Cro. Jac. 44. 435., and heads of *Error*, and *Pleas and Pleadings*; ‖and see 2 Will. Saund. 319. a. b.‖

If an issue be on a point that is impossible in *substance* and *nature* of the thing, it is not cured by the verdict; but if it be only impossible in the *manner* and *form* of it, a verdict will cure it; as in debt on a bond conditioned for the payment of 100*l.* on the 31st of *September*, and defendant pleads payment at the day, and it is found against him, the plaintiff shall have judgment: because the payment is what is material, and the day impossible, and is altogether idle and void; for not being paid before the end of that month, the obligation is absolute.

Cro. Car. 78. Purchase and Jegon. Jones, 140. S. C. Latch. 158. S. C. Noy, 86, 86. S. C. adjudged.

In an action of assault and battery, the defendant pleads that the plaintiff neglected his service, *per quod moderatè castigavit*: the plaintiff replies, *quod non moderatè castigavit*, and the issue found for the plaintiff; though this be an informal traverse, being (*b*) rather a traverse of the chastisement, than of the moderate manner of doing it, and the right traverse should have been *de injuriâ suâ propriâ absque tali causâ*; yet after verdict it is good, because the jury have ascertained that he did not beat him moderately.

Sid. 444. Vent. 70. 2 Keb. 623. (*b*) Where an issue joined on a negative pregnant, though bad on a demurrer, is good after verdict. *Vide* Cro. Jac. 87. and head of *Pleas and Pleadings*, (16.)

In

Noy, 56. 2 Jones, 184. (a) Where not guilty was pleaded to an *assumpsit*, yet the plaintiff had judgment, though an improper plea.

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it shall be aided by the statute; because being an ill plea (*a*), and a false one, the plaintiff ought to have his judgment, both for the badness of the plea and for its falsehood; but if the verdict had been for the defendant, yet the plaintiff should have judgment, because the declaration is not answered by the plea. (*b*)

Cro. Eliz. 470. ‖2 Salk. 734. 2 Stra. 1022.‖ 2 Roll. R. 368. *cont.* In debt against an executor upon the bond of his testator, the defendant pleads *non est factum*, &c. Hardr. 458. In an action of covenant, on a covenant that *C.* was seised in fee, and assigns for breach that *C.* was not seised in fee, *et sic infregit conventionem*; though, in covenant, the defendant ought to traverse either the deed or the breach, and both cannot be involved in *non fregit conventionem*, because the gist of the action lies on the deed, which must be traversed by itself, yet when the defendant pleads a bad plea, which is found against him, the plaintiff may have judgment either for the insufficiency or falsity of the plea. Sid. 289. Lev. 183. S. C.; *vide* Moor, 399. Cro. Eliz. 457. 2 Leon. 116. S. P. (*b*) *Qu.* If in debt on a penal statute, as for not setting forth tythes, for usury, &c. not guilty would not be a good plea, though *nil debet* is the proper, formal plea. 1 Term R. 462.]

Roll. Abr. 200. Yelv. 65. S. P. Cro. Jac. 67. adjudged. Cro. Eliz. 752. S. P. adjudged. Palm. 524. S. P. *per cur.* *Misnomer* in joining issue

If on an issue tendered by the plaintiff, the defendant joins the *scilicet* (*a*) by the plaintiff's name, or the plaintiff joins the *scilicet* by the defendant's name, to an issue tendered by the defendant, this shall be amended, there being a negative and affirmative before, between the plaintiff and defendant, which is the pattern whence the joining that issue is to be taken; there is a sufficient copy whence this may be amended, it being, from the nature of the thing, a plain mistake of one man's name for another.

upon an information. Stile, 167. ‖(*c*) This is a mistake for *similiter*. In a case, 2 Stra. 1117., where a similar error appeared at the trial, the Chief Justice dismissed the jury; but in a subsequent case the court refused to arrest the judgment on this ground. 3 Burr. 1793.; and the want of a *similiter* is now held amendable. Cowp. 407. 2 Chitt. R. 25.; *sed vide* 2 Bro. & B. 1.‖

(F) Of amending the Judgment.

Leon. 134. 8 Co. 138. Carth. 158. 367. 520. Ld. Raym. 565. 5 Mod. 16. 69. Comb. 354.; but see now 5 G. 3. c. 13. *supra*.

IT is a general rule, that the court will make no amendment that will defeat a judgment, the statutes allowing amendments in affirmance of judgments only.

Roll. Abr. 337

But in affirmance of the judgment, the judgment itself may be set right and amended by another part of the record, in a fact which appears to be the misprision or neglect of the clerk, as in the mistake of the names of the parties; so in debt against *A.* and the judgment is *quod prædictus B. capiatur*, when it should have been *prædict. A.*, this shall be amended.

Vent. 217. [This case was on a writ of error from *Ireland*: and see Cowp. 841. where the Court of

So in an action brought by *Robert Meredith*, and the judgment as entered, was *quod prædict. Carolus Meredith recuperet*, and the court held this amendable, being only the fault of the clerk, the misprision being only in the name, which was right in the rest of the record, which was before the clerk, and should have directed him.

King's Bench, in this country, amended a record in ejectment from thence, by enlarging the term.] *Vide* several cases to this purpose, Cro. Eliz. 400. 864. Hob. 327. Moor, 361. 697. Hut. 41. Brownl. 56. Raym. 39. Comb. 64.

So

So if in an action of debt upon an obligation against *Rob. H.* conditioned that if *Henry H.* or *Rob. H.*, the defendant, should pay, *&c.* judgment is entered that the plaintiff *recuperet debitum et damna* against the said *Robert, et prædictus Henricus in misericordia*; where it should have been *Robert*, for *Henry* was no party to the record; this shall be amended, for it is only the mistake of the clerk. Cro. Car. 594. Pelham and Heming. A judgment *quod prædictus Thomas recuperet*, instead of *prædict.*

Arthurus, amended after twenty years' standing. 4 Mod. 371. 12 Mod. 384. 1156. 1182. 2 Stra. 1132.

As to amending the judgment by the docket, it is to be noted, that before the statute 4 & 5 W. & M. c. 2. which, for the security of purchasers, requires that all judgments should be docketed, the courts used to amend both the judgment and the docket, where there were sufficient instructions to amend by; but now the docket cannot be amended; and therefore if there be a false docket, which is as none, though a right judgment, the purchaser is safe, and the party grieved must take his remedy against the officer for not docketing it truly. Cro. Car. 574. Raym. 39. Sid. 79. 1 Wils. 61. 2 Stra. 1209.

In a *quare impedit* for the presentation of a *vicarage*, and the judgment is *quod recuperet ecclesiam*, this shall be amended (*a*), being the mistake of the clerk, who had sufficient instructions from the *postea* to enter it right. Hob. 327. Hut. 41. Cro. Jac. 633. S. C.

(*a*) So in debt, where the judgment was entered *quod recuperet* the sum in the declaration, *pro misis et custagiis*, instead of *pro debito prædict.*, and amended. Vent. 132. In debt against an attorney by bill, the judgment is *quod querens nil capiat per breve*, where it ought to be *per billam*, yet it shall be amended. Roll. Abr. 206. Cro. Car. 580.

So if judgment be against a man and his wife, and the judgment is that the wife is *in misericordia*, and not the husband, this is amendable by the paper-book that is right. Hob. 127. Moor, 869. Cro. Jac. 633. Brownl. 16. Roll. Abr. 206. 215. S. C.

In ejectment brought by two, if judgment be entered that the plaintiffs *recuperet*, this is a plain mistake of the clerk, and shall be amended. 2 Jones, 199. [Where judgment was entered against executors *de bonis propriis* instead of *de bonis testatoris*, and error brought upon it; this being considered as merely the blunder of the clerk, was amended after argument in the Exchequer-chamber. 5 Burr. 2730. 2 Lev. 22.] ‖And see Green v. Rennett, 1 Term R. 783. But where an executor pleaded a false plea of judgment recovered, and the plaintiff entered up the judgment for debt and damages *de bonis testatoris, et si non, de bonis propriis*, and words were afterwards interlined (it did not appear by whom), by which the judgment *de bonis propriis* was confined to the damage alone, the Court of C. P. refused, on motion, to strike out the words interlined, the judgment being of six years' standing, and the amendment going to *fix* the executor's liability, whereas in the case in 5 Burr. it was to discharge it. Burroughs v. Stephens, 4 Taunt. 554. 1 Marsh. 211.‖

If the damages *de incremento* be mistaken by the clerk (*b*), the court will amend it by the judgment-book, because that was a sufficient instruction to the clerk to have entered the judgment by, and therefore it was his misprision not to go according to his instructions, which may be rectified and amended. Roll. Abr. 206.

(*b*) As where the jury found for the plaintiff, and gave 2*s.* damages, and so much for costs, and the clerk, in entering thereof, says 2*s.* for damages, and so much for costs, and so much *pro incremento, quæ in toto se attingunt* to so much; in which sum the 2*s.* is not comprehended, this shall be amended. 3 Bulst. 114. 8 Co. 162. Palm. 509. Dyer, 55. Roll. Rep. 272.; and *vide* like amendments in declarations, where the total sum is miscast. Bulstr. 171. 179. 2 Bulstr. 149. Yelv. 5. Noy, 44. Poph. 209.

‖Where the jury by mistake gave damages in a penal action in Hardy v. Cathcart,

1 Marsh. 180.; and see Goodtitle v. Otway, 8 East, 357.

in the Common Pleas, and error was thereupon brought, the Court of Common Pleas allowed the plaintiff to amend, by entering a *remittitur* of damages on the record, and making the transcript conformable.

Pickwood v. Wright, 1 H. Black. 642. Usher v. Dansey, 4 Maule & S. 94.; and see 2 Barn. & C. 902. 4 Dow. & Ry. 566. 11 Price, 410. 3 Bing. 346. 2 Chitt. R. 24.

And where a verdict is given for a greater sum than the amount of damages laid in the declaration, and for that cause error is brought, the court will allow the plaintiff to amend the judgment and transcript, by entering a *remittitur* for the excess, on paying the costs of the writ of error.

Dunbar v. Hitchcock, 5 Taunt. 820.; and see 2 Taunt. 554. 5 Chitt. R. 30.

Where the defendant was entitled to treble costs under the Mutiny Act, and entered up his judgment for treble costs generally, without stating on what ground he was entitled to them, the Court of Common Pleas refused, after error brought in the King's Bench, to amend the judgment by striking out the word "treble."

3 Maule & S. 591.; and see Tidd. 942. (9th edit.)

But a writ of error being afterwards brought from the King's Bench into the House of Lords, the Court of King's Bench, on motion, allowed an amendment to be made, by inserting the certificate of the judge who tried the cause, allowing the defendant treble costs.

Mellish v. Richardson, 7 Barn. & C. 819. The amendment was made in the record of King's Bench, and the case is now pending before the House of Lords.

Where a general verdict was given in Common Pleas for the plaintiff on a declaration consisting of several counts, some of which were bad in law, and the evidence applied to all the counts, and the Court of Common Pleas, after error brought and after argument of the error, amended the *postea* by the judge's notes by entering a verdict for the plaintiff on the first count, and for the defendant on the others, and also amended the judgment roll in Common Pleas by the amended *postea after* judgment had been reversed in the King's Bench; it seems that the court of error (King's Bench) was bound to amend the record by the amended record of the Common Pleas. ‖

Roll. Abr. 206. ‖See 8 East, 357.‖

In ejectment, if the judgment is entered *quod querens recuperet* the damages and costs, and not *quod recuperet terminum*, as the case is, this shall be amended, though this be but an action of trespass in its own nature.

Roll. Abr. 205. In the award of a repleader for the error

If a judgment be given on demurrer against the plaintiff, and the entry of the judgment is of a nonsuit instead of a judgment in demurrer, this shall be amended.

of the defendant's plea, it was entered *quia placitum est sufficiens in lege*, instead of *quia minus sufficiens est*, and the court held this not amendable (though it was right in the paper-book between the parties); but *Popham* and *Granville contrà*. Owen, 19. And *Qu.* If those *contrà* were not right?

2 Sand. 289. Between Pool and Longville, amended after a writ of error brought, and the first judgment affirmed accordingly.

If in replevin the defendant demurs to the plaintiff's plea in bar to the defendant's avowry, and judgment is entered *quod visis præmissis*, &c. *videtur justiciariis quod placitum prædict.*, &c. *minus sufficiens*, &c. but these words, *ideo consideratum est quod* the plaintiff *nihil capiat per breve suum, sed sit in misericordia et prædict.* defendant *eat inde sine die* are totally omitted, yet this shall be amended.

Raym. 39. S. P. cited. Sid. 70. cited. [Where, in replevin, the defendant made cognizance for rent in arrear, and the jury found for him, and damages to the amount of the rent claimed

claimed in the cognizance; but did not find either the amount of the rent in arrear, or the value of the cattle distrained, and judgment was entered for the damages assessed, he was permitted to amend his judgment, and to enter a judgment *pro retorno habendo*. Rees v. Morgan, 5 Term R. 349.]

If judgment is given upon a demurrer, and a writ of enquiry awarded, but in the entry thereof upon the roll, these words *per sacramentum duodecim proborum et legalium hominum* are left out, this shall be amended. 3 Mod. 112.

In debt upon a *mutuatus* the judgment was entered up as of *Hil.* term 1700, whereas the borrowing appeared to be 2 *April* 1701. After error brought it was moved to amend the judgment by the paper-book signed by the Master, which was the 2d of *January* 1700, and allowed to be amended; for it is but a slip of the clerk, who should have perused the paper-book signed by the master, which is authentic enough to amend by. Salk. 50. pl. 13. Parsons and Gill. Ld. Raym. 695. Com. R. 117.

But if there be a mistake or error in the judgment in any such matter in which the clerk has no instructions; as if before the 16 & 17 Car. 2. c. 8. a *capiatur* were entered for a *misericordia*, or *e converso*; this was error in the judgment, because before the statute it made a fine to the king, and a difference in the execution; and there being no instructions in the record itself, or in the judgment-book, whereby to amend it, it did not appear whether it was the error of the clerk in the entering, or of the court in giving the judgment, and therefore could not be amended (*a*); but may now by 16 & 17 Car. 2. c. 8. and the 5 W. & M. c. 12. takes away the *capiatur* fine, in actions *vi et armis*, therefore no *capiatur* shall be entered against the defendant, nor any thing in lieu thereof. (*b*) Cro. Eliz. 497. Palm. 98. 12 Mod. 104. 2 Ld. Raym. 1284. (*a*) 4 Mod. 6. Carth. 167. (*b*) Carth. 390.

(G) At what Time the Amendment must be made: and therein of Records removed out of inferior Courts, and paying of Costs.

IT seems to be the established doctrine of the courts, to allow the plaintiff to amend his declaration at any time (*c*), whilst the cause is in paper, on payment of costs, and giving the defendant liberty to alter his plea, because the pleading in paper came in only instead of the ancient way of pleading *ore tenus*, and in pleading *ore tenus* the record was only in *fieri*; but after the pleadings were entered on record, if it were not a record of the same term, it could not be amended or altered. Salk. 47. pl. 1. (*c*) And by Style's Pract. Reg. 45. the plaintiff may amend his declaration, though it be seven years past since he declared, if it be but in paper, paying costs, or suffering the defendant to imparl till the next term after. After plea pleaded, and the replication and rejoinder to part, and issue, notice of trial with *proviso* as to the other, and rule served to make up the issue to carry it down to trial, and the *nisi prius* roll ingrossed in parchment; all the proceedings above continuing in paper, the plaintiff had leave to amend upon payment of costs. Faresl. 156. 8 Mod. 226. Ld. Raym. 95. 116. 134. 183. 548. *Vide* Salk. 47. pl. 5., where *Holt* said, that he had known an amendment made, not only after plea pleaded, but after the record was sealed up, just even when it was going to be tried. The defendant cannot amend his plea after issue joined, or demurrer thereto; for by this he delays the plaintiff, which may turn greatly to his prejudice. Style's Pract. Reg. 49. Lord Raym. 669. 679. 683. Stra. 11. Salk. 179. Lutw. 1218.*

* The courts have, in many cases, suffered the defendant, on payment of costs, and submitting to terms, to amend his plea after demurrer, and even after argument, where leave was prayed before judgment given; *i. e.* where defendants had merits.

If

If the plaintiff declares, and the defendant pleads, and the plaintiff replies, and the defendant demurs, and the plaintiff joins in demurrer; yet the plaintiff may move to amend on paying of costs, if the cause be still in paper; so may he withdraw a demurrer not entered of record, and move to amend.

Salk. 50. Leperd and Germain. (a) Where, after a demurrer, the court cannot give leave to amend, *vide* Bulstr. 204.

But where the plaintiff declared against *J. G.* knight, the defendant pleaded in abatement he was a knight and baronet; and the plaintiff replied that he was knight, *&c.* on motion to have it amended upon payment of costs, all being in paper, and that the action being by bill the addition was not material; not being within the statute of additions it was denied, there being nothing to amend by, and the defendant had taken (*a*) advantage of the fault.

March, 1. Yelv. 38. Cro. Jac. 13, 14. Leon. 28. Sid. 54. 107. Raym. 231. 2 Vent. 142. 3 Lev. 39. 2 Bulst. 149. 3 Mod. 235. Ld. Raym. 669. 679. 6 Mod. 263. 310. Fitzgib. 193. 2 Stra. 890. Barnard. K. B. 408., where, after issue joined, or plea pleaded, and where not. Vent. 536. Style R. 33. 85.; but see the last note to the first clause. [A mere clerical mistake in the return to a *mandamus*, may be amended after the return has been filed. Dougl. 150. Rex v. the Mayor, &c. of Lyme Regis. 1 Stra. 275. A declaration in *quare impedit* was allowed to be amended after the defendant had craved *oyer* of the writ, and pleaded a variance between the writ and count. 2 Wils. 118.]

3 Lev. 347. Bearcroft v. Hundred of Barnham and Stone.

An action was brought by the master on the statute of *Winton*, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (though then fifty miles from the place,) also that he made oath that he did not know any of the persons; the issue was entered of record, and the jury appeared at the bar ready to try it, but being for other business adjourned to another day, the plaintiff observing his mistake moved to amend, by declaring of a robbery on his servant, *&c.* and it appearing that the year in which the action must be brought was expired, and consequently the action must be lost, if not allowed; the court after long debate, and consideration of former precedents, admitted him to amend.

Hil. 4 G. 2. The Duchess of Marlborough and Wigmore. Fitzgib. 193. 2 Stra. 890. Barnard. K. B. 408. (*b*) If

So where in *assumpsit* an executor laid the promise to be made to his testator, and the defendant pleaded the statute of limitations, and on motion to amend and lay the promise to himself, it was objected, that this would alter the nature of the issue (*b*), and take away the party's defence; yet it appearing that by the expiration of the six years the action would be lost, the court gave leave to amend.

the issue shall be changed thereby there shall be no amendment. Lit. Rep. 349. Hetl. 164. Moo. 681. 2 Roll. R. 312. [Where an executor had pleaded a former judgment recovered, but by mistake had stated a less sum than the judgment was really for, the Court of C. P. gave leave to amend, though the record had been made up near three years; but they at the same time permitted the plaintiff to reply *per fraudem*. Scutt v. Woodward, executor, 1 H. Black. R. 238.]

Lit. Rep. 278. Cro. Jac. 142. 365. 2 Leon. 120. Hetley, 142. Latch. 164. 2 Mod. 316. 12 Mod. 8. 684. Stra.

If the bill on the file be with blanks, or the imparlance roll be with blanks for dates or quantities (*c*), yet it may be amended by the paper by the clerks themselves until a *recordatur* be ordered of the verdict returned on the *nisi prius* roll; but after such *recordatur* it can only be amended by the court (*d*), for the roll lies with the prothonotary, to be made up according to the paper-book, until the *recordatur* of the verdict be allowed; but

if

if after the *recordatur* be entered, it is ordered on the roll *in statu quo tunc*, and then the court is supposed to take cognizance of it, in what manner it then was, and if the clerks might afterwards alter the roll after entry of the verdict, they might amend it in the verdict which is on the *nisi prius* roll, and it cannot be altered but by rule of court.

139. 2 Stra. 734. 2 Ld. Raym. 1441. 2 Stra. 947.

(c) So in an. *ejectione firmæ*, where the bill was with blanks for the quantities of land and meadow. Roll. Abr. 207. 8 Co. 162.

(d) Raym. 53. S. P.

The inferior court whence the record is returned, whether it be by the Common Pleas, or another court of record, may amend after judgment, as well after as before a writ of error brought, and the rule of such amendment is to be certified by the clerk of such inferior court to the superior; for though the record is removed by writ of error, and a *mittimus recordum* is entered on the roll, yet the writ of error is to send the record in the state and condition in which it ought to be by law, and that is corrected from all misprisions of clerks; or on alleging diminution the record is to be sent up amended as it ought to be, or it may be amended in the superior court, if the other refuseth; for as it superintends such inferior courts, so it may correct the misprisions of the clerks of that court.

Cro. Eliz. 435. 459. 677. 2 Roll. R. 471. 8 Co. 162. Moor, 407. Hob. 327. Hut. 41. Roll. Abr. 209, 210. Salk. 49. 2 Jones, 212. ‖3 Term R. 349. 7 Term R. 474. 4 Taunt. 588. 3 Maule & S. 591. 5 Taunt. 820. 3 Bro. & B. 66.‖

But there is this difference, where the clerks carry the rolls of amendment to a superior court, and where diminution is alleged, and a *certiorari* thereon issues: for when the clerks bring up the roll, it appears to have been amended by the date of the rule after error brought; but when diminution is alleged, they bring up the record *in statu quo* the *certiorari* finds it; and therefore when it is brought up they will intend it to be amended at the time of the judgment given, and that the transcript first sent up was a diminution and a mistake; and therefore if dower be brought against an infant, who appears and pleads by guardian, he ought not to be amerced, for an infant cannot be amerced for his indiscretion; nor a guardian, because he is appointed by the court: so this is error in the judgment itself, which is not amendable; and if certified by the clerks of the court to have been amended after error brought, could not have been amended; but yet certified to the *certiorari* rightly amended, they will suppose it was amended the same term judgment was given, and during that term, whilst matters are *in fieri*, they can rectify not only the misprision of clerks, but their own mistakes.

Cro. Car. 410.

If a writ of error be brought, the defendant in error shall pay all the costs of the writ of error, because until the record was amended, the plaintiff in error had sufficient reason to bring the writ; but then the plaintiff in error must nonsuit his writ; for if he proceed to reverse the judgment on any other error, there the defendant shall not pay costs for his amendment, because it is plain that the plaintiff did not depend on the error the defendant had amended.

5 Lev. 344, 345. Salk. 49. 5 Term R. 351. ‖Tidd's Prac. 772. (8th edit.)‖

‖Formerly it was holden, that where an indictment was removed by *certiorari* into the King's Bench, a mistake of the clerk

Faulkner's case, 1 Saund. 249.

clerk in certifying the caption might be amended in the same term in which it was certified, but not afterwards.

Rex v. Christopher Atkinson, fully reported in 1 Will. Saund. 249. a. n. (1); and see also Cro. Circ. Compan. 400. (9th edit.), and The King v. Darley, 4 East, 174.

But in a subsequent case, in 24 G. 3. the defendant being indicted for perjury at the *Middlesex* sessions of *oyer* and *terminer* in *February* 1783, removed the indictment into the King's Bench in *Easter* term following by *certiorari*. It was returned with a caption not properly applicable to the sessions of *oyer* and *terminer*, or to the sessions of the peace, the caption stating, that "at a general session of *oyer* and *terminer* holden, *&c.* before *W. M.* &c. &c. esquires, and others, justices, *&c. assigned to keep the peace*, &c. and also to hear and determine divers felonies, trespasses, and other misdemeanours, *&c. &c.* by the oath of *G. C. &c. &c.* (naming them) good and lawful men, *&c. &c.*" The defendant was found guilty on this indictment; And in *Easter* term 1784 *Bearcroft* moved in arrest of judgment, 1st, because it appeared that this was an indictment for perjury at common law found before justices of the peace, who have no jurisdiction in such case. 2d, That the names of the jurors did not appear on the record. Afterwards, in the same term, the Attorney General moved to amend the return to the *certiorari*, by inserting the commission of *oyer* and *terminer*, and names of the justices, according to the fact appearing by the commission, and by the minutes of the court, and that the caption might be amended agreeable to the return and by inserting the names of the jurors; and it appeared by an affidavit of the clerk of the peace, and his clerk, and the crier, that the sessions of the peace, and of *oyer* and *terminer* for *Middlesex*, were holden at the same place, and in the same court, but opened and adjourned by separate proclamations; the jurors under both commissions were the same persons; that at the sessions, or soon after, entries were made in the sessions-book of proceedings at the sessions; and that indictments under both commissions were put together on one file; and that in making returns to writs of *certiorari*, it was the practice to take the indictments off the file, and transmit them to the King's Bench. And if the indictment were under the commission of *oyer* and *terminer*, a printed form of caption, stating that commission, was prefixed to the indictment; if under the commission of the peace, a printed form of caption of the session of the peace was affixed; that long before, and at the sessions when the bill was found against the defendant, the clerk of the peace was unable to attend from illness, and his business was executed by a junior clerk; that eighteen justices were present, ten of whom were in the commission of *oyer* and *terminer*; that the indictment was immediately entered in the rough calendar, and afterwards copied in the sessions-book; and when the *certiorari* was delivered, the clerk through mistake took a return of the caption of the peace, and inserted the words *oyer* and *terminer*, which he thought would make a proper return. Lord *Mansfield* in delivering the opinion of the court, considered the return of the caption as a mere ministerial act, which, according to *Philips* v. *Smith*, was amendable at any time, and distinguished this from the cases cited for the defendant, since this was not a motion to amend

1 Stra. 156.

amend the *original* caption, but only the *returned* caption: and as the names of the jurors and justices appeared on the original minutes, there was sufficient to amend by: and *Rex* v. *Alcock* was a clear authority that wherever a transcript only was returned, any mistake therein may be amended by the original record; and accordingly the rule for the amendment was made absolute; and judgment being given thereon, a writ of error was afterwards brought into the House of Lords, and the amendment assigned for error, but the judgment was affirmed by the unanimous opinion of the judges then present, 11 *July* 1785.‖ 1 Sid. 155.

(H) Where Records defaced by Design or Accident will be set right and amended.

IF any part of the record be vitiated by razure, the court will restore it by amendment, because the wickedness of any person in corrupting the records of the court, ought not to obstruct the justice of the court, or prejudice any of the parties; as *in ejectione firmæ* (*a*), the lease was made the 10th of *May*; after verdict for the plaintiff it was made the 11th of *May* by a razure; and it appearing to the court that the declaration was vitiated by such razure (*b*), they amended it, both in C. B. and *B. R.* Roll. Abr. 208, 209. Latch. 162. S. C. Poph. 196. S. C. (*a*) 2 Roll. R. 80, 81. S. P. adjudged; though objected, that if the record should be amended, the delinquent could not be impeached for felony; for to make it so by the statute, the razure must be such that the judgment be defeated thereby. But, *per* two judges, the razure of the record is the offence, and not the annulling the judgment thereby; and *per* 11 Co. 34. the razure of a record, by which an outlawry was made good, was held felony. (*b*) Where in a *venire facias* the word *Chumley* was razed and made *Himly*, and amended. Roll. Abr. 208.

If an original writ, upon which a common recovery of several manors, *&c.* was suffered, being larger than the other writs on the same file, through the negligence of the officer, and by continual handling, is so obliterated and worn out, that but a letter of the names of several of the manors can be seen, but the names of the manors are truly recited in the count, and in the *habere facias seisinam*, the original shall be amended according to the other parts of the record. 8 Co. 160. Earl of Arundel and Lord Lumly, cited to have been adjudged by all the judges of *England, una voce, eo potius*, because a common recovery. And. 79, 80. S. C. adjudged by all the judges of *England*; and there is a *nota* by the reporter, that all the parchment remained entire, and if not, perhaps it might have been otherwise; and *vide* And. 170.

So if the original, or other part of the record, be stolen, taken away, withdrawn, or avoided by any clerk, though this be felony *per* 8 H. 6. c. 12. § 3. yet this may be supplied and amended by the other parts of the record; but if such part stolen, *&c.* or obliterated, cannot be supplied by the record, or any exemplification thereof, then it shall not be amended. 8 Co. 160. b.

[(I) Of Amendments in Equity.

A BILL may be amended at *any time* for the special purpose of adding necessary parties. Anon. 2 Atk. 15. 1 Pr. Al. Cur. Canc. 546. Green v. Poole, 4 Bro. P. C. 122. ‖See 1 Sim. 500. 1 M'Clel. 62. 13 Price, 131. 2 Cox. 393. 1 Ves. jun. 142. 2 Younge & J. 512. 12 Ves. 48. But there is no instance of a bill of discovery being allowed to be amended by adding parties as plaintiffs. 2 Meriv. 74.‖

Mitf. Eq. Tr. 258. 263., and the cases (cited in the note) of Hastings v. Gregory, *Scac.* 19th *Nov.* 1782., and Sanderson v. Thwaites, in Canc. Tr. 1781. Anon. Barnard Ch. Rep. 222. Harding v. Cox, 3 Atk. 583. Where a matter has not been put in issue by a bill with sufficient precision, permission has been given to amend it on the hearing of the cause. Filkin v. Hill, 2 Bro. P. C. 194.

After the examination of witnesses no part of the pleadings can be amended but under very special circumstances: but if no witness has been examined, an amendment has been permitted after publication passed.

Earl of Masserene v. Lyndon, 2 Bro. Ch. R. 291. 1 Eq. Cas. Abr. tit. Amendment, p. 1. note. ‖See 2 Sim. & Stu. 113. 1 Sim. & Stu. 421. 6 Madd. 314. 9 Price, 205. Coop. 141. See regulations as to allowance of time to amend, 19 Gen. Order, 3d *April*, 1828. 14 Gen. Order, same date.‖

After appearance the bill cannot be amended without payment of costs, which are fixed at forty shillings, a sum which the court will not exceed, notwithstanding repeated amendments, unless the defendant state a case of particular oppression.

Ld. Conings-by v. Sir Joseph Jekyll, 2 P. Wms. 300., and ——— v. Baines, in the note. ‖Plaintiff before filing replication may obtain an order for leave to amend bill as of course; but no further order but on special application, 13 Gen. Order, 3d *April*, 1828. After plea allowed to part of bill, plaintiff cannot amend his bill without special order to be obtained on notice of motion shewing proposed amendments. 2 Sim. & Stu. 12. After replication and subpœna to rejoin, plaintiff cannot amend bill without special application, shewing that using all possible diligence he was not in a condition to apply sooner. 6 Madd. 106.; and see 4 Madd. 268. As to a second order to amend, see 1 Russ. & Mylne, p. 1. 79. 80, 81.‖

An amendment to a bill has been permitted, after a demurrer to the whole bill has been allowed; but this seems not to have been strictly regular.

Napier v. Lady Effingham, 2 P. Wms. 401.

But there seems to be no precedent of an amendment to a bill, in a part wherein it was dismissed on the merits.]

1 Russell, 353.

‖It is not necessary to amend a bill for the purpose of introducing facts disclosed in the answer, on which the plaintiff means to rely as parts of his case, entitling him to the relief which he has prayed.

Ibid. 154.

On the hearing of a petition of appeals presented by the defendants, leave was given to the plaintiffs to amend their bill, by making it either a bill and information, or an information.

Taylor v. Shaw, 2 Sim. & Stu. 12.

After plea of settled account allowed of bill a motion to amend the bill, by stating facts which tended to shew there was no stated account, or that plaintiff ought to be allowed to surcharge and falsify, was refused with costs.

Sharp v. Ashton, 3 Ves. & B. 144.; and see 12 Ves. 458. 5 Madd. 475. 6 Madd. 255.; *sed vide* 5 Madd. 471. 2 Ves. & B. 330. 13 Price, 494. 2 Sim. 14.

The plaintiff, in a bill for an injunction, must state at once the whole case within his knowledge: but the court, though very jealous of amendments without prejudice to the injunction, under circumstances, permitted even a re-amendment, ascertaining precisely its nature, and by clear and positive affidavits that the plaintiff had not a knowledge of the facts enabling him to put that case on the record sooner.

Holmes v. Waring, 8 Price, 604.; and see 4 Madd. 207 11 Ves. 68.

The amendment of a demurrer was allowed under special circumstances, and a mistake.

Lowten v.

And so also mistakes in the title of an order of sequestration, by

by omission of the words "and others" were allowed to be rectified by inserting the words omitted. Mayor of Colchester, 2 Meriv. 395.; and see 2 Price, 606. 1 Sim. & Stu. 94.

And so a plea good in substance but bad in form may be amended. Merewether v. Mellish, 15 Ves. 435.; and see 1 Sim. & Stu. 220. 1 Price, 236.

But leave to amend a plea is not of course; the amendment must be stated.‖ Wood v. Strickland, 2 Ves. & B. 150.; and see 2 Younge & J. 37.

[Where an improper submission was made in the bill of an infant, the court allowed it to be amended on the hearing of the cause. Serle v. St. Eloy, 2 P. Wms. 386.

Where an answer was prejudicial to a defendant from a mere mistake, though such mistake was both in the original and office copy, upon evidence of the mistake, an amendment was permitted after the cause had been heard, and after it had been denied on a petition and on a motion. Countess of Gainsborough v. Gifford, 2 P. Wms. 426. In this case the draught was correct; but where the mistake runs through the draught and the engrossed answer, no amendment will be allowed. Bishop of Ely v. James, Bunb. 295.

There are no certain rules respecting the amendment of answers; but they are in the discretion of the courts. The admission of a fact is never allowed to be struck out (*a*), but on an affidavit of surprise, or the defendant being ill advised. But where an amendment is admitted in the bill (*b*), where, through inadvertency a mistake is made, as to a fact or date (*c*), where there is no danger of perjury (*d*), where the case depends upon old documents, lies pretty much in the dark, and new matter is discovered, which affords the defendant a good defence; the courts have allowed amendments to be made, either by striking out passages, or making new facts, and this after issue joined (*e*), or upon the hearing of the cause. If new matter has arisen, the practice is to add it by way of supplemental answer; for the defendant will not be permitted to take the old answer off the file, and put in a new one.] Woodgate v. Fuller, Barnard. Ch. R. 50. 1 Eq. Ca. Abr. tit. Amendment, p. 4. (*a*) Rawlins v. Powell, 1 P. Wms. 297. Pearce v. Grove, 3 Atk. 525. Ambl. 65. S. C. (*b*) Filkin v. Hill, 2 Bro. P. C. 194. (*c*) Wharton v. Wharton, 2 Atk. 294. (*d*) Berney v. Chambers, Bunb. 248. Holliday v. Nabb, Bunb. 323. (*e*) Phillips v. Gwynne, cited in Mitf. Eq. Tr. 261. But the author adds, that in later cases this indulgence has been refused. However, in the case of Moggridge v. Hudson, the Court of Exchequer thought that there were many cases in which it was highly necessary that it should be given. In that case Richards moved to file a supplemental answer to a bill for an account of tythes, upon an affidavit of the discovery of new matter. The motion was opposed by Abbot, who insisted that it was the rule of the court not to suffer a supplemental answer to be put in after issue joined. The Chief Baron admitted the general rule to be as Abbot stated; but said there were many exceptions to it. That if they were to refuse it, another bill might be filed for an account, and then it might appear that the plaintiff ought not to have had a decree in this instance, by reason of the matter now offered; that tythe cases were entitled to peculiar indulgence, depending upon old documents, and lying in remote antiquity. *Perryn* B. added, that he had known many instances of supplemental answers being allowed in similar circumstances; but supposing there were no precedent, the motion seemed so reasonable and so necessary, that the court ought to make one. Easter Term, 34 G. 3. Where the amendment is not in a very material point, it may be made without notice; but where it is, it cannot be made without notice, and also payment of costs. 1 Harr. Ch. Pr. 307.

‖The practice formerly was, to permit the amendment of an answer in case of mistake: now a supplemental answer is put in. Wells v. Wood, 10 Ves. 401.

Dolder v. Bank of England, 10 Ves. 285. But where there is a mere mistake in a name the answer has been allowed to be taken off the file and resworn.‖ Jennings v. Merton College, 8 Ves. 79. Strange v. Collins, 2 Ves. & B. 163. Taylor v. Obee, 3 Price, 83.; *sed vide* 1 Madd. 269. Griffiths v. Wood, 11 Ves. 63.

Earl Verney v. Macnamara, 1 Bro. Ch. R. 419. (*a*) Vaux v. Lord Waltham, cited, *Ibid.* [An answer shall not be amended after an indictment for perjury preferred or threatened. Yet if there were circumstances extremely strong to shew that it was only a mere mistake (*a*), it might be otherwise. Woodgate v. Fuller, Barnard. Ch. R. 51. Wharton v. Wharton, 2 Atk. 294.

Strudwick v. Pargiter, Bunb. 338. An infant may amend his answer when he comes of age, and therefore no exceptions can be taken to it.

Griells v. Gansell, 2 P.Wms. 646. ‖See 1 Cox, 281. 3 Swanst. 357. Where it appears that either the examiner is mistaken in taking a deposition, or the witness in making it, it may be amended after publication. 1 Bligh N. S. 225.‖

Speering v. Lynn, 2 Vern. 376. Pr. Ch. 115. S. C. A mistake in the title of an order was allowed to be amended, though for the purpose of charging a surety, who had entered into a recognizance to abide the order of hearing. 1 Eq. Cas. Abr. tit. Amendment, p. 6. S. C. ‖See 2 Meriv. 395. 8 Price, 606. 1 Sim. & Stu. 94.‖

White v. Taylor, 2 Vern. 335. 1 Eq. Ca. Abr. tit. Amendment, pl. 7. S. C. Where there was a mistake in the title of the interrogatories, neither the depositions were permitted to be read, nor the title to be amended, though most of the witnesses were gone abroad. But *qu.*]

ANCIENT DEMESNE.

(A) The Nature of the Tenure, and how proved.
(B) Of the Privileges annexed to Ancient Demesne.
(C) How it may become Frank-fee.
(D) Where Ancient Demesne may be pleaded, and the Form thereof.

(A) The Nature of the Tenure, and how proved.

4 Inst. 269. 2 Inst. 542. F. N. B. 14. Salk. 57. pl. 2. Black. Tr. 4to. 218. 231. (*b*) Lands which are next or most convenient to the

ALL those lands which were in the possession of *Edward* the Confessor, and afterwards came to *William* the Conqueror, and were by him, about the 20th year of his reign, set down in a book called *Doomsday*, under the title *De Terra Regis*, are (*b*) ancient demesne lands; these were exempt from any feudal servitude, and were let out to husbandmen to plough and cultivate for supplying provisions and necessaries for the king's household and family; and for this purpose the tenants (who are called by *Bracton*,

Bracton, villani privilegiati) enjoyed certain privileges, and the tenure itself had several properties distinct from those of other tenures, which it retains to this day, though the lands be in the hands of a subject, and the services changed from labour to money.

lord's mansion-house, and which he keeps in his own hands, for the support of his family, and for hospitality, are called his demesnes, but have not the same properties with ancient demesne. Spelm. 12.

This tenure, my Lord C. J. *Holt* says, is as ancient as any other, though he supposes that the privileges annexed to it commenced by some act of parliament, for that it cannot be created by grant at this day.

Salk. 57. pl. 2.

The lands which were in the possession of *Edward* the Confessor, and were given away by him, are not at this day ancient demesne; nor are any others, except those writ down in the book of *Doomsday;* and therefore, whether such lands are ancient demesne, or not, is to be (*a*) tried only by that book.

Salk. 57. pl. 2. 4 Inst. 269. Hob. 188. Brownl. 43.

(*a*) Where the book of *Doomsday* was brought into court by a *certiorari* out of Chancery, directed to the treasurer and chamberlain of the Exchequer, and by *mittimus* sent into the Common Pleas*, issue was taken whether *Longhope* in the county of *Gloucester*, was ancient demesne or not; and on producing the book of *Doomsday*, it appeared that *Hope* was ancient demesne, but nothing said of *Longhope:* and the court held, that the party failed in his proof. Lev. 106. Sid. 147. [Proof of the name being varied cannot be admitted, without its being averred on the record. *Ibid.* Bull. Ni. Pri. 248. (4th edit.) *Doomsday*-book will not shew whether the lands themselves are ancient demesne; it will only shew whether the manor is so or not. 2 Burr. 1048.]

[* The authority referred to for this passage is Dyer, 150. b.; but the editor has not been able to find any thing to this effect, either in that page, or in any other part of that book. The writ in the register does not require the production of the book itself, but only a certificate of the fact from the treasurer and chamberlain of the Exchequer. F. N. B. 16. C. (9th edit.)]

But if the question is, Whether lands be parcel of a manor which is ancient demesne? this shall be tried by a jury.

Salk. 57. pl. 2. Where an acre of land may be ancient demesne, though the manor of which it is parcel is not so, *vide* Roll. Abr. 521., and for this *vide* F. N. B. 14. Leon, 252. Dyer, 8. 11 Co. 10. Bro. Ancient Demesne, 15. 2 Leon. 191. 5 Lev. 405.

(B) Of the Privileges annexed to Ancient Demesne.

MY Lord *Coke* enumerates the six following privileges which tenants in ancient demesne are to enjoy. (*b*) 1. That they shall not be empleaded for any of their lands, *&c.* out of the said manor, but are to have justice administered to them at their own doors, by *by petit writ of droit close*, directed to the bailiffs of the king's manors, or to the lord of the manor, if it be in the hands of a subject.

4 Inst. 269. *vide* Roll. Abr. 523. (*b*) But it must appear first that the land is ancient demesne; for if a fine levied of those lands in C. B. be still in force, the lands are frank-fee till it is reversed; and therefore may be empleaded at common law. 2. The land must be holden of the manor, being ancient demesne. 3. It must not be holden by knight-service, because husbandry is the cause of the privilege. 4. It is is said that the tenant may remove the cause out of the lord's court, if there be no suitors, or but one suitor, for that the suitors are judges; otherwise there would be a failure of justice. 5. If the tenant accept a release of his lord of his seignory, or the seignory be otherwise extinguished, by reason of the seisin of the king or otherwise. 6. Or if the lord disseise his tenant, and make a feoffment in fee. 7. If the lord grant the services of his tenant, and the tenant attorn. 4 Inst. 269. Also if the manor and demesnes of the manor are in dispute they must be empleaded at common law, and not in the lord's court; otherwise the lord would be judge in his own cause. Salk. 56. pl. 1.

4 Inst. 269. That they may have a writ *de non ponendis in assisis et juratis*

2. They cannot be impannelled to appear at *Westminster*, or elsewhere in any other court, upon any inquest or trial of any cause.

against the sheriff, or any one who hath the return of writs; and if, notwithstanding such writ, the sheriff will return them, they may have an *attachment*. F. N. B. 166.

4 Inst. 269. Roll. Abr. 321.

3. They are free and quiet from all manner of tolls in fairs and markets, for all things concerning (*a*) husbandry and substance.

S. P. (*a*) But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow and are the produce of the lands. F. N. B. 228. 2 Leon. 191. Cro. Eliz. 227. Leon. 231. 233. 2 Inst. 221. S. P. *Vide* 2 Lutw. 1144. and how it must be set forth in pleading; and that this privilege extends to tenant in ancient demesne, whether he hold in fee, for life, years, or at will. Roll. Abr. 322. 2 Leon. 191. [*Qu.* as to tenant for years, or at will; and see 2 Burr. 1047.]

4 Inst. 269. That regularly

4. They are to be free of taxes and tallages by parliaments, unless they be specially named.

all general acts of parliament extend to ancient demesne lands, *vide* 4 Inst. 270. And 71.

4 Inst. 269.

5. That they were not to contribute to the expenses of knights of parliament.

4 Inst. 269. (*b*) Where the tenants in ancient demesne are distrained

6. That if they be severally (*b*) distrained for other services, than they are obliged to by the custom of the manor, they all, for the saving of charges, may join in a writ of *monstraverunt*, albeit they be several tenants.

to do the lord other services or customs than they or their ancestors have formerly done, they may have a writ of *monstraverunt* directed to the lord, commanding him not to distrain for other services; and if he will still distrain, &c. then, by a writ directed to the sheriff, he may command him not to demand or distrain for other services; and if he still persists, then he may raise the *posse comitatus*, or command the neighbours to rescue and destroy the distress; but the usual course is, that if, after the writ to the sheriff, the lord will distrain, then an attachment lies against him, returnable in one of the courts of record at *Westminster*, to answer the contempt. Plowd. 129.

4 Inst. 270. Moor, 211.

Land in ancient demesne are extendable upon a statute-merchant, staple, or *elegit*.

S. P. Lands in ancient demesne, upon an *elegit*, may, by the sheriff, be delivered in execution, because the title of the land is not directly put in plea in the king's court; adjudged. Hob. 47. Moor, 211. pl. 351. and Brownl. 234. S. C.

Vent. 244.

In an indictment for not taking upon him and executing the office of a constable, to which he was chosen by the leet, the question was, Whether a tenant in ancient demesne was obliged to execute that office? and the court held he was.

(C) How it may become Frank-fee.

4 Inst. 270 10 Co. 50. 7 H. 4. 44. Roll. Abr. 327.

IF a fine be levied, or recovery suffered of lands in ancient demesne, this makes them frank-fee.

But if the lord be not a party, he may (*c*) have a writ of disceit, and avoid the fine or recovery (*d*); for lands in ancient demesne were not originally within the jurisdiction of the courts of *Westminster*; but the tenants thereof enjoy this among other privileges, not to be called from the business of the plough by any foreign litigation.

(*c*) But cannot bring a *scire facias*, because not a party to the fine or recovery. 3 Lev. 419. That a termor may have a writ of disceit, and make it ancient demesne, at least during his term. Roll. Abr. 327.

[(*d*) An action on the case, in the nature of disceit, to reverse a recovery

recovery of lands in ancient demesne, was brought against the vouchee only, as *cestuy que use*, which was confessed by the plea. On motion to enter up judgment, the court refused it, because all the parties to the recovery were not before them; and the vouchee not appearing to be *cestuy que* use, otherwise than by his own acknowledgment, there was danger of collusion between him and the lord of the manor, to reverse a recovery of land in frank-fee, and so turn it into ancient demesne. Rex v. Hadlow, 2 Black. R. 1170. *Vide* Rex v. Mead, 2 Wils. 17. The lord is not barred of his writ of disceit by the death of any of the parties to a fine. Zouch v. Thompson, 1 Ld. Raym. 177.]

But if the lord be party, then the lands become frank-fee, and are within the jurisdiction of the courts of *Westminster*; for the privilege of ancient demesne being established for the benefit of lord and tenant, they may destroy it at pleasure. 2 Roll. Abr. 324. Salk. 57. pl. 2.

If a fine be levied of lands, part ancient demesne, and part frank-fee, and the lord brings a writ of disceit, the Court of *B. R.* upon view of the transcript of the record, and proof that part are ancient demesne, will reverse and avoid the fine as to that parcel; but they will not order the fine to be torn off the file, as in cases where the whole fine is reversed, because it shall stand good as to the frank-fee; but they will order a mark to be made on the fine, to signify that it is cancelled as to that part; and in this case the terre-tenant must be made party by *scire-facias*; for otherwise the conusance of him that was party to the fine shall not bind, if the tenements are frank-fee; because by that means the terre-tenant might be dispossessed without notice; whereas if he appears upon the *scire facias*, he may plead a release or confirmation in bar, and to preserve his possession. Keilw. 43. Roll. Abr. 775. Leon. 290.

But if a fine be levied of land all ancient demesne, and the lord reverse it by writ of disceit, it seems doubtful from the books, whether the fine shall stand good between the parties; some say, that it ought not to be wholly set aside, nor the conusor restored to his land against his own solemn acknowledgment on record, especially since the lord, who brings the writ of disceit, seeks nothing but to restore the land to the privileges of ancient demesne (*a*); others, on the contrary, hold, that the writ of disceit, and the reversal thereon, wholly avoids the fine, and restores the conusor to the possession of the land; and the conusance, though on record, shall be no estoppel; because it was made in a court that had no jurisdiction of the matter; and therefore the whole proceedings *coram non judice*. Bro. tit. *Fine*, 101. 17 E. 3. 31. F.N.B. 98. a. 9 H. 7. 12. 8 E. 4. 6. Roll. Abr. 863. Cro. Eliz. 471.

(*a*) But if after the fine levied, the conusor had released to the conusee and his heirs, or confirmed his estate, he should have retained the lands, notwithstanding the fine was destroyed; because by the release or confirmation, his estate would have been made firm and rightful. 4 Inst. 470. 10 Co. 50. Fitz. Disceit, 37. Leon. 290. If tenant in tail of lands in ancient demesne, leases for sixty years, and after levies a fine, with proclamations, in the Common Pleas, and this is after reversed in a writ of disceit, yet, *quoad* the lessee, this fine shall not be avoided, but shall make the lease good against the issue in tail, by the better opinion of the books. Leon. 290. *vide* Lutw. 710, 711.

If in a writ of right in ancient demesne the tenant pleads in abatement of the writ, and by judgment it is abated, and the demandant brings a writ of *false judgment*, wherein the writ of *right* is affirmed to be good, the Court of Common Pleas shall proceed as the inferior court should have done; and although judgment be there given to recover the land, yet the land is not frank-fee, but continues ancient demesne, because the beginning F. N. B. 19. 4 Inst. 270.

and foundation of those proceedings was in the court of ancient demesne.

Roll. Abr. 324. If the lord enfeoffs another of the tenancy, this makes the land frank-fee, because the services are extinguished perpetually.

Vide Roll. Abr. 324, 325. and the several cases there cited out of the year-books, and where it becomes frank-fee, by coming into the hands of the king. So if the lord releases to the tenant all his right in the tenancy, or if he confirms to him to hold by certain services at the common law, these make the land frank-fee.

(D) Where Ancient Demesne may be pleaded, and the Form thereof.

8 H. 6. 35. Roll. Abr. 322. IN all actions, wherein, if the demandant recovers, the lands would be frank-fee, ancient demesne is a good plea.

Where the suits may be removed to the courts above, and they to proceed as the inferior court might have done, *vide* F. N. B. 19. (D). 4 Inst. 270. Moor, 451.

Vide 4 Inst. 270. Roll. Abr. 322, 325. Therefore in all actions real, or where the realty may come in question, ancient demesne is a good plea; as *assize*, writ of *ward of land*, writ of *account* against a bailiff of a manor, writ of *account* against a guardian, *&c.*

Godb. 64. Bulstr. 108. Owen, 28. In *replevin* ancient demesne is a good plea, because by intendment the freehold will come in question.

5 Co. 105. Hob. 47. Bulst. 108. Hetl. 177. Cro. Eliz. 826. 2 Roll. Rep. 181. Hob. 47. In an *ejectione firmæ*, ancient demesne is a good plea; for by common intendment the right and title of the land will come in question; and if in this action it should not be a good plea, the ancient privileges of those tenants would be lost, inasmuch as most titles at this day are tried by *ejectment*.

5 Co. 105. Roll. Abr. 322. But in all actions merely personal, as *debt* upon a lease, *trespass quare clausum fregit*, *&c.* ancient demesne is no plea.

Cro. Eliz. 826. Roll. Abr. 322. In *trespass contra pacem*, though the realty comes in debate, yet ancient demesne is no plea; for this is at the suit of the king, and punishable for the good of the commonwealth.

2 Inst. 397. Hob. 48. In an *assize* by tenant by statute-merchant, ancient demesne is no good plea, because the plaintiff does not demand the freehold, but till he hath satisfaction.

Roll. Abr. 323. Hob. 48. In a *quare impedit* ancient demesne is no plea, because if it should be granted there would be a failure of right, for there they cannot grant a writ to the bishop.

2 Inst. 306. Hob. 47. 4 Inst. 270. Roll. Abr. 323. So in an action of *waste* ancient demesne is no plea, because in ancient demesne they cannot, upon the distress returned, award a writ to enquire of waste, according to the statute; for the sheriff ought by the statute to go in person, which cannot be supplied by their officer, and so there would be a failure of right; but in this the land shall not be frank-fee.

F. N. B. 11. 2 Leon. 191. Salk. 56. pl. 1. Comb. 183. Show. 271. If the manor and demesnes thereof are demanded, ancient demesne is no plea, because the lord would be judge in his own cause.

Ancient demesne may be pleaded after imparlance, because the lord may reverse the judgment by writ of *disceit*; and it goes in bar of the action itself, *viz.* in that court, because it is *coram non judice.* Dyer, 210. in margin. Stile, 50. Latch. 83. Moor, 451. Where the defendant in *ejectment* pleads ancient demesne, he need not make any defence by adding *defendit vim et injuriam suam.* Carth. 220. Show. 386. Salk. 217. *Vide* Doct. Pl. 51, 52. Roll. Abr. 322. and tit. *Pleas and Pleadings.* It may be pleaded without affidavit. 2 Ld. Raym. 1418. Barnard. K. B. 7. [But see *contr.* 3 Wils. 51. 2 Burr. 1047. And the affidavit must shew that the lands are holden of a manor, which manor is itself ancient demesne; that the matter can be tried in the court of the manor, that there are suitors there, and that the plaintiff hath an estate of freehold. 2 Burr. 1047. 8.]

ANNUITY AND RENT-CHARGE.

AN annuity, strictly taken, is a yearly payment of a certain sum of money granted to another in fee-simple, fee-tail, or life or years, charging the *person* of the grantor only: if payable out of lands, it is properly called a rent-charge; but if both the person and estate be made liable (*a*), as they most commonly are, then it is generally called an annuity. Co. Lit. 144. b. Finch, 161. Roll. Abr. 226. Doct. and Stud. Dial. 2. c. 30. F. N. B. 152. A. [An annuity in fee, granted by the crown out of the 4½*l.* per cent. duties payable for exports and imports at *Barbadoes*, is merely a personal inheritance. Earl of Strafford v. Buckley, 2 Ves. 170. And so, as Lord *Hardwicke* said, in giving his judgment in that case, is an annuity out of the post office or excise. Co. Lit. 20. a. n. 4. (14th edit.); and as such, the former has been treated by Lord *Thurlow.* Lady Holdernesse v. Marquis of Carmarthen, 1 Bro. Ch. R. 277. A rent created out of a rent is a mere annuity. *Per* Lord *Hardwicke*, 2 Ves. 178.

As an annuity may be granted in fee, it may, of course, as a conditional or qualified fee: but it cannot be entailed, being, in point of charge, strictly personal; Co. Lit. 20. a.: therefore a remainder cannot be limited over of it, as it may of a rent-charge; Turner v. Turner, 1 Bro. Ch. R. 316. Weeks v. Peach, 2 Lutw. 1218.; except in a grant by the king, 2 Ves. 181.; but when granted to one, and the heirs of his body, if the condition is performed by the grantee's having issue, the estate becomes absolute, and alienable without restriction; and this, it seems, though the grantee never come into actual possession. 1 Bro. Ch. R. 316. Ambl. 776. S. C. It is not the subject of a fine or recovery, Sheph. Touchst. 11. Pig. 97. 1 Ves. 391.; but passes by mere grant or transfer. 1 Bro. Ch. R. 377. There can be neither courtesy, nor dower of it. Co. Lit. 144. b. Poph. 87. Moor, 83. It is not within the mortmain act of 7 E. 1. stat. 2. Co. Lit. 2. b., nor the provisions of the statute of frauds, so far as they affect real property. 2 Ves. 170. It is not assets in the hands of the heir, because not comprised within the description either of land or tenements: not of executors, because its heritable quality prevents it from going to them. Doct. and Stud. c. 30. p. 97. 2 Ves. 179. But an annuity of inheritance is forfeitable, as an hereditament, for treason. Nevil's case, 7 Co. 34. b. It is assignable, and in most cases, though assigns be not named in the grant. Co. Lit. 144. b. Gerrard v. Boden, Hetl. 80. If granted by the king, it must be granted out of some branch of his revenue, for the royal person is not chargeable. Anon. 1 Salk. 58. (*a*) Whether the one or the other shall be liable, is in the election of the grantee; which election, when once distinctly made, is final and conclusive. Co. Lit. 144. b. Lit. § 219. Ambl. 782.]

(A) How an Annuity or Rent-charge differs from other Rents.

(B) What shall be a good Grant or Creation thereof.

(C) Of

(C) Of the Remedies for the Recovery of an Annuity.

[(D) Of the Provisions made by the Legislature respecting Life Annuities.] And herein,

‖1. *In what Cases a Memorial is necessary.*
2. *Of the Form and Contents of it.*
3. *Of vacating and setting aside Annuities.*‖

Apportionment and Extinguishment of an Annuity or Rent-charge, *vide* head of "RENTS." Vol. VII.

(A) How an Annuity or Rent-charge differs from other Rents.

Lit. § 218. *vide* for this head of *Rents.*

A Man seised of land grants, by deed-poll or indenture, a yearly rent to be issuing out of the same land to another in fee, in tail, or for life, *&c.* with a clause of *distress;* this is a rent-charge; and if the grant be without clause of *distress*, then it is a rent-seck.

Vent. 161. Co. Lit. 142.

A rent-service is an annual return, made by the tenant, either in labour, money, or provisions, in retribution for the land that passes.

Lit. § 214, 215. 2 Inst. 505. Plow. 134. (*a*) For without such clause it is only a rent-seck. Whether such reservation be good in a deed-poll

If a man makes a feoffment in fee, or a lease for life, or a gift in tail, remainder over in fee, upon such grants there can be no rent-service reserved at this day, the feoffor or grantor having no reversion, and the feoffee or grantee by the statute of *quia emptores terrarum* holding of the capital lord; therefore if in such deeds a rent be reserved, there must be a clause of *distress* inserted (*a*); and this will make a good rent-charge, the land being charged with a distress for the payment of it.

has been doubted, the words of reservation proceeding entirely from the feoffor or donor; but it seems now settled, that such reservation is good in a deed-poll, because whoever claims an estate under any deed, ought, in reason and equity, to be obliged to take it under the terms expressed in the deed. *Vide* Co. Lit. 143. b. 2 Roll. Abr. 449. Plow. 134. Gilb Rents, 16, 17.

Co. Lit. 147. b. 7 Co. 23. b.

If a man grants a rent out of three acres, and grants over, that if the rent be arrear, that he shall distrain for the rent in one of the acres, this is one entire rent; but it cannot be a rent-charge for the whole, because the greatest part of the land out of which it issues, is not chargeable with any distress for the recovery of it; and *denominatio sumenda a majori;* therefore it is taken to be a rent-seck, for which, by the words of the grant, the grantee may distrain in the third acre; for whenever the remedy, by way of charge for the rent, is not commensurate to the rent, the rent is called *seck*, and the charge is only appurtenant to the rent, and does not give it its denomination; and the reason is, because if such original grant should be lost and worn out by time, and a man were to prescribe for it, if he were to give it the denomination of a charge, it would grasp more land than was originally intended to be charged; and therefore the

the law binds them down to the denomination of the rent, as seck, and to set forth the charge as an appurtenant, that by length of time no more should be comprehended in the charge than was originally intended in the grant of that charge.

If a man grants a rent out of his lands to *J. S.* and his heirs, and grants that he may distrain for it during his life, this is a rent-charge in *J. S.* because he may distrain in the land, out of which it issues, during his own life; but it shall be seck in the hands of his heirs, because by the express words of the deed, the remedy was to cease upon his death; *aliter* if the distress had been limited only for years, for then the entire rent had been seck, because the remedy being temporary is not adequate to the right, which is perpetual.

Co. Lit. 147. b. 7 Co. 23. b. If a rent be granted to two and their heirs out of one acre, and that it shall be lawful for one of them and his heirs to distrain for it, this is a *rent-seck*; and the distress given to one is only an appurtenant to the rent; but if he to whom the distress was not limited dies, the survivor shall distrain, because the whole rent is then in him. Co. Lit. 147. 7 Co. 23. b.

(B) What shall be a good Grant or Creation thereof.

IF a man obliges himself to *J. S.* in an annual rent of 10*l.* *per cipiendum annuatim de manerio de* D., and bindeth the said manor, and all the chattels therein, to a distress, this amounts to a good grant of the rent, and *J. S.* may distrain for it.

2 Roll. Abr. 424. For in many cases, without words of granting, contracts binding and effectual, the law creates a rent-charge, because it is the design of the law to render all so far as the intention of the parties may be gathered from the deed; and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with. ‖That a grant of *annuity* must be by deed, and must contain words of present grant, otherwise the grantee cannot sue at law. See 14 Ves. 491. 2 Dow. & Ry. 606.‖

So if I bind my goods and lands to the payment of a yearly rent to *J. S.*, this is a good rent-charge, with power to distrain, though there be no express words either of grant or distress; or if I grant that if such a rent be arrear, that *J. S.* shall distrain for it in the manor of *D.*, this is a good rent-charge, for in all these cases it is evidently my intention that my land be liable to the charge.

Co. Lit. 147. a. 2 Roll. Abr. 424. Bro. Rent. 14.

So it is if I grant to *S. S.* that he and his heirs, or the heirs of his body, shall distrain for 40*s.* rent in my manor of *Dale*; this is a good rent-charge in fee or in tail, because the power of distraining is in one case given to the heirs general, and in the other to the descendants of the body of *S. S.*; and whoever has a power of distraining, has an estate in the rent for which the distress is given.

Co. Lit. 147. a. Lit. § 221. 2 Roll. Abr. 424. 7 Co. 23. Butt's case.

But if I grant a rent of 40*s.* out of the manor of *Dale*, and if the rent be behind, that the grantee shall distrain in my manor of *Sale*, this power of distress in the manor of *Sale* shall not amount to the grant of a rent-charge out of the manor of *Sale*; for though in the former cases such construction is admitted to support the intentions of the parties, where the grant is not explicit, yet in this case the reason of such construction fails, because here is a plain grant of the rent out of the manor of *Dale*, and the distress is given in the manor of *Sale*, as a means for the recovery of it, for which he had no remedy by the grant itself; and

2 Roll. Abr. 425. Co. Lit. 147. a. 7 Co. 23.

and therefore the rule, *quod expressum semper facit cessare tacitum*, takes place here, that where the intentions of the parties are evident, there that construction shall never be admitted, which the law only allows in dubious contracts, *ut res magis valeat quam pereat*; for if that manner of interpretation were admitted, the grant might be made double, and the grantor twice charged, against the design of the grant.

2 Roll. Abr. 425. If a rent be granted to *A.* and if the rent be behind, that a stranger shall distrain for it for the use of the grantee; this is a good rent-charge in *A.*, and a distress limited to a stranger for his benefit, is in effect making him the grantee's servant for that purpose; and what a man may do by one servant, he may do by himself or any other.

2 Roll. Abr. 425. But if the distress had been limited to a stranger, without saying for the benefit of the grantee, so that the limitation of the distress may seem to be independent on the grant, and without relation to it; this distress does not make it a rent-charge, since by no words in the deed the distress shall be applied to the use or advantage of the grantee.

Bro. tit. *Grant*, 69. 73. 2 Roll. Abr. 425. If *A.* grants and confirms to *B.* a rent of 5*l.* to be taken out of his lands, which rent *B.* has of the grant of his father, though *B.* never had any such rent from his father, yet this grant of *A.*'s shall be good to create a rent-charge in *B.*, for it is evidently the intention of *A.* that *B.* shall have a rent of 5*l.* out of his land; and a mistake or error in the description of the thing referred to, shall not render the true design of the contract ineffectual and void.

Co. Lit. 147. b. If two tenants in common, or several tenants be, and they grant a rent of 20*s.* per annum If a man seised of twenty acres of land, grants a land of 20*s.* *percipiendum de quâlibet acrâ terræ suæ*, or out of every acre of land; this is in nature of a several grant out of every acre, for the grant shall be taken most strongly against the grantor, and the grantee shall have 20*s.* out of each acre.

out of their land, the grantee shall have 40*s.* rent; for as their estate is several, so shall their grant be too; and therefore each shall be taken to grant a several rent of 20*s.* 5 Co. 7. b. Plow. 140. b. 161. 171. 289. Co. Lit. 197. a. 267. b.

Co. Lit. 147. b. If *A.* bargains and sells land to *B.* by indenture, and before enrolment they both join in a grant of a rent-charge to *C.* this after the enrolment shall be construed the grant of *B.* and the confirmation of *A.*, because when the bargain and sale is enrolled, it has the effect of a deed enrolled, from the making thereof; and therefore it must be the grant of *B.*, who had the land at the time of the grant made; but if the deed had never been enrolled, then it should have been the grant of *A.* and confirmation of *B.*, because the land never passed from *A.*, the deed being ineffectual and void, without enrolment.

Bro. tit. Grant, 86. 8 H. 7. 3. Plow. 156. Palm. 29, 30. 2 Vent. 204. But a rent *in esse*, or already If an original grant be made of a rent-charge to commence after the death of *J. S.* it is good; for this is not like the case of lands, where the livery must carry the freehold immediately, and where the abeyance, or want of distinguishing where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, a man that had brought his

præcipe

præcipe against the grantor, after he had proceeded in it a considerable time, might have his writ abated by the freehold's vesting in a stranger, by reason of a conveyance made by the grantor, before the writ brought; but the grant of a rent *de novo* is not attended with this inconvenience; for no man can have a precedent right to a thing which is originally created by the grant itself; yet *quære*, at what distance of time such charges may be allowed to commence, whether it must not be after the lives of the persons *in esse*; for if they be indefinite, they seem to have the same tendency to a perpetuity as any other contingent remainders, or executory interest; and the bare affectation of a perpetuity is sufficient to condemn any conveyance.

created, cannot be granted to commence after the death of *J. S.* because to such rents there may be precedent titles, and therefore such grants are not good; for such freehold, by thus being split and severed, doth hide the person in whom the right is; and therefore the party that has right, will not be able to discern against whom to bring his *præcipe* for the recovery of it. Bro. tit. Grant, 86. 8 H. 7. 3. Plow. 156. [An annuity (after a disposition of it for other purposes) was devised to the testator's eldest son: and on his decease, to the heirs male of his body; and in case of his having no issue male, to remain to the testator's next eldest son, and the heirs male of his body; the four eldest sons died without issue: it was adjudged, that the claim of the fifth was too remote. Turner v. Turner, 1 Bro. Ch. R. 316.]

[Where a man devised all his lands for the payment of his debts, and also an annuity out of a certain town, which the trustees sold; it was decreed in equity, that the annuity should issue out of the other lands unsold; there being sufficient to pay the debts.

Ld. Kennoule v. Earl of Bedford, 1 Eq. Ca. Abr. tit. Annuity, &c. (A), p. 1. 1 Ch. Ca. 295. S. C.

Where an annuity was devised out of a rectory, the glebe being but of small value, and the tythes not liable to distress, it was decreed that the whole rectory should be liable.]

Thorndike v. Allington, 1 Eq. Ca. Abr. tit. Annuity, &c. (A), pl. 2. 1 Ch. Ca. 79. S. C.

‖A demise by a parson of his benefice, made subsequent to the 57 G. 3. c. 99. for securing an annuity, is void, it being in substance a charging of a benefice within the meaning of the 13 E. c. 20., which, so far as relates to the charging of benefices, is now in force, having been revised by the 57 G. 3. c. 99.‖

Shaw v. Pritchard, 10 Barn. & C. 241.; and see 9 Barn. & C. 344.

[If a man, possessed of a term, grant a rent generally, without limiting any estate, the rent shall continue during the term.

1 Roll. Abr. tit. Estate (H), pl. 5.

A man, possessed of a term for years, determinable on lives, devised 20*l.* per annum to *J. S.* to be paid half-yearly, if the *cestui que vies* should so long live. *J. S.* died during the life of the *cestui que vies*, and it was adjudged that the rent was not determined by his death, but should be paid to his executors during the continuance of the term.]

Gosley v. Gilford, 2 Vern. 35. The like determination in the case of a devise of an annuity to testator's executors and their heirs during the life of *B.*, to the separate use of a married woman, who died in the life of *B.* Rawlinson v. Montague, 2 Vern. 667. So, where a man devised an annuity to another during the life of his executor, to be paid him by the executor, and the annuitant died in the life-time of the executor. Savery v. Dyer, Ambl. 139.

‖An annuity can only be where the principal is irrecoverably gone, and is to be satisfied by periodical payments; therefore a bond conditioned for payment of a sum to the executors of the obligee, and interest in the mean time to him, is not an annuity bond.‖

Winter v. Mousley, 2 Barn. & A. 802.

(C) Of

(C) Of the Remedies for the Recovery of an Annuity.

Lit. § 219. F. N. B. 152. 6 Co. 58. b.

IF a man grants by his deed an annual rent to *J. S.* in fee, for life or years, out of certain lands, with clause of distress, the grantee may, at his election, either distrain for this rent, or have a writ of annuity (*a*), and thereby charge his person.

(*a*) But no writ of annuity lies for a rent-service. *Vide* tit. *Rents*, and Roll. Abr. 226. 1 H. 4. 4.; nor if a man devises a rent out of his land, and dies; for after his death it is impossible to charge his person. 6 Co. 58. b. Nor will a writ of annuity lie for a rent granted for equality of partition, or in lieu of dower; for though these be given by the person, yet, being granted in satisfaction of a real estate, they retain the nature of the things for which they are given, and therefore not recoverable in a personal action. Poph. 87. Co. Lit. 144, 145. Roll. Abr. 227. Co. Lit. 144. a.

Lit. § 220. Poph. 87. 6 Co. 53.

If a man grants a rent out of his lands, and by a proviso in the deed, or by deed of defeasance, provides that neither the grant, nor any thing therein contained, shall be construed to extend to charge his person by writ of annuity; in this case the person of the grantor is not chargeable; because the charge upon the person arising only from the manner of construing grants, which, for the consideration given, ought to be extended as far as the words will bear against the grantor, there can be no room for such construction, when by the express words of the grant, the person of the grantor is not charged; for no implication shall be admitted to overthrow an express clause in the deed.

But if the proviso had been that the grant, nor any thing therein contained, should charge the land, that proviso had been void, as repugnant to the grant. Co. Lit. 146. a.

Co. Lit. 14 6 6 Co. 41. b. 7 Co. 38. b. Dyer, 227.

If a man grants a rent-charge out of the manor of *Dale*, in which the grantor has no interest, with a proviso that the grant shall not charge his person, this proviso is void; because the grantor, having nothing in the manor of *Dale*, could not, by any act of his, charge it; and consequently, the grantee having no remedy for his annuity, but against the person of the grantor, the proviso to exempt his person is void, as rendering the whole grant ineffectual: and if in this case the grantor had been seised of the manor, and had granted a rent-charge out of it, for the life of the grantee, with a proviso that the grant should not charge his person, though the grantee himself could have no remedy but by distress; because, that remedy being open to him, the proviso is good to exonerate the person; yet, upon the death of the grantee, his executor may have an action of debt against the grantor for the arrears, because the executor has no other remedy for the recovery of them; for he cannot distrain after the grant is determined; and therefore the proviso to exempt the person is void against the executor, as rendering the grant useless and ineffectual.

[Where a man covenanted to settle lands of such a value, and had none at the time, but purchased land afterwards, and voluntarily devised it, such land was holden to be liable to the annuity in the hands of the devisee. Tooke v. Hastings. 2 Vern. 97.]

6 Co. 58. b.

And hence it is, that if a rent be granted out of lands, with a proviso that the person of the grantor shall not be charged, that this proviso is void; because the grantee, having no distress given by the deed for the recovery of the rent, would be without any manner of remedy, if the proviso took place.

But if the grantor had given a penny, or any other thing in the name of seisin, the proviso had been good, because he might recover the rent in an assize. 6 Co. 58. b.

If

If a man by his deed grants, if *J. S.* be not yearly paid the sum of ten shillings, that then he may distrain for it in his manor of *Dale*, this is a good rent-charge out of the manor; but no writ of annuity lies for it, because there is no grant of the rent made by the grantor; yet, because he hath given the grantee a power to distrain, if such a yearly sum be not paid him, the manor is thereby charged with the distress, and consequently with the rent for which the distress is given. Co. Lit. 146.

If *A.* and *B.* joint-tenants, grant a rent-charge out of their land, with a proviso that the grantee shall not charge the person of *A.*, this discharges the person of *A.* but leaves *B.* liable to the writ of annuity. Co. Lit. 147. b.

If a man, seised of land in fee, and possessed of other land for years, grants a rent-charge for life out of both, with a power to distrain in both, if the rent be arrear, the leasehold, as well as the land of inheritance, are subject to the distress; because a man may oblige his chattels to the discharge of the rent; but the rent being a freehold, shall issue only out of the inheritance; because the leasehold, being only a temporary and perishing interest, is not a fund commensurate to the charge; and therefore, the rent shall issue out of the inheritance, which for its duration is a more complete estate to support the charge, and render the grant effectual. And hence it was adjudged (*a*), that though the grantee might distrain the leasehold lands, yet he must avow for a rent issuing out of the inheritance.

Co. Lit. 147. b. Cro. Jac. 590. Roll.Rep. 330. Cro. Eliz. 607. 622.

(*a*) 7 Co. 23. 25. Butt's case.

But if a man possessed of a term for years, grants a rent out of it to another for life, though the estate be of shorter duration than the charge; yet because it is the only fund provided by the grant, for the payment of the rent, it shall answer the grantee so long as it has continuance, if the life for which the rent was granted, lasts so long.

7 Co. 23. Cro. Eliz. 185.

There is another remedy for the recovery of an annuity or rent-charge, and that is when a power is given the grantee to enter (*b*) and hold the lands till satisfied the arrears by the perception of profits, the grantee, when the rent is arrear, may in such case enter and hold the lands till satisfied by the perception of the profits; though in this case it was objected, that there was no estate conveyed, out of which a use might arise to the grantee, upon the nonpayment of the rent; and that this grant could pass no estate to the grantee, as a conveyance at common law, because the grantee could have no inheritance or freehold in the land, when the rent was in arrear for want of livery, nor an estate for years, for want of a certain commencement and determination; yet it was adjudged, that by the grant he had an interest vested in him, when the rent was arrear; and though it be an uncertain interest, which, for the uncertainty of its commencement and determination, might be void by the strict rules of law, if it were granted independent of any estate certain, yet it is good in this case, because it is created to attend a determinate estate; and the nonpayment of the rent fixes the certainty of its beginning, and the satisfaction of the arrears, by the perception of the profits, the end and determination of such interest; and therefore the grantee may reduce such interest, as it rises, into his

Perception of Profits. Sid. 223. 262. 344. Lev. 170. Keb. 784. Raym. 135. 158. Sand. 112, 113. Jemet and Cawley.

[(*b*) In such case, if he enters, he is not compellable to quit till he has been paid interest for the arrears down to the day; *aliter*, if he neglects to enter. Robinson v. Cumming, 2 Atk. 2411. Where a grantee of

an annuity has recovered in ejectment against a tenant from year to year, of the grantor, he may afterwards, in an action for use and occupation, recover all the rent in the hands of the tenant at the time he gave him notice, and down to the day of the demise, but not afterwards. 1 Term R. 378. Birch v. Wright.

his possession by ejectment, which is the proper remedy to recover the possession.

Cro. Jac. 510, 511, 512. 2 Roll. R. 12. Poph. 126. 147. 3 Bulstr. 250. Havergile and Hare. And by the better opinion, it seems, that if the rent be arrear before the fine levied, yet the fine levied afterwards shall be sufficient to raise an use in the grantee to enter into the land for the recovery of these arrears; because the fine is guided by the deed of grant, and both amount but to one assurance. Cro. Jac. 512.

If a man grants a rent-charge to *J. S.*, his heirs and assigns, and if it shall happen that the rent be behind and unpaid, that then the said *J. S.*, his heirs and assigns, shall enter into the land, and have and enjoy the rents thereof, until the arrears be fully satisfied; and the grantor covenants to levy a fine to the uses of the said deed; if after the fine levied the rent be arrear, the grantee may enter into the land, or make a lease for years to try his title in ejectment; because by the fine there is an estate vested in the conusees, to raise an use in the grantee, of the rent-charge, when the rent is behind; and whenever the rent becomes arrear, the possession is executed to that use, and consequently the grantee hath a right to take and keep that possession, till the use for which it was executed be satisfied; and that was till the arrears of rent be paid by the perception of the profits; and therefore though the greatest interest in the land be uncertain, (because it is uncertain when the rent will be paid out of the profits,) yet while his interest remains, if his possession be disturbed or devested, he may restore it by ejectment, which is the proper remedy to recover the possession; and if the grantee assigns over the rent, the assignee may likewise enter, and maintain a title in ejectment; for though the use arises out of the estate of the conusee only, as the rent is in arrear, and, till the rent be behind and unpaid, there is nothing more than a bare possession of a use, which in its nature is not assignable; yet by the conveyance of the rent it shall pass, because it is nothing more than a remedy or security for the rent; and therefore shall attend that into whose hands soever it comes.

Co. Lit. 162. 4 Co. 49. a.

An action of debt does not lie for the arrearages of an annuity, if the grantee be seised of it in fee, tail, or for life.

‖Webb v. Jiggs, 4 Maule & S. 113. Kelly v. Clubbe, 3 Bro. & B. 130.‖ But where an annuity was granted by deed for two years, and the grantee brought an action of debt for the arrears; on demurrer it was held, that debt would lie upon the contract, it being granted by deed, and for years. Cro. Eliz. 268. For the remedies which heirs and executors have by distress or action of debt, *vide* head of *Rents*, and the statutes 32 H. 8. c. 37.* 8 Ann. c. 14. 4 G. 2. c. 28. 11 G. 2. c. 19.

* See a good comment on this statute of H. 8. Co. Lit. 162. a. b.

Roll. Abr. 226. Poph. 87. Hob. 58. Dyer, 344. Co. Lit. 144.

As regularly the remedies for recovery of an annuity or rent-charge are either by writ of annuity or distress, it is to be seen which is the most eligible method, and what shall determine the grantee's election. If *A.* grants a rent-charge to *B.* and his heirs, if the rent be arrear, not only the grantee, but his heirs *in infinitum*, may distrain for it; for the remedy, being commensurate to the right, must be of equal duration with the right; but if in this case the rent be arrear, and the grantee brings a writ of annuity, in order to charge the person of the grantor, it is no longer to be considered as a rent issuing out of the land, because the writ of annuity has entirely turned the charge upon the

the person of the grantor, and under that denomination it must determine with the life of the grantor, because his heirs are not chargeable.

But if *A.* had granted for him and his heirs (*a*) to *B.* and his heirs, such a rent out of his lands, in this case the heirs, being comprehended in the contract, are bound to make good the grant so far as they have assets by descent from the grantor. 1 Roll. Abr. 226. Co. Lit. 144. Poph. 87. [(*a*) An annuity granted by a body politic will charge the successors, though not named in the grant. Plowd. 455.]

If a rent be granted in tail, the grantee cannot alien it while it continues a rent; because as such it may be entailed within the statute *de donis*; but if the grantee brings his writ of annuity, it is no longer within the statute, because then it is become a charge merely personal, without any relation to the land out of which it was first granted, and therefore is become a fee-simple conditional, as such a gift of lands had been before the statute; and therefore the annuity not being within the statute, may be aliened. Poph. 87. Co. Lit. 19. a. 7 Co. 4. 35. a. Nevil's case.

But in some respects the writ of annuity is the better remedy: as if a termor for years grants for him and his heirs a rent-charge out of his land to another and his heirs, in this case, if the grantee distrains, and thereby has thrown the charge entirely off the person upon the land, upon the expiration of the term, the rent is gone; because the grantor could not charge the land longer than his own interest in it continued; but if the grantee had brought his writ of annuity, the charge upon the person had been perpetual, so long as the heirs of the grantor had any assets; because the grant was for him and his heirs. Annuity where better. Poph. 87.

The next thing to be enquired into is, what acts of the grantee are sufficient to determine his choice; and this determination must be by some solemn act in a court of record, that it may appear to be the act of the grantee himself, and not of a stranger, without his permission or authority; and therefore if the grantee distrains for the rent, that is no determination of his election; neither is the suing forth a writ of annuity any determination, because these may be done by a stranger, without the grantee's knowledge or consent; or rather, because the design of the law being to help men to the recovery of their rights, in the best and most beneficial method, the grantee shall not be foreclosed of either of his remedies, by any rash or unadvised act of his; but if the grantee counts in the writ of annuity, or avows the taking of the distress, the count and avowry is a repeated determination, or plain confirmation of his first choice and election; and this, being entered on record, is taken to be the deliberate act of his mind, and therefore he shall not be allowed to recede from what he has done in so solemn a manner. Lit. § 219. Roll. Abr. 223. Co. Lit. 145.

But if a man grants a rent-charge in fee, without saying, for him and his heirs, and the grantor dies, and the grantee brings a writ of annuity against the heir, though he counts thereon, and proceeds to judgment, yet that does not foreclose him of his distress on the land out of which the rent issues; because, by the death of the grantor, the grant, as an annuity, was determined; and consequently the grantee had no election, having Dyer, 344. b. Hob. 58.

but one remedy for the recovery of it, which was by distress; but the distress in this case still remained, because the grantee lost his election by the act of God, for which no man ought to suffer.

Poph. 86. Co. Lit. 148. Mo. 301. 2 Co. 36.

So it is if tenant *pur auter vie* grants a rent-charge for ten years, and the *cestui que vie* dies, in this case the charge is determined as a rent, because the estate for life, out of which it issued, is ended; but the grantor is still liable to a writ of annuity for the growing annuity, because the grantee had not by any act of his determined his choice; and therefore, the election being taken away by the act of God, and not by any act of his own, he may pursue the other remedy by writ of annuity.

Co. Lit. 148. (*a*) But *Qu.* Whether the case may not be so circumstanced as to entitle him to relief in equity? *Vide* 2 Vern. 143, 144. [In the case referred to from Vern. the grantee was only a mortgagee of the estate charged with the annuity.]

But if the grantee of a rent-charge, before he has made his election, purchases part of the land, in this case he is without any remedy (*a*), either against the land or against the person of the grantor; the land is not liable, because the rent is extinct by the purchase; and it being in its original creation a rent-charge, though the law gave a double remedy for it, yet when the grantee has by his own act discharged the land, and extinguished the rent, he can have no remedy for the thing which he has wilfully destroyed, and therefore he can have no writ of annuity against the person.

[(D) Of the Provisions made by the Legislature respecting Life Annuities.

17 G. 3. c. 26. § 1.

BY statute 17 G. 3. c. 26. § 1. it is enacted, "that a memorial "of every deed, bond, instrument, or other assurance, "whereby any annuity or rent-charge shall, from and after the "passing of this act, be granted for one or more life or lives, or "for any term of years, or greater estate determinable on one "or more life or lives, shall, within *twenty days* of the execution "of such deed, *&c.* be enrolled in the High Court of Chancery; "and that every such memorial shall contain the day of the "month and the year when the deed, *&c.* bears date, and the "name of all the parties, and for whom any of them are trustees, "and of all the witnesses; and shall set forth the annual sum or "sums to be paid, and the name of the person or persons for "whose life or lives the annuity is granted, and the consider-"ation or considerations of granting the same; *otherwise every* "*such deed*, &c. *shall be null and void to all intents and purposes.*"

The memorial in such case must disclose the consideration truly. Rex v. Wright, Hunt, 43. (*b*) A *scire facias* to revive a judgment entered up before the act passed, is

§ 2. "That before any judgment shall be entered of record "upon any warrant of attorney for recovering or securing the "payment of any annuity or rent-charge that hath already been "granted for one or more life or lives, or for any term of years "or greater estate determinable upon one or more life or lives, "and before any execution shall be sued out, or action (*b*) "brought on any such judgment already entered, or on any "deed, bond, *&c.* already executed for the purposes aforesaid, "a like memorial of the deed, *&c.* shall be enrolled in the high "Court of Chancery; and in case the party shall neglect to

"enrol

"enrol the same, any such judgment, execution, or proceeding "in the action respectively shall be null and void."

an action within this clause.

Fenner v. Evans, 1 Term R. 267.

‖By the 53 Geo. 3. c. 141. § 1. the statute 17 Geo. 3. c. 26. is repealed, except as to annuities granted before the passing of that act, but the principal provisions of the statute are re-enacted with some alterations and additional regulations.

53 G. 3. c. 141. § 1.

By § 2. (which nearly corresponds in substance with the above § 1. of the 17 Geo. 3. c. 26.) it is enacted that within *thirty days* (*a*) after the execution of every bond, instrument, or other assurance, whereby an annuity or rent charge is granted for one or more life or lives, or for any term of years or greater estate, determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument or assurance, of the names of the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations as the circumstances of any particular case may require, otherwise every such deed, *&c.* shall be null and void. (The act then gives a form of memorial.)

§ 2.

(*a*) Twenty days in the former act.

The numerous cases decided on these corresponding sections of the two acts may be classed under the following heads:

1. In what Cases a Memorial is necessary.
2. Of the Form and Contents of it.
3. Of Vacating and setting aside Annuities.

1. *In what Cases a Memorial is necessary.*‖

[The warrant of attorney is an assurance within the act, and must be enrolled.]

Hopkins v. Waller, 4 Term R. 463. Davidson v. Foley, 2 H. Black. 12. 3 Bro. C. R. 598. Jacques v. Witty, 1 Term R. 557. Downes v. Parkhurst, cited in 2 H. Black. 13.

‖And it is not sufficient to state it merely by way of recital in stating the annuity deed.‖

Van Braam v. Isaacs, 1 Bos. & P. 451.; *sed vide* Jackson v. Milsentown, 6 Taunt. 189.

[But a judgment entered is not such an assurance, unless perhaps where it is the only security.

Sherson v. Oxlade, 4 Term R. 824.

An assignment of part of an annuity is within the act, for it must always appear by the registry, who has the present subsisting right.

Duke of Bolton v. Williams, 4 Bro. C. R. 297. 2 Ves. jun. 138. S. C.; *sed vide* Dixon v. Birch, 2 H. Black. 307.

So where an annuity was granted before the act passed, and assigned subsequent to it, and after the assignment made, the original securities, but not the assignment, were enrolled; it was holden, that no proceedings could be had by reason of the non-enrolment of the assignment.

Grant v. Foley, C. P. Trin. 23 G. 3.

Jackson v. Lever, 3 Bro. C. Ca. 605.

A contract to grant and secure an annuity, though in part executed, is not within the statute.

4 Term R. 660. 662. 5 Term R. 283.; and see 8 Bing. 215.

The act being made to take effect "from and after the passing "of it," its operation commenced from the first day of the session, and affected annuities granted subsequent to that time, though before it actually passed. The twenty days are exclusive of the day on which the deeds are executed.]

O'Callaghan v. Ingilby, 9 East R. 155.

‖A trust deed granting estates to trustees upon trust to raise money by annuities, which annuities are accordingly granted, does not require enrolment, it not being an instrument "*whereby any annuity is granted.*"

Henderson v. Countess of Glencairn, 2 Taunt. 235.

So also where an annuity bond was assigned by the obligee, the annuitant, to secure an annuity granted by the obligee of less amount, it was held that the second annuitant was not obliged to enrol the bond.

Keats v. Hick, 5 Moo. R. 629. 4 Barn. & C. 69. S. C.

Where a mother, at the instance of her sons, sold her business and advanced them a sum of money out of the proceeds, and subsequent to such advance it was agreed that the sons should secure to her an annuity, and a bond was accordingly given for securing it, it was held, that as the bond was subsequent to the advance of money, the annuity was voluntary, and not within the act.

Blake v. Attersoll, 2 Barn. & C. 875. 4 Dow. & Ry. 549.

The act applies only to annuities sold for pecuniary consideration; and, therefore, where by marriage settlement 10,000*l.* was to be paid by the father of the wife to trustees upon trust to pay the interest to the husband for life, and the father died without having paid the principal to trustees, and his affairs being embarrassed, and it being uncertain whether there would be sufficient to pay his debts, the husband agreed to accept in lieu of the 10,000*l.*, 5000*l.* and an annuity for his life of 125*l.*, it was held, that such annuity granted by the executors of the father, did not require enrolment.

Tetley v. Tetley, 4 Bing. 214.

So where an annuity of 10*l.* was granted by a son to his parents, in consideration of their giving up to him a farm which they occupied, and the stock on it worth 300*l.*; it was held that the annuity need not be enrolled under 53 Geo. 3. c. 141.

Brown v. Dowthwaite, 1 Madd. 446.

So an annuity granted in consideration of an assignment of a reversionary interest in stock does not require enrolment.

James v. James, 2 Bro. & B. 702. 5 Moo. 479.

And where an annuity is granted in consideration of the fair and *bonâ fide* sale of landed property, the consideration is not a pecuniary consideration or *money's worth* within the meaning of the statute, and enrolment is not necessary.‖

(*a*) An equitable estate is within this exception, though it mortgage its whole value. Shrapnel v. Vernon, 2 Bro. Ch. R.

[The last section of 17 G. 3. c. 26. excepts from the act any annuity or rent-charge given by will or marriage-settlement; any annuity secured upon lands of equal or greater annual value, whereof the grantor was seised (*a*) in fee-simple or fee-tail in possession at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the annuity; any voluntary annuity (*b*) granted without regard to pecuniary consideration;

sideration; any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament; and any annuity where the sum to be paid does not exceed ten pounds, unless there be more than one such annuity from the same grantor or grantors, to or in trust for the same person or persons.]

268. (*b*) An annuity in consideration of the grantee's giving up his business to the grantor, is within this clause; for any annuity granted for any other than a *pecuniary* consideration is, for the purposes of the act, to be taken to be a *voluntary* annuity. Crespigny v. Wittenoom, 4 Term R. 790.; ‖and see Doe dem. Johnston v. Phillips, 1 Taunt. 556. So also an annuity granted in consideration of the grantee's resigning his situation as master of an academy. Hutton v. Lewis, 5 Term R. 639.; and see James v. James, 2 Bro. & B. 702. Blake v. Attersoll, 2 Barn. & C. 875.; and *antè*, p. 244. The two last cases were decided on the 55 G. 3. c. 141., in which the words "money's worth" are added to the words "pecuniary consideration" in the former statute. An annuity secured on lands of equal annual value need not be enrolled, although also secured upon leasehold property. *Ex parte* Mitchell, 2 East R. 137.‖

‖The corresponding clause in 53 G. 3. c. 141., enacts that this act shall not extend to *Scotland* or *Ireland*, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child; nor to any annuity or rent-charge secured upon freehold, or copyhold, or customary lands in *Great Britain* or *Ireland*, or in any of his majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice of the time of the grant, whereof the grantor is seised in fee-simple or fee-tail in possession, or the fee-simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament. 53 G. 3. c. 141. § 10.

By section 5. it is enacted, that in case any person or persons by whom any annuity or rent-charge, of which such particulars as aforesaid are hereby required to be enrolled, shall, for the time being, be payable, shall be desirous of obtaining a copy of every or any deed, bond, or instrument, or other assurance, whereby such annuity or rent-charge was granted, and of such his, her, or their desire, shall give twenty-one days' notice in writing to the person or persons, for the time being, entitled to such annuity or rent-charge, such person or persons shall, on or before the expiration of such twenty-one days, unless prevented by fire, or other inevitable accident; and in that case, if the assurance shall not be destroyed by such accident, then, as soon after as such impediment shall be removed, send or deliver to the person or persons requiring the same, a copy of every deed, bond, instrument, or other assurance, whereby such annuity or rent-charge was granted, or of such of the assurances as in such notice shall be required; and such last-mentioned person or persons shall, at the time of receiving the same, pay to the person or persons furnishing the same, a sum after the rate of *Ibid.* § 5.

sixpence for every one hundred words contained in every such copy, and also the reasonable costs of sending or delivering the same; and the person or persons holding the original instruments by which such annuity or rent-charge shall be secured, shall suffer the person or persons to whom such copies shall be delivered or sent to examine the same with the originals; and in case such copies shall not be sent or delivered, or the person or persons holding the original instruments, shall refuse to suffer such copies to be examined therewith, according to the direction in this act, it shall be lawful for the person or persons by whom the annuity or rent-charge is payable, to take out a summons from any of his majesty's justices of his courts of King's Bench and Common Pleas, requiring the person or persons neglecting to send or deliver such copies, or refusing to suffer the same to be examined with the original instruments as aforesaid, to appear before such judge, and shew cause in the premises; and it shall and may be lawful for the judge before whom such person or persons shall be summoned to make such order for the production of the instruments by which such annuity or rent-charge shall be secured, and for suffering the complainant to take copies thereof, and examine the same or the copies delivered with the original instruments, and otherwise in the premises as to such judge shall seem meet.

2. *Of the Form and Contents of the Memorial.*‖

Downes v. Parkhurst, 2 H. Black. 13.

[The omission or incorrect statement of the date of warrant of attorney is fatal.

Duke of Bolton v. Williams, 4 Bro. Ch. 210.

Duke of Bolton v. Williams, 4 Bro. Ch. 210. 2 Ves. jun. 138. S. C.; but see *Ex parte* Chester, 4 Term R. 694. Saunders v. Hardinge, 5 Term R. 9.

A defect in the memorial as to the date of any one of the securities vitiates the whole transaction.(*a*)

‖(*a*) But now by 3 G. 4. c. 92. it is provided, that every bond, &c. granting any annuity which shall be duly enrolled shall be valid, notwithstanding a memorial of any other deed securing the same annuity shall not have been enrolled.‖

Oliver v. Style, Exchequ. Tr. 32 G. 3. Anderson v. Collard, Sitt. *Westminster*, *cor.* Ld. *Kenyon* after Easter T. 1791.

It is not necessary to describe the trustees *eo nomine*, it is enough if it appear on the face of the memorial that they are such.

Duke of Bolton v. Williams, *ubi suprà*.

The names of all persons, agents as well as principals, by whom and to whom the consideration is paid must be set forth,

Toldervy v. Allen, 5 Term R.

Hood v. Burton, 4 Bro. Chan. Ca. 121.

Every trust relating to the annuity must be registered.

Toldervy v. Allan, 5 Term R. 480.

But it seems not necessary to take notice of those which are not created in consequence of the annuity.]

‖Although the words of the act, 17 Geo. 3. c. 26. only require the names of the parties to be specified, and for whom any of them are trustees, yet the decisions have required the trusts of the deed to be expressed, though this doctrine has been repeatedly disapproved.

Thus

Thus a statement of the trust as general for the grantee, when in fact there was a prior trust for the grantor until default in payment of the annuity, was held insufficient. Taylor v. Johnson, 8 Term R. 184.

So also, where the trustee was described in the memorial as "nominated on the part of the grantee," and it appeared from the deed that he was a trustee both for the grantor and grantee, the memorial was held insufficient. Askew v. Mackreth, 1 New R. 214.

So also, where the deed contained a stipulation that the trustee should permit the grantor to take the rents and profits until default, and in case the annuity should be in arrear sixty days, he might enter and raise sufficient to satisfy it, and suffer the grantor to take the overplus, a memorial stating the deed to contain the usual powers of entry and distress, and perception of the rents, *&c.* for securing the annuity, was held insufficient. Desenfans v. O'Brien, 3 East R. 559.

So also, it is insufficient to refer generally to the trusts of the deed as the "trusts thereby declared." Leycester v. Lockwood, 1 Maule & S. 527.; and see Bradford v. Burland, 14 East, 445.; but see Defaria v. Sturt, 2 Taunt. 225. Blamire v. Barfoot, 6 Taunt. 504. Browne v. Rose, 6 Taunt. 124.

It is not necessary that the estates charged should be specifically set forth in the memorial where the aunuity is charged on all the grantor's estate in a county, and so stated; nor is it necessary to state specifically the powers in a deed, except so far as they create a trust, and so are brought within the words of the statute as to trustees. O'Callaghan v. Ingleby, 9 East, 135.

If a bond be joint and several, the memorial is insufficient if it state it to be several. Willey v. Cawthorne, 1 East. 398; and see Coare v. Giblett, 3 East, 461.

If an annuity bond bind the grantor's heirs, the memorial is not insufficient for describing it generally, without mentioning the obligation on the heirs. Horwood v. v. Underhill, 10 East, 123. 4 Taunt. 546. S. C.; and see Jackson v. Milsentown, 6 Taunt. 189.

If the annuity-deed under the 17 G. 3. c. 26. contain a proviso for a repurchase by the grantor, the terms of it must be stated; and it is not sufficient to refer to the proviso, stating the annuity to be redeemable on such terms as therein expressed. *Ex parte* Ansell, 1 Bos. & Pull. 62.; and see Booth v. Druce, 4 Taunt. 252. Tringham v. Bethune, 7 Taunt. 429. Doe dem. Mason v. Phillips, 5 Maule & S. 569.

But under the 53 G. 3. c. 141. a proviso for redemption need not be mentioned in the memorial. Yems v. Smith, 3 Barn. & A. 206.

Where the grantor was required to make her will, as a further security for the annuity, and the grantee retained the will, it was held that the memorial was insufficient for not noticing the will. *Ex parte* Mackenzie, 4 Taunt. 323.

It is not decided whether a fine is an assurance requiring enrolment by 17 G. 3. c. 26. 14 East, 453.

The assurances required by the annuity acts to be enrolled are those entered into by the grantor, or persons at his instance, for securing the annuity; and therefore a guarantee given by a third party, unconnected with the grantor, and for a commission payable to such third party, is not within the act. Sandilands v. Marsh, 2 Barn. & A. 673.; and see 3 Youn. & J. 136. *Sed vide* Rosher v. Hurdis, 5 Term R. 678.

Ex parte Price, 5 Madd. 132.

A lease deposited two years after the annuity is granted, as a collateral security, does not require enrolment.‖

Hood v. Burton, 4 Bro. Chan. Ca. 121.

[Where several annuities are payable out of a gross sum assigned for that purpose, every annuity must be stated in the memorial; it is not sufficient to deserihe it as one annuity of such gross sum.

Duke of Bolton v. Williams, 4 Bro. Ch. R. 297. 2 Ves. jun. 138.

The memorial must contain an account of all the proceedings relative to the consideration, to whom and on whose behalf paid; and the actual mode and manner of paying it.]

Dalmer v. Barnard, 7 Term R. 248.

‖If the consideration is paid *by* an agent, his name, as well as that of the principal, must be stated in the deed.

Askew v. Mackreth, 1 New R. 214.

Crawford v. Phillips, 2 New R. 141.

But if paid *to* an agent of the grantor, his name need not be stated, since the words of the statute do not require this.

Coare v. Giblett, 4 East, 85.

The *time* of payment is not required to be specifically stated by the act, and is not any further material than as entering into the question of the value of the consideration.

Crawford v. Phillips, 2 New R. 141.; and see Cook v. Jones, 15 East, 256.

And where the consideration was alleged in the deed to be paid by the grantee on a particular day, on which day it was in fact paid to the common agent of both parties, and by him paid a few days after to the grantor, this was held a sufficient allegation of payment within the statute.‖

Wright v. Reed, 3 Term R. 554.

[If paid part in notes, a description of it as money is bad, and the dates and other particulars of the notes must be stated.]

‖Berry v. Bentley, 6 Term R. 690.; see Drake v. Rogers, 4 Moo. R. 402.‖

Ex parte Mitchell, 2 East, 137.

‖But if the value of the notes has been received in money before the execution of the deeds, it may be stated as money.‖

(*a*) Kirkman v. Price, 1 H. Black. 309. (*b*) Shove v. Webb, 1 Term R. 732. (*c*) Cox v. Wright, E. 22 G. 3.

[If part of the consideration be money previously lent (*a*), or part of it be retained in satisfaction of a debt (*b*), or to satisfy the accruing payments of the annuity (*c*), or part of it be the giving up a former annuity (*d*), or if the whole be a judgment recovered against the grantor (*e*), a memorial stating the payment generally is bad, for it does not disclose the transaction truly.

B. R. Hunt on Annuities. (*d*) Washburn v. Birch, 5 Term R. 472. (*e*) Jaques v. Withy 1 Term R. 557.

Simons v. Mortimer, 5 Term R. 139. Sowerby v. Harris, 4 Term R. 494.

But where the consideration has been paid from time to time, and has been renewed for the purpose of keeping the contract open, the gross amount may be stated as the consideration. The consideration may be set forth merely by way of recital.

Hodges v. Money, 4 Term R. 500.

And it is sufficient to mention it only once, though there are several deeds for securing the annuity, in each of which it is expressed.]

Ranger v. Earl of Chesterfield, 5 Maul & S. 2; and see Barber v. Gamson, 1 Barn. & A. 282.

‖So also, if the name of the party for whose life the annuity is granted is expressed in one of the several securities, it is sufficient without expressing it in the others.‖

[But

[But where one of the instruments which constitute the assurance does not set forth the consideration, (and it is not necessary to set it forth in every one,) the memorial must connect the instrument omitting it with the others, by so plain an inference that it may clearly appear to relate to the same transaction, else such instruments will be void; and it must be inferred from the memorial itself that all the deeds are connected.] Saunders v. Hardinge, 5 Term R. 9.

Where a memorial described an instrument as an assignment, and it appeared in fact to be an under-lease, it was held sufficiently described in popular language. Butler v. Capel, 2 Barn. & C. 251.

An annuity deed is properly described as a "*grant of annuity*," though it contain an assignment of stock as a security; so also though it contain a release of a former annuity. Browne v. Lee, 6 Barn. & C. 689. Crowther v. Wentworth, 6 Barn. & C. 566.

It is not necessary that the annuity deed should be executed by all the parties to it before the memorial is enrolled, pursuant to 53 G. 3. c. 141. § 2. Buckridge v. Flight, 6 Barn. & C. 49.

By the 53 G. 3. c. 141. the memorial must contain the description and places of residence of the witnesses to the annuity deed; and therefore where the subscribing witness to a warrant of attorney, given as a collateral security for an annuity, was described as *C. R.* clerk to *W. A.* of *Great M. Street*, in the county of *M.*, it was held insufficient, as *C. R.* did not reside in *Great M. Street*. Darwin v. Lincoln, 5 Barn. & A. 444. Smith v. Pritchard, 5 Barn. & A. 717. *Sed vide* 7 Moo. 382. 1 Bing. 77. 3 G. 4. c. 92.

So where the memorial described one of the witnesses by the initial only of his Christian name, it was held insufficient. Cheek v Jefferies, 2 Barn. & C. 1.; and see Metcalf v. Bowes, 5 Barn. & C. 258.

If the witnesses to the deed are accurately described in the memorial, it is sufficient, though they did not see the parties execute. Flight v. Buckeridge, 3 Bing. 215.; and see 5 Bos. & Pull. 153. 6 Taunt. 124.

Now by the 3 G. 4. c. 92. it is enacted and declared, that no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is granted, is required in the memorial, besides the names of such witness or witnesses. 3 G. 4. c. 92.

By 53 G. 3. c. 141. § 4. it is enacted, that in every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially shall be described in such or the like manner as is herein-before required in the enrolment; otherwise every such deed, instrument, or other assurance, shall be null and void. 53 G. 3. c. 141. § 4.

‖3. *Of vacating and setting aside Annuities.*

17 G. 3. c. 26. § 3. (*a*) The payment of part of the money to a third person at the request of the grantor for the redemption of a former annuity, was holden not to affect the legality of the consideration.

[By the 17 G. 3. c. 26. § 3. it is enacted, "that in every deed, "instrument, or other assurance, whereby any annuity or rent-"charge shall, from and after the passing of this act, granted, "or attempted to be granted; the consideration really and *bonâ* "*fide*, (which shall be in money only (*a*), and also the name or "names of the person or persons by whom and on whose "behalf the said consideration or any part thereof shall be "advanced, shall be fully and truly set forth and described in "words at length; and in case the same shall not be fully and "truly set forth and described, every such deed, *&c. shall be* "*null and void* to all intents and purposes."]

Ex parte Fallon, 5 Term R. 283. A debt for goods *antecedently bonâ fide* sold, seems to be a good part-consideration. Shove v. Webb, 1 Term R. 732. *Qu.* Whether a judgment recovered, Jaques v. Withy, 1 Term R. 557. or an assignment of a former annuity, be a good consideration? *Ex parte* Fallon, 5 Term R. 283. Duke of Bolton v. Williams, 4 Bro. Ch. R. 297. It is not necessary to state the consideration in more than one of the instruments which constitute the assurance. Hodges v. Money, 4 Term R. 500.

Williams v. Hockin, 8 Taunt. 435.

‖The court set aside the securities for an annuity, on the ground that the consideration-money did not belong to *W.*, as stated in the securities, but to *C.*, and that the name of the person on whose behalf the money was paid was not truly set forth in the receipt, *C.* claiming the consideration money and the annuity as his own.‖

(*b*) But this relates only to the particular provisions of this section. On a defect in the memorial, any person may apply to the court. Saunders v. Hardinge, 5 Term R. 9. (*c*) The entering up judgment, or even giving a warrant of attorney to enter up judgment in any court, is sufficient to give that court this summary jurisdiction.

[§ 4. enacts, "That if any part of the consideration shall be re-"turned to the person advancing the same, or in case the consider-"ation or any part of it is paid in notes, if any of the notes with "the privity and consent of the person advancing the same, shall "not be paid when due, or shall be cancelled and destroyed with-"out being first paid, or if the consideration or any part of it is "paid in goods, or if any part of the consideration is retained "on pretence of answering the future payments of the annuity, "or any other pretence; in all and every of the aforesaid cases "it shall and may be lawful for the person (*b*) by whom the an-"nuity or rent-charge is made payable, to apply to the court in "which any action (*c*) is brought for payment of the annuity on "judgment entered, by motion, to stay proceedings on the judg-"ment or action; and if it shall appear to the court that such "practices as aforesaid, or any of them, have been used, *it* "*shall and may be lawful for the court* to order the deed, "bond, *&c.* to be cancelled, and the judgment, if any has been "entered, to be vacated."]

Haynes v. Hare, 1 H. Black. 659. *Ex parte* Chester, 4 Term R. 694.

Girdlestone v. Allan, 1 Barn. & C. 61. 2 Dow. & R. 150.; and see 1 Taunt. 372.

‖This section is held not imperative on the court, as the words (unlike those in the three preceding sections) are, "it may be *lawful* for the court to order the deeds to be "cancelled," *&c.*; it is discretionary in the court, either to vacate the securities in case of a violation of the section, or to do so on particular terms, or to refuse to do so according to the circumstances of the case; and so also as to the sixth section of the

53 G. 3.

53 G. 3. c. 141. which is a transcript of the above clause. The words of the sections import on the face of them to refer to cases where improper practices exist, and they give the court a discretionary power to examine whether unfair advantage has or has not been taken of the grantor.

Therefore, where part of the consideration-money had been deposited in the hands of the grantee's attorney till certain houses, out of which the annuity was granted, should be completed, but it appeared that the money deposited had all been paid over to the grantee in a short time after the date of the deeds, and there was no fraud in the transaction, the court refused to set aside the annuity; since this was not a fraudulent retainer contemplated by the act. Barber v. Gamsom, 4 Barn. & A. 281.

So where *A.*, an attorney, purchased an annuity of *B.*, and having paid the consideration-money, received from *B.* the amount of a bill for business done, including by mistake a charge for searches for incumbrances, which search had never been made, it was held that the payment of this charge, so inadvertently made, was not a return of the consideration-money within the meaning of the fourth section of 17 G. 3. c. 26. Hurd v. Girdlestone, 6 Taunt. 8. 1 Marsh. 407.; and see 5 Term R. 597.

And where the attorney of the grantor, at the time of payment of the purchase-money, takes and keeps an unreasonable part of it for the expenses of the deed, this is not a ground on which the court will set aside the annuity; the attorney having no connection with the grantee. Mootham v. How, 7 Taunt. 596.

But where the agent of the grantee retained a considerable sum for expenses of preparing the deeds, and a further sum by way of advance to answer the first year's payment of the annuity, the Court of Common Pleas set aside the deeds against a surety for the annuity, on the ground that this was an illegal retainer. And they did the like in another case, although the grantee alleged he had given no authority for, and was ignorant of, the retainer. Menco v. Hammond, 6 Moo. 491. Williamson v. Goold. 1 Bing. 234. 8 Moo. 109.; and see 1 Bing. 287. 8 Moo. 302. 2 Bing. 370.

So also, where 910*l.*, the consideration-money, was paid to the grantor, who immediately returned it, except 1*l.*, to pay off preceding annuities, and 160*l.*, which the attorney who negotiated the bargain retained for his trouble, the court set aside the annuity. Henry v. Taylor, 3 Bing. 177.; and see Finley v. Gardner, 6 Barn. & C. 165. Jones v Silberschildt, 4 Bing. 26.

Where the grantor of an annuity, had on a mistaken claim of the grantee paid a half-yearly instalment for half a year sooner than the deed required, it was held not to avoid the annuity. Jackson v. Ld. Milsington, 6 Taunt. 189.

17 G. 3. c. 66. § 5. enacts, that a particular roll shall be kept by the clerk of the enrolments in Chancery, and that every memorial shall be enrolled in order of time, as it shall be brought in; and the day, hour, and time of bringing the memorials into the office are to be specified on the roll. It also appoints the fees of the clerks. 17 G. 3. c. 66. § 5.

§ 6. enacts that all contracts for the purchase of annuities from infants shall be void, and incapable of confirmation after the infants shall come of age: and makes the procuring or soliciting § 6.

citing an infant to grant any life-annuity, or to promise, or otherwise engage to ratify it when he comes of age, an indictable misdemeanor, punishable with fine and imprisonment: as does § 7. the asking, demanding, or taking by any solicitor or other person of more than 10*s.* per cent. for procuring money to be advanced on any life-annuity.

By the act 53 G. 3. c. 141. we have seen that the statute 17 G. 3. c. 26. is repealed, except as to annuities granted previous to the passing of the act; but the principal provisions of the former act are in substance re-enacted by the latter, with some additional regulations.

§ 2. By § 2. the time for enrolment is enlarged to thirty days, and a form of memorial is given.

§ 3. By § 3. it is provided, that if any such annuity shall be granted to or for the benefit of any company exceeding ten persons, for the purpose of granting or purchasing annuities, it shall be sufficient to describe them by their usual firm or name of trade.

§ 4. § 4. enacts, that where the person to whom the annuity is granted shall not be entitled thereto beneficially, the name of the person intended to take it beneficially shall be described in the enrolment, otherwise the deed or instrument *shall be null and void.*

§ 5. (For § 5. see *antè*, p. 245.)

§ 6. § 6. is to the same effect as § 4. of the former act. (*antè*, p. 250.)

§ 7. § 7. is to the same effect as § 5. of the former act. (*antè*, p. 251.)

§ 8. § 8. is to the same effect as § 6. of the former act. (*ibid.*)

§ 9. § 9. is to the effect of § 7. of the former act.

Crossley v. Arkwright, 2 Term R. 603.; and see 5 Term R. 9.

[Where the securities are made absolutely void by the statute, a stranger may take advantage of any irregularity; and therefore where a *fieri facias* issued against a person in possession of goods under a deed given *inter alia* in consideration of an annuity, it was holden that the sheriff, having notice that the annuity was not registered, was justified in returning *nulla bonâ.*

Shove v. Webb, 1 Term R. 732.

And where the contract is avoided merely for irregularity, the consideration-money may be recovered back from the grantor; whether such consideration be wholly in money, or for a debt antecedently due for goods sold. But *qu.* as to goods sold at the time of granting the annuity?]

Waters v. Mansell, 3 Taunt. 56.

‖If the grantor has communicated to the grantee that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, the grantee may maintain an action for money had and received, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones before he sues.

Scurfield v. Gowland, 6 East, 241.

And where the grantor sets asides the securities, the grantee may recover back the consideration-money, as money had and received, although a bond was given for securing the annuity, which is not set aside; he is not obliged to sue on the bond.

Hicks v. Hicks, 3 East, 16. 4 Esp. 196.;

When the grantee of an annuity set aside for a defective registry brings an action for money had and received to recover back the consideration, the grantor may set off the payments in respect

respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. and see 1 Taunt. 520.

Where the grantee has regularly received the annuity during his life, his executor cannot sue for the consideration-money, on the ground that no memorial was enrolled; as the contract was not thereby void, but only voidable.‖ Davis v. Bryan, 6 Barn. & C. 651.

[An action for money had and received for this purpose cannot be maintained against a surety who has in fact never received any part of the consideration, though he join with the principal in signing a receipt for it.] Stratton v. Rastall, 2 Term R. 366. *per Buller* and *Grose* J. *contrà Ashurst* J.

‖Where upon the grant of an annuity the agent who negotiated it, as between the grantor and grantee, was appointed trustee and receiver of the rents of the estate of the grantor on which it was charged, and afterwards advanced money to the grantee out of his own funds, in anticipation of such rents, and debited the grantee with the usual commission charged by him on annuity payments; it was held, that on the eventual failure of the securities and insolvency of the grantor, the agent could not treat such an advance as a mere loan, but that it must be taken as a payment made to the grantee in liquidation of the arrears of the annuity, and that the latter could only issue execution for the arrears actually due after deducting the sum advanced and received by him from such agent. Carroll v. Goold, 1 Bing. 171. 7 Moo. 621; and see 1 Bing. 274. 316.

A party outlawed in K. B. in an action to recover the arrears of an annuity, cannot be heard in C. P. to move to set aside the annuity.‖ Loukes v. Holbeach, 4 Bing. 419.

[As to the extent of the summary jurisdiction of the common law courts in questions on this act, see 2 Ves. jun. 154. 4 Bro. Chan. R. 310.]

APPEAL.

AN appeal is the party's private action, seeking revenge for the injury done him, and at the same time prosecuting for the crown, in respect of the offence against the public. [It is derived from the *French*, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "*appeal*" in *English*. 4 Black. Com. 312.]

Though this be a legal suit, and therefore to be carried on in a reasonable way, yet as none of the statutes of *amendment* or *jeofail* extend to it, the utmost exactness is required in the proceedings, especially where the life of a man is brought into danger; but as the nice distinctions made and allowed of in the several kinds of appeals, are accurately treated of by Mr. Serjeant

2 Hawk. P. C. 232.

jeant *Hawkins*, it may be sufficient to set down here what seems to have been most materially said by him relating to appeals under the following heads:

59 G. 3. c. 46. This wholesome statute was passed in consequence of the case of Ashford v. Thornton, 1 Barn. & Ald. 405., where this proceeding was resorted to. See the proceedings stated at length in the report.

‖By the 59 G. 3. c. 46. reciting that appeals of murder, treason, felony, and other offences, and the mode of proceeding thereon, have been found to be oppressive, and the trial by battle is a mode of trial unfit to be used; it is enacted, that after the passing of the act, all appeals of treason, murder, felony, or other offences, shall cease, determine, and become void; and that it shall not be lawful for any person or persons, at any time after the passing of the act to commence, take, or sue any appeal of treason, murder, felony, *&c.*, but that all such appeals shall be utterly abolished; and it is further enacted, that after the passing the act, in any writ of right then depending or thereafter to be instituted, the tenant shall not be received to wage battle, nor issue be joined or trial had by battle, in any writ of right.‖

(A) Of the different Kinds of Appeals: And herein,

1. *Of an Appeal of Death.*
2. *Of Appeals of Larceny.*
3. *Of an Appeal of Rape.*
4. *Of an Appeal of Mayhem.*

(B) In what Courts an Appeal may be brought.

(C) Who may bring an Appeal.

(D) Within what Time an Appeal must be brought.

(E) In what County an Appeal must be tried.

(F) How the Appellant is to appeal and prosecute.

(G) The Form of the Writ, and for what Faults it may be abated.

(H) The Form of the Declaration.

(I) What may be pleaded in Bar to an Appeal.

(K) How the Appellant is to be punished for a false Appeal.

(A) Of the different Kinds of Appeals.

2 Inst. 132. Bract. 118. 2 Hawk. P. C. 259.

THERE were anciently several kinds of appeals which seem obsolete at this day, as appeals of treason, which might be sued before the parliament and other courts of law, as well as before the constable and marshal, and were determinable by battle.

2 Inst. 132.

But appeals before the parliament are taken away by 1 H. 4. c. 14.

c. 14. and those before other law courts are become obsolete. (*a*)

(*a*) But as to the jurisdiction of the constable and marshal, in relation to treasons committed out of the realm, it seems to continue still in force; for in the seventh year of *Charles* the First, an appeal of treason supposed to be committed beyond sea, was actually commenced before the constable and marshal, who, for want of sufficient proof to clear the truth, awarded that a duel should be fought between the parties, for the final determination of the matter. Rushworth's Collect. part 2. vol. i. fol. 112., between Donald Lord Rea and David Ramsay, Esq.

Appeals *de pace, de plagis,* and *de imprisonamenta,* are out of use, and have been turned to actions of trespass for many hundred of years past; also the whole learning of appeals of *arson* (*b*) seems obsolete at this day. 4 Inst. 182. Co. Lit. 126. (*b*) Co. Lit. 288. a.

The kinds of appeals therefore that seem to require any consideration at this day, are those of death, larceny, and rape, which are capital appeals, and that of mayhem, which is considered as a trespass; and therefore,

1. *Of an Appeal of Death.*

An appeal of death, which is now chiefly in use, is a vindictive action which the law gives a wife against her husband's murderer, and to the heir at law against one who kills his ancestor, which being the suit of the subject the king cannot pardon; but as the several matters set forth in the following part of this head more particularly relate to this kind of appeal, it seems needless to insert them here.

2. *Of Appeals of Larceny.*

An appeal of larceny in an action which a person robbed of goods may bring against the felon, in which there shall be a restitution of the goods (*c*), and the offender to suffer such punishment as if he were convicted at the suit of the king. H. P. C. 184. Latch. 127. (*c*) Where fresh suit is required in order to entitle the party to a restitution, *vide* 2 Hawk. P. C. 248.

In every appeal of larceny it is necessary to set forth whose the goods were that were stolen, and what the price of them was (*d*), and that the words *felonicè cepit* be made use of. 2 Hawk. P. C. 258. (*d*) But 2 Hawk. P. C. 258. This does not seem necessary for any other purpose than to shew that the crime amounts to grand larceny, and to ascertain the goods, in order thereby the better to entitle the appellant to a restitution.

They who are robbed of goods in which they have a special property, as churchwardens, carriers, *&c.* may maintain an appeal of larceny, and may either bring it generally for their own goods (*e*), or specially for the goods of *J. S. &c.* in their custody. 2 Hawk. P. C. 246. (*e*) Keilw. 70. pl. 7.

3. *Of an Appeal of Rape.*

By the common law, any virgin, wife, or widow, might bring an appeal of rape against any one who had ravished her, though she were his nief; but a lawful wife could never bring such appeal without her husband; and by the common law the ravisher was to suffer death. 2 Inst. 180. Co. Lit. 123.

But

2 Hawk. P. C. 253. But by the statute of *Westm.* 1. c. 13. the offence of committing a rape was reduced to a trespass, and punishable in the same manner with other trespasses, till the making of the statute of *Westm.* 2. c. 34. by which it is enacted, *that whoever ravishes any woman, where she did not consent before or after, shall have judgment of life and member; and though she do consent after, he shall have judgment if attainted at the king's suit;* but it is observable, that this statute does not restore the old common law in relation to such appeals, as it would have done if it had only repealed the said statute of *Westm.* 1. but makes a new law concerning them; whence it follows, that all appeals of rape, which are impliedly given by this statute, must conclude *contra formam statuti.*

4. *Of an Appeal of Mayhem.*

Hob. 134. 2 Jones, 205. An appeal of mayhem lies for any hurt done to a man's person, whereby he is rendered less able in fighting to annoy others or defend himself.

Vide 2 Hawk. P. C. 236. In this action the words *felonicè mayhemavit* are necessary, though the defendant is not subject to the loss of member.

(B) In what Courts an Appeal may be brought.

2 Hawk. P. C. 232. APPEALS are commenced either by writ, which is an original out of Chancery, returnable in the King's Bench only, or by bill.

Cro. Eliz. 605. (*a*) But not against one who is main- Appeals by bill may be sued in the King's Bench against any person in actual custody, or by having bail filed for him there. (*a*)

prised *de die in diem.* Cro. Eliz. 694. 2 Hawk. P. C. 232.; and *note*, That if the appellee be arraigned and tried the same term, there is no necessity to file a bill against him. Jones, 425. Cro. Car. 532. Roll. Abr. 536. But *vide* Skin. 634. pl. 3., where, notwithstanding the court ordered a roll to be made, and a copy of it to be delivered to the appellee, and gave him a day to plead.

2 Hawk. P. C. 232. Skin. 634. *Vide* Cro. Eliz. 605. 695. If a man be brought into court either by a void writ of appeal, or by a voidable one, which is afterwards abated, he may be arraigned by bill *in custodiâ mareschalli.*

Vide 2 Hawk. P. C. 233. and the authorities there cited, for appeals before the sheriff and coroner, and appeals of felonies done out A bill of appeal lies before justices of *eyre*, and before justices specially assigned, and before justices of gaol delivery, and for the same reason, as some say, before justices of assize; who by the purport of several statutes are authorized to deliver gaols without any special commission against any prisoner in the gaol, which they are to deliver, or as it is generally holden, against a person whom they have bailed.

of the realm, before the constable and marshal, *vide* 2 Hawk. P. C. 157.; and that they cannot be sued before justices of the peace. *Idem.*

2 Hawk. P. C. 235. If some of the accomplices only be in prison, a bill of appeal lies against all, which, after the trial of those in the prison, shall be removed into the King's Bench, where the rest shall be proceeded against.

(C) Who

(C) Who may bring an Appeal.

AN infant may bring an appeal (*a*), but he must prosecute it by guardian, and shall be nonsuited upon such guardian's non-appearance at a day whereon he is demandable; but if the infant comes into court, and says, that he will relinquish the suit, and the guardian insists to continue it, the court may discharge him and assign another.

Moor, 461. H. P. C. 183. 11 Mod. 216. 2 Ld. Raym. 1288. Holt, 355. (*a*) Also an appeal lies against an infant. H. P. C. 185. 2 Hawk. 247.

But an idiot, or person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainder or outlawry continues in force, cannot bring any appeal whatsoever.

H. P. C. 183. 2 Hawk. P. C. 240.

The wife only (unless she had a share in the guilt, in which case it shall be brought by the heir) can bring an appeal of the death of her husband (*b*), but she must have been his lawful wife; which is to be tried by the bishop's certificate.

Vide tit. *Baron and Feme.* 2 Inst. 68. (*b*) That an appeal may be brought against a feme covert, *vide* 2 Hawk. P. C. 247.

Also a woman divorced from her husband, though by a voidable sentence (*b*), cannot maintain an appeal.

2 Hawk. P. C. 242. (*c*) For this at least is implied in the old rule, that a woman shall have an appeal *de morte mariti inter brachia sua interfecti, et non alitèr.* 2 Hawk. P. C. 242. *Vide* 2 Inst. 68.

But a wife who elopes from her husband, and the wife of one attainted of high treason, may have an appeal of his death; though such a wife cannot have dower, for the statutes, which take away dower in those cases, say nothing as to her right of bringing an appeal.

2 Hawk. P. C. 245.

If the wife take another husband either before or pending the appeal, she puts an end to it for ever; and if she marry after judgment (*d*) she cannot pray execution.

2 Hawk. P. C. 243. (*d*) But whether the court may not award execution against him either *ex officio*, or at least at the demand of the king, *qu.* 2 Hawk. P. C. 243.

For the death of an ancestor who leaves no wife the heir only can bring an appeal, and such heir must himself be innocent (*e*) of the fact, he must be heir general (*g*) according to the course of the common law, and also heir male (*h*), and in his count must set forth how he is heir to the deceased.

Vide head of *Descent.* (*e*) But if he have a share in the guilt, the next heir shall have an appeal against him. H. P. C. 182. 2 Hawk. P. C. 243. (*g*) Therefore the father cannot bring an appeal for the death of his son, nor the youngest son in *Borough-English* for the death of his father; and if the deceased have two sons at the time of his decease, the eldest attainted of treason, neither of them can bring the appeal. Co. Lit. 8. Leon. 326. Dyer, 50. (*h*) This depends upon *Magna Charta*, which ordains that none shall be imprisoned on the appeal of a woman for the death of any but her husband; and therefore if she brings such appeal, the court *ex officio* will abate the writ; but no other appeals by women are excepted, besides the appeal for the death of an ancestor. 2 Hawk. P. C. 243, 244.

If an heir die, pending an appeal commenced by him, it seems agreed that no other heir can proceed in such appeal, or commence a new one; and it seems the stronger opinion, that if the right of bringing an appeal be once vested in an heir, who dies without bringing any, the right of appeal is gone for ever; and

Vide 2 Hawk. P. C. 244. Ld. Raym. 434. 557.

if an heir die after judgment given against the appellant, it is questionable whether his heir can sue execution.

(D) Within what Time an Appeal must be brought.

2 Inst. 320. 3 Inst. 53. 4 Co. 42. b. 2 Hawk. P. C. 241. 3 Salk. 38. Ld. Raym. 21, 22. 11 Mod. 70. pl. 9.

BY the statute of *Gloucester*, cap. 9. (which has been construed to extended only to appeals of death,) *an appeal shall not be abated for default of fresh suit, if the party sue within the year and day after the deed done*, the computation whereof, as the law is now settled, shall be made not from the day when the wound was given, but from the day when the party died; also the year and day shall be computed from the beginning of the day, and not from the precise time when the death happened, because regularly no fraction shall be made of a day.

2 Hawk. P. C. 2. (a) So of appeal of larceny. 2 Hawk. P. C. 247.

An appeal of rape may be brought in any reasonable time, the judgment whereof lies in the (a) discretion of the court; for, as has been said, the above statute of *Gloucester*, cap. 9. extends only to appeals of death.

(E) In what County an Appeal must be tried.

Dyer, 38.

ALL appeals are local actions, and regularly to be tried in the county wherein the offence was committed.

2 Hawk. P. C. 242.

But it is said, that if a person had died in one county of a wound given in another, the appeal might be brought in either of them, and the trial be at the bar by a jury returned from the body of each of those counties; but since the 2 & 3 E. 6. cap. 2. which enacts, *That the party may sue an appeal in the county where the person feloniously stricken*, &c. shall *die*, &c. it seems the trial can be from such county only.

Dyer, 39. 7 Co. 2. 2 Hawk. P. C. 247. (b) But if one take me

So an appeal of larceny is a local action; yet if one rob me of goods in the county of *A.* and carry them into the county of *B.*, I may (b) either bring an appeal of robbery in the county of *A.*, or an appeal of larceny in the county of *B.*

from the county of *A.* into that of *B.*, and there rob me, he shall be appealed of robbery in the county of *B.* only, for he was only a trespasser in *A.* 2 Hawk. P. C. 247. So in rape, if a man takes a woman by force in one county, and carries her into another, and there ravishes her, the appeal shall be brought in the latter only. 2 Hawk. P. C. 256.

(F) How the Appellant is to appeal and prosecute.

2 Inst. 315. 2 Hawk. P. C. 257. (c) As where a defendant prayed his clergy after his conviction, and the plaintiff replied

AT common law neither plaintiff nor defendant, in any appeal whatever, could make an attorney (c), except in some special cases; but now by the 3 H. 7. cap. 1. it is enacted, *that the appellant in any appeals of murder* (d), *or death of a man, where battle by the course of the common law lies not, may make an attorney, and appear in the same, in the said appeals, after they be commenced, to the end of the suit and execution of the same.*

bigamy; in which case he was allowed to make his attorney, in order to procure the bishop's certificate. 2 Hawk. P. C. 257. Also after a defendant is acquitted, he may appear by attorney in

in order to recover damages from the abettors. 8 E. 4. 5. pl. 5. (*d*) Cannot appear by attorney in an appeal of mayhem. Carth. 395.

But it seems that the appellant cannot make an attorney till he has once appeared in proper person; and that if the plaintiff or defendant appear or plead by attorney where they ought not, and the court receive the plea, and adjourn the cause, it seems that the appeal is discontinued, because such appearance was merely void in law. Skin. 48. pl. 1. 670. pl. 9. Carth. 394. Salk. 61.

The appellant may be nonsuited for not appearing when demanded, at any day of continuance, except a verdict hath been given against him; in which case by the 2 H. 4. cap. 7. he cannot be nonsuited. Noy, 88. Latch. 173. Moor, 407. Cro. Eliz. 465.

Where an appeal is commenced in the court below, and removed into the King's Bench, the appellee is to be arraigned *de novo* on the same bill of appeal, and it is not necessary to exhibit a new bill against him *in custodiâ mareschalli*; and if the appellant will not appear to prosecute his appeal, the appellee may sue out a *scire facias* reciting the whole matter, warning him to appear at a certain day; and if he make default on that day, the court on demand will nonsuit him; but the appellant may appear *gratis*, and prosecute without any *scire facias*. Roll. Abr. 131. 2 Bulstr. 19. Skin. 670. pl. 9. Carth. 394, 395.

(G) The Form of the Writ, and for what Faults it may be abated.

THE writ in an appeal is an original issuing out of Chancery, returnable into the King's Bench only; before the return thereof the Court of Chancery only can supersede or set it aside, where it appears to have issued *erronicè* or *improvidè*, by some error extrinsic to the writ itself; but for any error or defect on the face of it, it may be quashed after it is returned into the King's Bench. Abr. Eq. 416.

The court (*a*) *ex officio* will quash the writ for faults appearing on the face of the writ; as where the sense is defective for want of a material word, or where it wants those words of art which the law has appropriated for the description of the offence. 2 Hawk. P. C. 268. (*a*) But the appellant is first to demand *oyer* of the writ, and this he must do in open court. 2 Hawk. P. C. 267. Bigby v. Kennedies, 5 Burr. 2643. 2 Black. R. 710. S. C.

So, if in a writ of appeal brought by husband and wife, the conclusion is in the name of the wife only; or if the writ omits either the name of baptism, or surname of the appellant or appellee being under the degree of nobility, it shall be abated. 2 Hawk. P. C.

Also the court will abate the writ when the declaration varies from the writ in some material point, either as to the reign of the king, or as to the county wherein the fact is laid, *&c.* *Vide* Hawk. P. C. 268., and where such faults in the declaration are not fatal, if the writ on the file be right. 8 Co. 162., and title *Amendment and Jeofail.*

On the exception of the party the court will abate the writ; as if he shews that there are not fifteen days between the *teste* and Salk. 63. pl. 4. See Ld. Raym.

671. 1 Mod. 416. 448. 451. Vent. 7. For this *vide* tit. *Misnomer and Addition*; and 2 Hawk. P. C. 184. to 193.

return of the writ; but this he must do before he has pleaded in chief, without taking advantage of it.

If the writ or declaration mistake either the name of baptism, or surname or addition of the appellant or appellee, the appellee before imparlance may plead it in abatement.

2 Hawk. P. C. 275.

But the omission or insufficiency of an addition is salved by the appellee's coming in and pleading, without taking any advantage of such defect, but not by his bare appearance.

2 Hawk. P. C. 276. (*a*) *Vide* Carth. 56. That he must plead the general issue at the same time that he pleads in abatement.

The defendant may at the same time plead as many pleas in abatement as he pleases, together with matter in bar, and the general issue, if he can do it without repugnancy; and if he be (*a*) suffered to plead any such plea without pleading with it the general issue, the finding it against him doth not conclude him from pleading the general issue afterwards.

(H) The Form of the Declaration.

2 Hawk. P. C. 258. *Vide* head of *Indictments*.

THE declaration must set forth the offence with the utmost certainty, and likewise describe it by such words of art as the law has appropriated to the purpose; therefore if the words *felonicè* in any appeal, *murdravit* in an appeal of murder, *rapuit* in an appeal of rape, *cepit* in an appeal of larceny, *mayhemiavit* in an appeal of mayhem, be omitted, they cannot be supplied by any circumlocution.

2 Hawk. P. C. 259. Must shew the length and breadth of the wound, if practicable.

The declaration must set forth in what part of the body the wound was given; and therefore if it only says, that the wound was given *circa pectus*, it is vicious; but it is certain enough by shewing that the wound was given in the left part of the belly, or of the side, or in the left leg, *&c.*

2 Hawk. P. C. 260.

(*b*) The year is sufficiently expressed by shewing the year of the king without adding that of the Lord, or saying that it was in such a year of the reign of the king. 3 Inst. 318. 2 Hawk. P. C. 264. (*c*) Must not only shew the day of the hurt, but also the day of the death; and if done in the night-time, proper to allege *nocte ejusdem diei*; but a mistake of the day is not material on evidence. 2 Hawk. P. C. 264, (*d*) *Circa horam primam* sufficient. 2 Hawk. P. C. 262. Carth. 333. S. P. But a mistake of the hour on evidence is not material. (*e*) If a place be generally alleged, the law will intend it a vill, unless it be mentioned with some addition which shews the contrary. 2 Hawk. P. C. 265. Skin. 554. Carth. 333. But upon evidence the place is not material, so as the fact be proved any where within the county. 2 Hawk. P. C. 265. (*g*) If it were by other means, as by poisoning, drowning, suffocating, burning, or the like, the circumstances must be specially set forth; but if the count be for killing with one weapon, and the evidence of killing with another, the variance is not material, if the means made use of may any way come under the notion of a weapon. 2 Hawk. P. C. 261. 3 Mod. 158.

"By the statute of *Gloucester*, cap. 9. If an appeal declare "the deed, the year (*b*), the day (*c*), the hour (*d*), the time of "the king, and the town (*e*) where the deed was done, and with "what weapon (*g*), it shall stand in effect."

(I) What

(I) What may be pleaded in Bar to an Appeal.

IF the appellant wants any of those requisites required by law in a person who brings an appeal, it will be a good plea; as that a woman was never lawfully married, that *A. B.* is heir at law, and not the appellant, *&c.* 2 Hawk. P. C. 279.

Autrefoits convict of manslaughter is a good plea to an appeal of murder for the same killing. Carth. 17. Where the appellee pleaded that he was before indicted of murder, and convicted of manslaughter, and prayed his clergy, which the court would not allow him. *Vide* 3 Mod. 101. Carth. 16. 19. Salk. 61. Skin. 670. pl. 9.

A *retraxit* of one appeal is a good bar of another for the same thing, and so also is a nonsuit; and according to some opinions, so is a discontinuance after appearance, but not before. Salk. 64. pl. 5. Cro. Eliz 605. Sid. 32. Bulst. 141. Cro. Jac. 283. Yelv. 204. [The case referred to in Bulst. Cro. Jac. and Yelv. is that of Bradley v. Banks, and there the whole court were clearly of opinion, that a discontinuance before appearance was peremptory.]

A release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any appeal; but a release of all personal actions does not bar an appeal of felony, being an action of an higher nature. 2 Hawk. P. C. 282.

If the appellee pleads a special plea, which does not amount to a confession of the fact, it seems he must at the same time plead over to the felony, except in special cases; as where such plea would be prejudicial to him, or where such plea declines the jurisdiction of the Court. 2 Hawk. P. C. 284. Carth. 56.

(K) How the Appellant is to be punished for a false Appeal.

BY the common law a defendant may recover damages for the false and malicious appeal against the appellant and his abettors, by a writ of conspiracy or action on the case. Co. Lit. 283.

And by *Westm.* 2. *cap.* 12. it is enacted as followeth, "For as much as many through (*a*) malice, intending to grieve others, do procure false appeals to be made of (*b*) homicides and other felonies, by appellors having nothing to satisfy the king for their false appeal, nor to the parties appealed for their damages; it is ordained, that when any being appealed of felony surmised upon him, doth acquit (*c*) himself in the king's court in due manner, either at the suit of the appellor or of our lord the king, the justices before whom the appeal shall be heard, shall punish the appellor by a year's imprisonment; and the appellor shall nevertheless restore to the parties appealed their damages (*d*), according to the discretion of the justices (*e*), having respect to the imprisonment or arrestment, that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise; and shall nevertheless make a grievous

(*a*) The appeal must appear to have been brought maliciously; therefore if in an appeal of murder, the defendant be found guilty of manslaughter or homicide *se defendendo*, neither the appellor nor his abettors can be punished. 2 Hawk. P. C. 286. (*b*) In the construction

of the words *homicides and other felonies*, it has been held, that they extend to offences made felony by subsequent statutes. 2 Inst. 384. (*c*) But neither an

" fine unto the king; and (*g*) if peradventure such appellor be " not able to recompense the damages, it shall be enquired by " whose abetment by malice the appeal was commenced, if the " party appealed desire it; and if it be found by the same inquest, " that any man is an abettor through malice, he shall be distrained by a judicial writ, at the suit of the party appealed, to " come before the justices; and if he be lawfully convict of such " malicious abetment, he shall be punished by imprisonment " and restitution of damages, as before is said of the appellor."

acquittal by an abatement of the appeal by a bare nonsuit on a plea, which shews that he is not entitled to the appeal, nor a judgment on a demurrer, nor an acquittal on an insufficient original, nor any other discharge of the appellee which does not finally bar all other prosecutions against him, either at the suit of the party or of the king, for the same felony, entitle him to his damages. 2 Hawk. P. C. 287. (*d*) If there are several appellees damages shall be assessed according to the different circumstances of their several cases. Dyer, 120. pl. 10. 2 Inst. 386. (*e*) Therefore if the jury give too small damages, the justices may increase them, and in like manner abridge them when they appear to be exorbitant. 2 Hawk. P. C. 288. (*g*) The abettors are only liable in case the appellors be insufficient; but if the appellor be found sufficient to render only part of the damages, the judgment against the abettors shall be for the whole. 2 Hawk. 290, 291.

2 Hawk. P. C. 292.

Also at common law, an appellant shall be fined for an ill-grounded appeal, at the discretion of the justices, in cases not provided against by this statute; as upon a nonsuit after appearance, or where the appeal abates by the folly of the appellant, or where a feme covert sues an appeal known by her to be groundless; as for the death of a husband whom she knows to be alive.

APPROVER.

H. H. P. C. 192. 3 Inst. 129. S. P. C. 142. 2 H. H. P. C. 225, 226, 227. 229.

AN approver, or in *Latin*, *probator*, is one who being indicted of treason or felony, for which he is in prison, confesses the indictment; and being sworn to reveal all the treasons and felonies he knows, enters before a coroner his appeal against all his partners in the crime within the realm.

3 Inst. 125. H. H. P. C. 192. (*a*) Whether disabled

All persons may be approvers, except peers of the realm, persons attainted of treason or felony, or outlawed (*a*), infants, women, persons *non compos*, or in holy orders.

by being outlawed in a personal action, *vide* 2 Hawk. P. C. 205. And whether infants and women may not be approvers, as they may bring an appeal at this day, though they cannot wage battle, *vide* 2 Hawk. 205. Rex v. Margaret Caroline Rudd, Cowp. 331. And that a man above the age of seventy, or maimed, may be an approver, though he cannot wage battle. H. H. P. C. 192.

3 Inst. 129. S. P. C. 144. 2 Hawk. P. C. 294. (*b*) That if he hath once pleaded not

The court is not bound of right to admit any person whatsoever to be an approver, nor will any person be admitted, unless he be actually indicted of treason or felony, and confess the indictment; (*b*) neither shall a person indicted of felony continue to be an approver after an appeal exhibited against him for the same

same felony; neither shall the appellee of an approver be himself an approver; for it would falsify the appeal of the first approver, in supposing that he had omitted some of his partners; and also it would cause an infinite delay; for the appellee of such an approver might as well become an approver of others, and so on.

guilty, he cannot be an approver, but shall be hanged, because it is found false, and his confession contradicts his former plea. 3 Inst. 129. H. H. P. C. 193. S. P. C. 144. But *vide* Finch, 387. *cont.*, and 2 Hawk. P. C. 295. *Qu.*

A man can only approve others of the very same crime with that for which he is indicted; and therefore no man can approve another with having been an accessory to himself, because it is an offence of which it is not possible that he himself can be guilty; but inasmuch as an approver is sworn to reveal all the treasons and felonies he knows, if he accuse persons of crimes different from his own, such accusation seems a reasonable ground to carry on a prosecution against them for such crimes, though it be not of itself sufficient to put them on their trials.

2 Inst. 629. Fitz. Coron. 127. 2 Hawk. P. C. 295.

If it appear either by the confession of the approver, or by the return of the sheriff, or the testimony of persons of credit, that there are no such persons as some of those appealed *in rerum naturâ*, or in the realm, or in the county whereof they are named in the appeal, he shall be hanged, unless the court in mercy spare him.

2 Hawk. P. C. 296. and the authorities there cited.

The justices of the *King's Bench*, and justices of gaol-delivery, and justices in eyre, may admit a man to be an approver, because such justices may assign a coroner to take the appeal; but justices of the peace cannot admit a man to be an approver, because they cannot assign a coroner.

3 Inst. 130. H. P. C. 194. But whether the lord high steward, or justices of oyer and terminer can do it without a special clause in their commission, authorizing them to assign a coroner, *qu.*; *et vide* 2 Hawk. P. C. 296. 2 H. H. P. C. 229. is express, that a man cannot become an approver before justices of oyer and terminer, because they cannot assign a coroner.

As soon as a person has confessed the indictment, with an intent to become an approver, he puts it in the discretion of the justices, either to give judgment and award execution against him, or to respite them till he hath convicted his partners; if the justices think fit to admit him to be an approver, they will assign a coroner to receive his appeal, and will take his oath to discover all the treasons and felonies he knows, and will assign him a certain number of days, to make his appeal in, during which he shall be at liberty, and shall have from the king a penny a-day (*a*); also he must make his appeal before the coroner on each day during the time limited, and must at last repeat it *verbatim* in court; and if the coroner record his failure of making his appeal on any of the days, or the least variation in his repeating it in court, he shall have judgment of death.

3 Inst. 129. H. P. C. 144. 2 Inst. 629. 2 Hawk. P. C. 297. (*a*) See Anci. Dial. of Exchequer, 426.; and *Qu.* Whether he shall have the penny till he has made good his appeal, by convicting the appellees. 2 Hawk. P. C. 297.

The coroner may award process against the appellee, to the sheriff of his own county, till he come to the *exigent*, from awarding whereof he seems to be restrained by *Magna Charta*, *cap.* 17. The *King's Bench* and justices in eyre, and justices of gaol-delivery, may award process into any county to apprehend

2 Hawk. P. C.

and try the appellee; but it seems questionable, whether *justices* of gaol-delivery can award process of outlawry into a foreign county, as the *King's Bench* and justices of oyer clearly may.

2 Hawk. P.C. 297. It is at the election of the appellee, either to put himself on his country, or wage battle with the approver; and if several persons be appealed by one approver, every one of them has his election, either to put himself on his country, or to wage battle with the approver, who must fight them all, or at least till one of them hath vanquished him; after which he cannot maintain his appeal against the rest; but if a person appealed of the same felony by several approvers vanquish one of them, he shall be discharged against all the rest.

H. P. C. 201. 3 Inst. 130. S. P. C. 149. If the king pardon either the approver or appellee, pending the appeal, the approvement ceases, and the appellee shall be discharged; in the first case because by the pardon the felony is extinct, and the approver is no longer liable to be condemned; in the second, because the approvement is, in truth, the suit of the king; and therefore as much in his power to pardon as an indictment.

2 Hawk. P. C. 298. Neither the approver's confessing his appeal to be false, nor the conviction of the appellee, exclude him from the benefit of clergy.

Ibid. 299. See Anci. Dial. of Excheq. 426. As it is in the discretion of the court, whether they will suffer one to be an approver, this method of late has been seldom practised; and in many cases we have what seems to amount to the same, by statute; where If an approver convict all the appellees, whether by battle or verdict, the king, *ex debito justitiæ*, is to pardon him as to his life, and also give him his wages from the time of the appeal to the time of the conviction; but anciently he was not suffered to continue in the kingdom. It is recited by 5 H. 4. cap. 2. "That "divers notorious felons, for safeguard of their lives, had become "provers, to the intent, in the mean time, by brocage and great "gifts, to pursue and have their pardons; and then, after their "deliverance, had become more notorious felons than they were "before; and thereupon it is enacted, that if any person pray "or pursue, or cause to be prayed or pursued, for any such "felon so attainted by his own confession, to have any charter "of pardon, the name of him who pursues such charter be put "in the same charter, making mention that the same charter "is granted at his instance; and if he to whom such charter is "granted become a felon again, the party who pursued the "charter shall forfeit 100*l.*"

pardon is assured to offenders, on discovering and convicting their accomplices. Burn. 45. See the statute of 4 & 5 W. & M. c. 8. 6 & 7 W. 3. c. 17. 10 & 11 W. 5. c. 23. 5 Ann. c. 31. 29 G. 2. c. 30. There seems, however, some objection to the form in which the pardon to the accomplice is promised, *viz.* upon the criminal's being apprehended and convicted. The testimony of such an accomplice would be less liable to *exception* if the pardon was granted upon his giving evidence generally, let the event of the trial be what it may. Observat. on Stat. 141. (2d edit.) [It hath also been usual for the justices of the peace by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree. 4 Black. Com. 331. If the discovery upon the whole be fair and ample, he ought not to be prosecuted again, because he has merely by accident omitted

omitted any one offence. Cowp. 339. But if prosecuted, he cannot plead this in bar, or avail himself of it upon his trial; but he may move the court to put off the trial, that he may have time to apply for a pardon. *Ibid.*] ‖The judges will not, in general, admit an accomplice as king's evidence, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. Carr. C. L. 67. If an accomplice, after being received as a witness for the crown, breaks the condition on which he was admitted, and refuses to give full and fair information, he will be sent to trial to answer for his share of guilt in the transaction. 2 Russ. on Cri. 598.‖

ARBITRAMENT AND AWARD.

AN award is the determination of matters in controversy, by submission to persons indifferently chosen by the persons contending.

Under this head we shall consider,

(A) The Matter in Controversy.

(B) The Submission; and therein of the different Kinds, and the Revocation thereof, and of the Stat. 9 & 10 W. 3. touching Awards.

(C) The Parties to the Submission.

(D) The Arbitrators or Umpire.

(E) The Award itself, or final Determination of the Arbitrators or Umpire.

1. *It must be made according to the Submission.*
2. *It ought to be certain.*
3. *It ought to be equal, and mutually satisfactory.*
4. *It must be of a Thing lawful and possible.*
5. *It must be final.*

(F) The Construction and Effect of the Award; and herein of the Performance thereof.

(G) Of the Pleadings in Awards.

[(H) In what Cases the Performance of an Award may be compelled by an Attachment, and the Course of Proceeding to be taken in order to obtain it.

(I) Of compelling Performance of an Award by Bill in Equity.

(K) In what Cases, when, and in what Manner, Awards may be relieved against.]

(A) The

(A) The Matter in Controversy.

Roll. Abr. 242. 14 H. 4. 19. 24. 9 H 6. 6. a. Keilw. 99. Leon. 228. Roll. Abr. 244. pl. 14. 9 E. 4. 44.

WHERE the right of freehold is in debate, the property cannot be transferred by an award; for the arbitrators are in the room of the parties themselves, and act in their stead, as far as commissioned; whatever, therefore, the parties can do, may be done by the arbitrators; but the parties cannot pass corporeal inheritances without solemn livery. (*a*)

(*a*) But if the condition of an obligation is to stand to the award of *J. S.* touching such lands, and the arbitrator awards the lands to one, and that the other should release to him, if he does not do this, the obligation is forfeited; if the arbitrator awards the land to one, it seems the obligation is not forfeited, though the other do not convey to him to make him a good title; for the arbitrator hath not awarded any act to be done by the party; and the award itself cannot transfer the right, and so must be void; and then the condition of the obligation cannot be forfeited; for the awarding the lands to one cannot be expounded, that the other shall infeoff him. If, where there is no bond, the arbitrator award that one shall infeoff the other, it seems an action on the case may be maintained for not doing it; for the award in itself is as good as if there were a bond, and then there is the same reason an action should lie, as that the condition of the obligation should be forfeited; for if such an award were void, then the condition of the obligation to perform it could not be broken. *Vide* the authorities *suprà*; but see 3 Black. Com. 16. Ld. Raym. 115. Kyd. 54. to 40. [In the year 1417, we find a very important arbitration by the keeper of the king's privy seal, the chief justice of the King's Bench, and one of the other judges of that court, arbitrators nominated and appointed by King *Henry* the Fifth to settle a long controversy between the bishop and the prior of the church of *Ely*, concerning their several claims to ecclesiastical and temporal jurisdiction, and the land of several manors. Bentham's Hist. Eliz. Appendix 27. c. MSS. Cotton. C. 11. fo. 329.]

Doe dem. Morris v. Rosser, 3 East R. 15.

‖But though the award cannot convey lands, yet it will estop one party to the reference from disputing the title of the other party, in whose favour the arbitrator has awarded.

Johnson v. Hodgson, 8 East, 38; and see 2 Chitt. R. 594.

Where an inclosure act directed that the grass and herbage upon parcels set out for getting materials, should for ever remain to and for the use of the appointees of the commissioners, and the commissioners awarded the same to certain surveyors of the highways and their successors, it was held, that although this assignment was bad as a common law conveyance, since the surveyors were not a corporation, yet it operated as a parliamentary declaration of the persons entitled to take, as if the terms of the award had been enacted in the act of parliament.

Rex v. Cotton, 5 Camp. 444.

An award, respecting the liability to repair a highway, made on a reference of the question by the lessee of lands charged as liable, *ratione tenuræ*, does not bind the landlord, who was no party to the submission.‖

9 H. 6. 60. 14 H. 4. 19. Roll. Abr. 266. pl. 3.

An annuity is not determinable by award, for it is reckoned in nature of a freehold, and therefore cannot pass without the deed of the party.

Roll. Abr. 242. A. p. 3. V.

Partition cannot be made by award, for a freehold cannot pass without livery and seisin.

Roll. Abr. 242. A. pl. 4. 9 Co. 78. 6 Co. 44. Leon. 104.

It has been (*a*) doubted whether leases for years, being chattels real, could be transferred by award? Therefore it seems safest when the controversy relates to these, that the parties be bound in mutual obligations to perform the award, and then if the arbitrators

(*a*) An award

trators award that one shall assign, transfer, *&c.* the lease to the other, if he refuses, he forfeits his obligation. of the arrears of rent reserved on a lease

for years, joined with other things of an uncertain nature, is good. Roll. Abr. 264. pl. 5. Allen, 52. Where an award may be made in waste. 6 Co. 44. 9 Co. 78. Cro. Jac. 100. Roll. Abr. 266. pl. 9.

The detaining a charter of feoffment, as it relates to a real thing, cannot be submitted; but an action of trespass for taking the charter may be submitted, for damages only can be recovered for such taking. 9 H. 6. 60.

Debt, on arrearages of account before auditors, shall not be discharged by award, because it appears of record (*a*), and must be discharged by matters of as high a nature. 6 H. 4. 6. a. 8 H. 5. 3. b. 4 H. 6. 17. b. Roll. Abr. 264.

p. 1. *contr.* 2 H. 4. 18. (*a*) An award may be made in attaint, because not barely founded on the record, but also on the supposed false oath. 13 E. 4. 1. b.

Causes criminal are not arbitrable (*b*), because they ought to be punished for the common good. West. Symb. part 2. § 33.

(*b*) Though the submission be by bond, yet the obligation is void, and the parties may be punished for entering into such bonds. 2 Vent. 109. ‖But mixed cases, as assault, libel, and other private misdemeanours where the party injured has a remedy by action, may be referred to arbitration, although a criminal prosecution has been commenced. The King v. Blanshard, 9 East, 497. Baker v. Townshend, 1 Moo. 120. 7 Taunt. 422. 8 Term R. 520.‖

Causes matrimonial seem not arbitrable, because marriage ought to be free, and religion disallows the severing those whom the church hath joined. West. Symb. part 2. § 33. Roll. Abr. 252. pl. 10. But the

damages a person sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. 16 E. 4. 2. pl. 6. ‖See 2 Bos. & Pull. 444. 1 Dow. R. 255.‖

Debts due by specialty cannot be discharged by naked award; but if the submission were by bond the award would be a good bar, for one specialty may be dissolved by another. 1 H. 7. 16. b. Dyer, 51. 6 Co. 44. Cro. Jac. 99. 447. 649.

A certain and fixed debt is not discharged by an award, for the end and design of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt is to give him no more, nor do any greater thing for him, than was done before, for now he can have but an action, and that he might have before; and to give him less than he had before is to do him a manifest injustice, which the arbitrator cannot do. 10 H. 7. 4. Roll. Abr. 264. But if 20*l.* be due to a man, and he and another submit all personal things, &c. to arbitration,

there, if the arbitrator award 10*l.* it is a good award, because there were other uncertain things submitted, and the arbitrator had consideration of all, and set one against the other in making the award, so as perhaps the debt of 20*l.* was diminished in consideration of some trespasses done by him to the other party. 10 H. 7. 4. Allen, 52. [Godfrey v. Godfrey, 2 Mod. 303. S. P. And so things which cannot be submitted by themselves, may, when joined with things of an uncertain nature, as debt on bond, 6 H. 4. 6. a. b. Coxal v. Sharp, 1 Keb 937. Morris, v. Creech, 623. 659. 1 Lev. 292. S. C. Debt for arrears of rent ascertained by a lease, 10 H. 7. 4. Damages recovered by verdict and judgment. Goldsb. 91. 2.] In debt on arbitration, whereas the plaintiff claimed 40*l.* *pro diversis negotiis*, and sets out the award; and it was held that the action lay, for the debt being *pro diversis negotiis*, it was uncertain what was due for business. Cro. Eliz. 422.

It is holden clearly, that all chattels personal, and personal actions, such as trespass, conspiracy, maintenance, *&c.* may be determined by arbitration, and the right transferred by naked award 22 H. 6. 39. b. 9 Co. 78. Petoe's case. Roll. Abr. 242.

award (*a*), though the submission were not by deed; for these being transferable by the party himself without any solemnity, whatever the parties themselves could do may be done by the arbitrators, who are their substitutes, and stand in their place: and if on these submissions without deed the arbitrators award one party a sum certain, he may bring an action of debt for it; but if they award the doing of some other thing, which is beneficial to him, he must bring his action on the case.

Of submissions made pursuant to a rule of Court, *vide post*, Let. (B).

‖(*a*) The property in a chattel is not, however, transferred by the mere force of an award, without the assent of the party. Thus where on a reference of disputes between a landlord and tenant the arbitrator awarded that a stack of hay should be delivered up to the landlord by the tenant, on the latter being paid a certain sum in satisfaction, it was held that the tenant, having refused to accept the sum, the property in the hay did not pass to the landlord by mere force of the award so as to enable him to maintain trover for it. Hunter v. Rice, 15 East, 100.‖

Keb. 600. 2 West. Symb. § 32.

The arbitrators cannot make an award of matters different from those which were submitted; therefore if the submission be of ewes with lambs, and after the submission the lambs are yeaned, they cannot arbitrate concerning the lambs.

Cald. 30. Rex v. Justices of Northampton.

[An appeal at sessions against a poor-rate may, with the consent of the parties interested, be referred by the justices to arbitration.]

(B) The Submission; and therein of the different Kinds, and the Revocation thereof.

Westm. Part 2. § 1, 2.

THE submission is the authority given by the parties in controversy to the arbitrators, to determine and end their grievances; and this being a contract or agreement must not be taken strictly, but largely, and according to the intent of the parties submitting.

5 E. 4. 7. Keb. 600. 2 Keb. 238. 3 Keb. 64.

This submission may be by word or deed; if the submission be by word, there is no remedy to enforce the party to perform the award; but reciprocal actions on the case, and an action of debt will lie, if money be awarded (*b*), for it is in nature of a simple contract.

a. [(*b*) But now an action may be maintained in all cases upon the submission itself. Purslow v. Bailey, 2 Ld. Raym. 1039. Kyd. 7.]

‖A parol submission cannot be made a rule of court. Ansell v. Evans, 7 Term R. 1.‖

36 H. 6. 8. 22 E. 4. 25. Owdy v. Gibbons, Comb. 100.

[If the submission be by bond, such bond may be given to a third person, or even to the arbitrator himself; and it may be given by other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award.

Hayes v. Hayes, Cro. Car. 433.

It is not necessary that in each of the bonds of submission it should appear of how many persons the parties to the submission consist. Thus, where it appeared that there were three brothers, *Richard*, *Robert*, and *William*; that their father had devised certain lands to the two latter; and that, several disputes arising between them and *Richard*, they had, by bond, submitted to arbitration; *Richard* entering into a bond to *Robert* and *William* jointly, but they giving him separate bonds: it was holden, after several arguments, on an action brought by *Richard* against *Robert*, that the submission was properly made.

The

The submission may be by indenture with mutual covenants to stand to the award.] Samways v. Eldsly, 2 Mod. 73.

If the submission be without deed, it may be revoked without deed, and the party shall lose nothing, for *ex nudâ submissione non oritur actio.* 21 H. 6. 30. a. Bro. tit. Arbitrament, pl. 49. 8 Co. 81, 82. But the party must give notice of the revocation. Sid. 281.

If the submission be by deed, it is of its own nature countermandable (*a*), though made irrevocable by the express words of the deed; for the arbitrators being constituted and put in the place of the parties, by their consent, to act for them, they can no longer act than they have such consent. 8 Co. 82. Sid. 281. Brownl. 62. 2 Brownl. 290. (*a*) But it cannot be countermanded without deed, *quia solvitur*, &c. 8 Co. 80. b. Brownl. 62. If you plead *quod revocavit*, without giving any notice to the arbitrators, the party may take issue upon the revocation; for not to let them know you have revoked is no revoking; for *de non apparentibus et non existentibus eadem est ratio;* but it need not be shewn in pleading, that notice was given, for there *quod revocavit* necessarily implies notice. 8 Co. 82. 2 Brownl. 290, 291. ‖*Acc.* Marsh v. Bulteel, 5 Barn. & A. 507. 1 Dow. & Ry. 106. S. C.‖

But where a man obliges himself to stand to an award, if the party revokes it according to his power, he hath forfeited his obligation, for the making the award becomes impossible by his own default, and therefore the obligation is simple; but if it be without obligation he forfeits nothing. (*b*) 8 Co. 82, 83. Brownl. 62. [(*b*) In 2 Keb. 10. 20. 24. and Sid. 281. there is an instance of an action on the case being maintained for the countermand of a parol submission; and there can be no doubt but an action will lie in such a case, for a parol submission amounts to a promise to perform.]

‖Whether the submission is by bond or covenant, or agreement, it is now clear that the party revoking the arbitrator's authority is liable to an action on the condition or covenant to *abide* by the award; and the arbitrator is right in proceeding to make an award after the revocation; and the court will not set such award aside, though they will set aside the rule to make the submission a rule of court, if it be subsequent to the revocation, and if the submission be by bond or agreement. King v. Joseph, 5 Taunt. 452. Marsh v. Bulteel, *infrà.*

The reason given for not setting aside the award in *King* v. *Joseph*, viz. that it would deprive the party of his action, may be doubted; since in order to sue on the agreement to abide by the award, assigning a breach in revoking the authority, it is not necessary to shew an award made, and the true reason seems to be, because the court has no jurisdiction after the revocation. And in a later case, where the reference was under a judge's order, the Court of Common Pleas set aside the award made after revocation of the authority. Clapham v. Higham, 1 Bing. R. 87.

Whether the submission be by a judge's order or instrument of the parties, it may be equally revoked before it is made a rule of court; but a revocation afterwards would be a contempt. *Ibid.*; and Milne v. Gratrix, 7 East R. 608.

Where the reference is by order of *nisi prius*, the court cannot vacate the revocation, or compel the party revoking to pay costs. Skee v. Coxon, 10 Barn. & C. 485.

But if the judge's order, in addition to the terms of submission, direct (as is now usual) that either party by affected delay or otherwise hindering the arbitrator, shall pay costs, such order may Aston v. George, 2 Barn. &

Ald. 395.; and see observations of *Abbott* C. J. as to the distinction between a reference by judge's order, and by deed; and see 2 Saund. 153. c. d.

may be made a rule of court even after a revocation, in order to enable the opposite party to have a remedy for his costs.

Charnley v. Winstanley, 5 East, 266.

And the revocation may be either virtual or express. Thus where the plaintiff declared in covenant against the defendant *Winstanley* and wife, on a covenant made by the wife before marriage to abide by the award of *W. R.*, appointed to arbitrate between the plaintiff and the wife before marriage; and the plaintiff alledged that, after the marriage, the arbitrator made his award, and awarded the wife to pay a sum to the plaintiff on a certain day, and assigned a breach in nonpayment, after verdict for the plaintiff it was moved in arrest of judgment that the marriage being a revocation the arbitrator had no authority to make his award, and consequently there could be no breach. The court, however, held, that the marriage appearing to have taken place before the award was in itself a revocation, and, consequently, a breach of the covenant to abide by the award; and therefore they were bound to give judgment on the whole record for the plaintiff.

Marsh v. Bulteel, 5 Barn. & A. 507. 1 Dow. & Ry. 106. S. C.

In a subsequent case, where an action was brought on a covenant to abide by the award, the first count assigned a breach in nonpayment of a sum of money awarded, and the second count assigned a breach in revoking by deed the arbitrator's authority. To the first count the defendant pleaded that, before the award made, he duly revoked the authority, to which plea the plaintiff demurred. To the second count the defendant demurred, assigning for cause that the plaintiff had not alleged any notice to the arbitrator of the revocation. The court held that the defendant was entitled to judgment on the demurrer to the plea to the first count, since the plea was a good bar to the breach assigned; and although the plea disclosed another breach in revoking, still that the plaintiff could recover only on the specific breach alledged in this count; and this case was distinguishable from that of *Charnley* v. *Winstanley*, since there the breach arising from the revocation appeared on the plaintiff's count. On the second count the court gave judgment for the plaintiff, since the allegation that the defendant by deed revoked, imported that he gave notice to the arbitrators.

Warburton, v. Storr, 4 Barn. & C. 103. Brown v. Turner, 1 M'Clel. & Y. 464.

And if two parties enter into an agreement, not under seal, to refer, and bind themselves to one another in a penal sum for the faithful observance of the award to be made, either of them revoking the authority may be sued in debt for the penalty; and assumpsit will also lie in such case.‖

28 H. 6. 6. b. Brownl. 62.

If several plaintiffs or defendants submit themselves to an award, one cannot revoke the submission without the other, for joint acts are considered as the acts of one person, and there can be no revocation without the act of that person that made the submission.

Newgate v.

[If one of the parties first revoke the authority of the arbitrators,

tors, and afterwards request them to make an award, that will not save the forfeiture. But where the submission limits no time for the making of the award, it shall be understood to be within convenient time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation afterwards will be no breach of the submission. Degeldir, 2 Keb. 10. 20.

One party may revoke with the consent of the other; but consent after the revocation will not save the penalty of the bond.] Noble v. Harris, 3 Keb. 745.

If a feme sole submits to arbitration, and afterwards marries, this is a revocation of the submission; and if it be by bond the bond is forfeited. (*a*) 2 Keb. 865. Jones, 388.

[(*a*) But if the husband and wife submit again, the courts will not encourage the opposite party in suing for the forfeiture. Samin v. Norton, 3 Keb. 9.] ‖See Charnley v. Winstanley, 5 East, 266.‖

‖So also the death of one of the parties before the arbitrator has made his award, is a revocation of the authority; and this, whether the submission be by order of *nisi prius*, rule of court, or otherwise. The court in one case observed, that it would be well if the order of *nisi prius* contained a clause to make the award binding, notwithstanding the death of one of the parties, a suggestion which is now frequently adopted; and in such case the death does not revoke the authority. Potts v. Ward 1 Marsh. R. 366. Cooper v. Johnson, 2 Barn. & A. 394. Rhodes v. Haigh, 2 Barn. & C. 345. *Sed vide ibid.* 346.; and see 1 Moo. 287. 7 Taunt. 571. 17 Ves. 232.; but see *contrà* Bower v. Taylor, 7 Taunt. 574.

Where the order of *nisi prius* contains such a provision, and a power is given generally to the arbitrator to enlarge the time fixed for making the award, the arbitrator may enlarge the time after the death of the party as well as before. Tyler v. Jones, 3 Barn. & C. 144.; and see 10 Moo. 272. 4 Bing. 435.

The death of the arbitrator before award has the effect of opening the cause, (referred at *nisi prius*) so that it may be tried again. Harper v. Abrahams, 4 Moo. 3.

If a stranger to the cause be made a party to the rule of reference, he will be liable to an attachment for nonperformance of the award on his part, notwithstanding the suit may have abated by the death of one of the parties to it. Rogers v. Stanton, 7 Taunt. 575.

And if the arbitrator, by the rule of court, is empowered to deliver his award to the parties or their executors, the authority is not determined by the death of one of the parties before the award is executed. Clarke v. Crofts, 4 Bing. 143.

The bankruptcy of a party to the reference before award made, does not operate as a revocation. Andrews v. Palmer, 4 Barn. & A. 250.

But where the reference concerns certain property of the bankrupt which passes to the assignees by the bankruptcy, the submission becomes by the bankruptcy no longer mutual, since the assignees would not be bound by the award; and therefore, if the other party revokes the authority, he is not liable to an action by the assignees.‖ Marsh v. Wood, 9 Barn. & C. 659.

If one have judgment in an ejectment, and then the controversy be submitted to arbitration, but before any award be made he T. Jones, 154.

he sue out execution, it is a forfeiture of the bond, for he is the cause no award can be made. (*a*)

(*b*) A matter was referred by consent to three of the jury, and before the award was made, one of the parties served the arbitrators with a *subpœna* out of Chancery, which hindered them from proceeding in the award; and the court held this a breach of the rule, and granted an attachment *nisi*. Salk. 73. pl. 10.

Sid. 290.

In debt upon a bond to perform an award, and *oyer* of the condition, the defendant pleads *non submisit*, the plaintiff needs not assign a breach, for the defendant puts the whole stress of his cause upon a matter antecedent to the alleging of a breach; for if there was no submission there could be no award, and consequently no breach of it.

Salk. 73. pl. 12. (*b*) *Vide* Sid. 54. Raym. 35. where such rules have been before this statute.

A submission may be made a rule of court, pursuant to the statute 9 & 10 W. 3. cap. 15. (*b*); and it is said, that although the submission be by bond, yet the party may have it made a rule of court; in which case, it is said, he may proceed on the bond, and likewise have an attachment for not performing the award.

9 & 10 W. 3. c. 15. Stra. 1. 10 Mod. 332.

By the 9 & 10 W. 3. cap. 15. it is enacted, "that it shall and "may be lawful for all merchants and traders, and others de- "siring to end any controversy, suit, or quarrel, for which there "is no other remedy but by personal action, or suit in equity, "by arbitration, to agree (*c*) that their submission of the suit to "the award or umpirage of any person or persons should be "made a rule of any of his majesty's courts of record (*d*), which "the parties shall choose, and to insert such their agreement in "their submission; or the condition of the bond or promise, "whereby they oblige themselves respectively to submit to the "award or umpirage of any person or persons; which agree- "ment being so made and inserted in their submission, or pro- "mise or condition of their respective bonds, shall or may upon "producing an affidavit thereof, made by the witnesses there- "unto, or any one of them, in the court of which the same is "agreed to be made a rule, and reading and filing the said affi- "davit in court, be entered of record in such court; and a rule "shall thereupon be made by the said court, that the parties "shall submit to, and finally be concluded by the arbitration or "umpirage which shall be made concerning them by the arbi- "trators or umpire, pursuant to such submission; and in case of "disobedience to such arbitration or umpirage, the party refus- "ing or neglecting to perform or execute the same, or any "part thereof, shall be (*e*) subject to all the penalties of con- "temning a rule of court, where he is a suitor or defendant in "such court, and the court, on motion, shall issue process ac- "cordingly; which process shall not be stopped or delayed in "its execution by any order, rule, command or process of any "other court, either of law or equity, unless it shall be made "appear on oath to such court, that the arbitrators or umpire "misbehaved themselves (*g*), and that such award, arbitration or "umpire, was procured by corruption or other undue means: "and that any arbitration or umpirage procured by corruption "or undue means, shall be judged and esteemed void and of "none effect, and accordingly be set aside by any court of law "or

(*c*) An arbitration bond had these words, And if the obligor shall consent that his submission shall be made a rule of court, that then, &c. Upon motion to make his submission a rule of court, it was objected, that these words did not imply his consent, but if he would forfeit his bond, he need not let it be made a rule of court; yet, because this clause could be inserted for no other purpose, the court took these conditional words to be a sufficient indication of consent. Salk. 72. pl. 8. Ld. Raym. 674. Com. Rep. 114. [A con-

" or equity; so as complaint of such corruption or undue " practice be made in the court where the rule is made for " submission to such arbitration or umpirage, before the last " day of the next term after such arbitration or umpirage made " and published to the parties."

sent in the submission bond that the *award* shall be made a rule of court, does not warrant the making of the submission a rule of court. 2 Stra. 1178. 2 Barnard, 163. ‖But this case is now overruled and the contrary is settled. Pedley v. Westmacott, 3 East, 605. Soilleux v. Herbst, 2 Bos. & Pull. 444. And if the original submission contain a provision that it may be made a rule of court, this provision will extend to indorsements on it enlarging the time for making the award, although the indorsements do not expressly repeat the provision, and the award made within the enlarged time may be enforced by attachment. Evans v. Thompson, 5 East, 189. overruling Jenkins v. Law, 8 Term R. 87.; and see 2 Barn. & Cres. 179. The statute does not extend to criminal matters, and therefore a submission of an indictment for assault at the quarter sessions cannot be made a rule of court. Watson v. M'Cullum, 8 Term R. 520.; and see 2 Dow. & Ry. 265.; nor can the court make an agreement a rule of court on the ground of the parties having stipulated for that purpose, unless the agreement be to refer matters to arbitration. 1 Bing. R. 133.‖ [A submission may be made a rule of court on the motion of one party, and producing the bond executed by the other. Barnes, 55. So it may, though it be no part of the condition of the bond, but be thereunder written, and not signed, if it appear by affidavit that it was written before the execution of the bond. *Ibid.*] ‖And this may be done in vacation, 5 Barn. & A. 217.‖ [(*d*) The court will compel a witness to a submission to arbitration to make affidavit of the execution, in order to make a rule of court. Stra. 1. Barnes, 58.] A matter being referred by rule of court to the determination of the judges of assize, it was moved that the judges' determination might be made a rule of court; and *per Holt*, where a matter is referred to arbitrators by rule of court, and they make their award, we will compel a performance of it, as much as if the award were part of the rule; so a new rule is needless. Salk. 71. pl. 6. *Note;* The constant practice is to make the rule at *nisi prius* a rule of the court above, which is always granted on motion. (*e*) If one of the parties revokes the submission, or hinders the arbitrators from proceeding in the award, the court will grant an attachment. Salk. 73. pl. 10. ‖But only where the submission has been made a rule of court before the revocation, for otherwise it is no contempt. Milne v. Gratrix, 7 East, 608.; and see 1 Bing. R. 88. 1 Jac. & Walk. 511. though the party may have his action, 5 East, 266. 5 Barn. & Ald. 507.‖ But if the party dies, there is no remedy by attachment against his representatives, for the contempt dies with him. 2 Vern. 444. If the party accepts to the award, though it be affirmed, an attachment will not be granted; for the nonperformance of it, while the matter was *sub judice*, was no contempt. Salk. 73. pl. 11. 2 Ld. Raym. 857. 3 Keb. 446. Also, the party must be required personally to perform the award, and such personal demand must be made out by affidavit, otherwise the court will not grant an attachment. Salk. 83. pl. 1. (*g*) On motion * to set aside an award, because the arbitrators went on without giving the party time to be heard, or produce a witness, *Holt* said, that arbitrators being judges of the party's own choosing, he shall not come and say, that they have not done him justice, and put the court to examine it: *aliter* when they exceed their authority. Salk. 73. pl. 11. Awards have been frequently set aside, especially in equity, where the arbitrators have appeared to have been mistaken, or have been guilty of corruption or partiality; as if they have an interest in the thing in controversy. 2 Vern. 251. So where there are three arbitrators, and two of them by fraud or force exclude the other, or if they have private meetings, and admit one of the parties, and give no notice to the other. 2 Vern. 514. So where they awarded 495*l.* against one of the parties for calling the other, who was a butcher, *a bankrupt knave*, to repair his honour, as they called it. Vern. 157. So where the submission was to arbitrators, and they had power to choose an umpire, which they did by throwing *cross* and *pile* who should name him; and for this the court set aside the award. 2 Vern. 485. ‖Wells v. Cooke, 2 Barn. & A. 218. *acc.* But where each arbitrator named to the other a person for umpire, and neither disapproved of the other's nominee, but did not like to give up his own, and agreed to decide by lot; this was held a valid mode of choice. Neale v. Ledger, 16 East, 51. Where, however, it was agreed between the arbitrators that each should name one person, and that they should then toss up for the choice of the umpire from the two named, the court set aside the award, since here the agreement to toss up preceded the nomination of the two persons, and therefore there was no opportunity of objecting to them. Young v. Miller, 3 Barn. & C. 408. And a late case, which seems to overrule Neale v. Ledger, has settled, that the appointment of the umpire must proceed from the will and judgment of the arbitrators, from choice and not chance. *In re* Cassell, 9 Barn. & C. 624.‖ This statute does not extend to submission by rule of court. Stra. 301. [It was made to put submissions to arbitration in cases where no cause was depending upon the same footing as where there was one, and is only declaratory of what

the law was in the latter case.] 2 Burr. R. 701. This motion will not be received before submission be made a rule of court. 2 Stra. 1178.

Cro. Eliz. 839. Cro. Jac. 200. 355. 8 Co. 98. Dyer, 216. Roll. Abr. 257. Sand. 32. Brownl. 65. *Vide postea*, that awards now receive a more favourable interpretation than formerly, *vide* 9 Mod. 232. 2 Stra. 1024.

Submissions are likewise general, as of all controversies, debts, dues, *&c.* and here the arbitrators are not obliged to determine all matters disclosed, but their arbitration of some things will be good, though they leave other things undone; but where the submission is special or conditional, *ita quod* an award be made of all controversies depending, they ought to determine all matters whereof they have notice, because here, by the express words of the authority, I do not own his determination unless all matters in controversy are settled; and therefore to determine one without the others, is to act contrary to the authority; but if upon such a submission the arbitrators make an award but of nne thing, it shall be intended there were no others to make an award of, unless the other side shew there was, and that the arbitrators had notice thereof.

1 Will. Saund. R. 32. a. n. 1. Randall v. Randall, 7 East, 81. George v. Lousley, 8 East, 13.

‖This clause of *ita quod*, &c. appears now not to be of much importance, for, whether the submission contains it or not, if the reference be of certain specified matters, and the arbitrator does not make an award upon each of them, the award is bad, and the court will not enforce it by attachment, and will set it aside. Winter v. Munton, 2 Moo. 723. Ld. *Ellenborough* C. J. in Randall v. Randall, certainly lays much stress on the clause *ita quod*, &c.; and see the remarks of *Willes* C. J. in Bradford v. Bryan, Willes' R. 269., and of *Chambre* J. 1 Taunt. 554.

Ingram v. Milnes, 8 East, 445. Mitchell v. Stavely, 16 East, 58. *Sed vide* Simmonds v. Swaine, 1 Taunt. 549. Gray v. Gwennap, 1 Barn. & Ald. 106.; and see Cargey v. Atcheson, 2 Barn. & C. 170. 2 Bing. 199.

And so on the other hand, if the reference be general of all matters in difference, whether the submission be with a condition *ita quod*, &c. or without, if the arbitrator omit to award upon any matter in difference which is brought before him, the award is bad, and such omission may be pleaded in bar to an action on the arbitration bond; or if the award is pleaded in bar to an action, the plaintiff may invalidate it by replying that other matters within the submission were brought before the arbitrator on which he made no award; or if the award is given in evidence by the defendant, the plaintiff may impeach it by giving this matter in evidence; however, until the contrary is shewn, the court will presume that the arbitrator has awarded on all matters within the submission, and this whether his award be stated to be *de premissis* or not.

Fisher v. Pimbley, 11 East, 188.

If the award is made of matters not within the submission it is bad, as where the submission was of matters between *A.* and *B.*, and the arbitrator awarded on matters between *A.* and *B.*, *C.*, and *D.* jointly, the award was held bad.

Ingram v. Milnes, *ubi supra*; and see 8 Taunt. 698.

But where the award is made of matters partly within the submission, and partly not within it, it is good for so much as is within the submission.‖

(C) The Parties to the Submission, and who are bound by it.

10 H. 6. 14. Latch. 207.

PERSONS that cannot contract cannot submit to arbitration, therefore femes covert, persons compelled by threats and imprisonment, persons professed in religion, cannot submit.

The

The husband may submit the chattels he hath in right of his wife to an award, for he may dispose of them. Stile, 551. March, 77, 78.

If the husband submits to arbitration the chattels the wife has as executrix or administratrix, this shall bind the wife, because the wife cannot personate (*a*) any one without the husband during coverture. 21 H. 7. 29. Roll. Rep. 269. Cro. Jac. 447.

(*a*) But *quære*. For, by some opinions, the wife, in this case, may submit to an award without the husband; for when the husband allows her a power of administration, he must suffer her to act pursuant to the trust reposed in her, and his express consent to her administration is a tacit consent to all future actions of that nature, and consequently are his own acts; but whether this makes him liable to a *devastavit* is a greater question, because they are not properly acts of administration, and consequently he never consented to them. *Vide* 1 And. 117. 181. 5 Co. 27. ‖But the wife cannot submit to a reference respecting her real estate, and the Court of Chancery will not refer it to the master (as in case of an infant) to say whether the reference would be for her benefit or not. Davis v. Page, 9 Ves. 350. Emery v. Ware, 5 Ves. 846. But a married woman who is litigating with her husband for a divorce and alimony, the husband having filed a cross bill against her, may make a valid submission of all matters to arbitration, though not regularly separated from her husband. 1 Dow. R. 244.‖

[An executor may, as such, submit to arbitration. But if the arbitrators do not award as much as he would be entitled to at law, it will be a *devastavit* for the residue. As if an executor submit to arbitration, and it be awarded, that for 70*l.* he release an obligation given to his testator in 100*l.*, for performance of covenants which were broken by the obligor, the 100*l.* shall be assets, for the submission was his own act. Dy. 261. Office Extr. 159. Anon. 3 Leon. 53. But the submission of itself is not an admission of assets. Pearson v. Henry,

5 Term R. 9. Where the executor engages himself personally, and in broad terms submits to pay whatever shall be awarded, he cannot afterwards resort to the plea of *plenè administravit*. Barry v. Rush, 1 Term R. 691. ‖And where on a reference in an action against an administrator the arbitrator awards that the administrator *shall pay* a certain sum to the plaintiff, the administrator cannot resist payment for want of assets. Worthington v. Barlow, 7 Term R. 453. A submission by trustees has been held not to render them personally liable. Davis v. Ridge, 5 Esp. Ca. 101. *Sed vide* 2 Chitt. R. 40.‖

Executors are bound by the submission of their testator.] 1 Ld. Raym. 248. 2 Vent. 249. ‖See 2 Bos. & Pull. 131.‖

If an infant submit to arbitration, he may execute or avoid it at his election, as he may all other his contracts. 13 H. 4. 12. 10 H. 6. 14.

March, 111. 141. Jones, 164. 3 Lev. 17. Roll. Abr. 268. p. 1, 2. 730. pl. 5. [Equity will not decree an award to bind an infant. Eq. Cas. Abr. 50. In the case of Roberts v. Newbold, it is ruled, that a guardian may submit for the infant, and enter into a bond for his performance of the award. Comb. 318. And in the case of the Bishop of Bath and Wells v. Hippesley, 28 Ch. 2. cited by Ld. *Hardwicke*, 3 Atk. 614., Lord *Nottingham* held an infant bound by an award submitted to by the bishop of the one part, and the infant and his guardian of the other part; and on a bill to confirm it, decreed accordingly.] ‖Where a cause, in which an infant by his *prochein ami* was plaintiff, was referred, the court directed that the infant should have notice of the award, and if he would not perform it the defendant might carry down the record to trial by proviso. Godfrey v. Wade, 6 B. Moo. 488. The attorneys in a suit in chancery in which infants are parties have no authority to refer the disputes to arbitration so as to bind infants. Biddell v. Dowse, 6 Barn. & C. 255.; and see 10 Moo. 272.‖

Persons attainted or outlawed cannot submit to arbitration, for they have no property, and cannot by the law controvert any thing.

A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot submit to an award, for the submission has the force of a contract, and they cannot contract without them. 21 E. 4. 13.

[If a man authorize another on his behalf to refer a dispute between Dyer, 316. b.

Caghill v. Fitzgerald, 1 Wils. 28. 58. (a) In general, a man is bound by an award to which he submits for another. Alsop v. Senior, 2 Keb. 707. 718. Shelf v. Bayley, Com. Rep. 183. And where an attorney submits without the express authority of his principal, ‖and binds himself personally to perform the award,‖ the attorney only, and not the principal, shall be bound. Bacon v. Dubarry, 1 Salk. 70. 1 Ld. Raym. 246. S. C. Comb. 129. S. C. Carth. 412. S. C. ‖See Burrell v. Jones, 3 Barn. & A. 47. *Ex parte* Hughes, 5 Barn. & A. 482.‖ In the case of Evans v. Cogan, Ld. *King* thought, that daughters of age and unmarried, might, though not parties to the submission, by consent subsequent, be bound by an award to which their mother submitted, touching the title of an estate which was limited to them after her death. 2 P. Wms. 449. The assent of a solicitor to a reference by rule of a court of equity, it has been holden, is not obligatory upon the client, without his actual concurrence; though such a reference, by rule of *nisi prius*, will bind the client; 1 Chan. R. 104. 1 Chan. C. 86.; but the former point may now be doubted. ‖And the assent of an attorney to refer a cause will bind the client though he had expressly ordered the attorney not to refer. Filmer v. Delber, 3 Taunt. 486.; and see 7 Price, 644.‖

between the principal and another, an award consequent on such submission is binding on the principal alone; and it is no objection that the agent had no interest in the subject of the dispute. But if the agent expressly bind himself for the performance of the principal, not only the principal who authorized him, but the agent himself, is bound by the award. (a)

Strangford v. Green, 2 Mod. 228. ‖See 2 Bos. & Pull. 131.‖

If a man submit, for himself and partner, all matters in difference between the partnership and another, the partner submitting shall be bound to perform the award; but the other shall not, because he is a stranger to the award.

Mudy v. Osam, Lit. 30. Hetl. 4. S. C.

If the parson on the one hand, and some of the parishioners on the other, in behalf of themselves and the rest of the inhabitants of the parish, but without the authority of the rest, submit to arbitration by bond, the parishioners submitting shall alone be answerable for a breach of the award by any of the other parishioners.]

Attorney-General v. Hewitt, 9 Ves. 232.

‖The Court of Chancery will not act under an award in a charity cause without the consent of the attorney-general, or a reference to the master to enquire whether it is for the benefit of the charity.‖

20 H. 6. 12. a. 41. a. Roll. Abr. 268. (B).

If several persons do a trespass, and one of the wrong-doers and the party to whom it is done submit to arbitration, and an award is made, the other person shall take advantage of it by way of extinguishment of the trespass: the same law where the party releases to one of them; for in both cases a satisfaction really is, or is presumed to be made, and a man cannot receive a double compensation for the same wrong.

2 Rich. 3. 18. b. 1 Keb. 886. 22 E. 4. 25. Latch. 208. Roll. Rep. 2. Brown 112. Yelv. 203. 1 Bulstr. 123. Cro. Car. 433. Stile, 471. Roll. Abr. 261. Hardr. 399 Vern. 259.

If several persons on the one part, and several on the other, submit generally to any award, the arbitrators have not only power to determine matters between them jointly, but severally and distinctly also; and an award between one only of the one side and another of the other side is good; for this is not doing less than the commission warrants, since there is an authority in it to determine matters distinctly between them, for the submission is of all matters, so that it contains as well all things severally between each of them, as jointly between them all, and perhaps there may be no cause of award between the others.

Mansell v. Burredge,

‖Where two parties, having separate disputes with a third, agree to a reference, and jointly and severally agree to perform the

the award of the arbitrator, and he awards separate sums to be paid by each to the third, the two parties are liable one for the other, and may be jointly sued for the sums awarded.‖

7 Term R. 352.; and see *post*, 285, 287

[By statute 5 G. 2. c. 30. § 34., it is provided, "that the "assignee or assignees of any bankrupt's estate and effects, "with the consent of the major part in value of the bankrupt's "creditors who shall have duly proved their debts under the "commission, and who shall be present at any meeting of the "said creditors, pursuant to notice to be for that purpose given "in the *London Gazette*, may submit any difference or dispute "between such assignee or assignees, and any person or per-"sons whatsoever, for or on account, or by reason or means of "any matter, cause, or thing whatsoever, relating to such bank-"rupt or bankrupts, his, her, or their estate or effects, to the "final end and determination of arbitrators to be chosen by the "said assignee or assignees, and the major part in value of such "creditors, and the party or parties with whom they shall have "such difference, and perform the award of such arbitrators: "and the same shall be binding on all the creditors of the said "bankrupt or bankrupts; and the assignees are thereby indem-"nified for what they shall fairly do according to the directions "aforesaid."

5 G. 2. c. 30. § 34. ‖This clause is re-enacted, § 98. of the new Bankrupt Act, 6 G. 4. c. 16., with an additional proviso that if one third in value of the creditors do not attend at such meeting, the assignees with the consent of the commissioners may do any of the matters therein mentioned.‖

Lord *Hardwicke* held, that under this clause the creditors could not give a general power to the assignees to submit matters to arbitration at their own discretion, but that they must have a special meeting, upon notice given for that purpose in the *London Gazette*, to consider of the particular case intended to be submitted to arbitration.]

1 Atk. 91. *Ex parte* Whitchurch.

‖By the 3 G. 4. c. 119. § 13. assignees of insolvent debtors are empowered to refer disputes relating to the estate of the insolvent to arbitration, with the consent of the major part in value of the creditors of the insolvent present at a meeting held on fourteen days' notice in the *London Gazette*, if the insolvent were in custody in *London*, or in the bills of mortality, or if not, then in some newspaper published in the county, city, or place in or near which the insolvent shall have been in actual custody, and with the approbation of one of the commissioners of the insolvent court.‖

3 G. 4. c. 119. § 13.

(D) The Arbitrators or Umpire.

THE arbitrators are persons indifferently chosen, to determine the matters in controversy according to their own minds, whether they be matters of law or fact: infants, persons excommunicate, outlawed, *&c.* (*a*) may be arbitrators, for every person must use his own discretion in the choice of his judges; and being at liberty to choose whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice.

West. Symb. part 2. § 27. Hardr. 44. Salk. 73.

[(*a*) *Qu.* of this? and see the part referred to in West, where these very persons are excepted against as incompetent. In 18 E. 4. 1., and Bro. tit. Arbitrament, 57., there is an instance of an unmarried woman, the Duchess of *Suffolk*, being an arbitress.]

5 Co. 78. 3 Atk. 529. Roll. Abr. 251. Cro. Eliz. 726. Palm. 146. 2 Roll. R. 214. Sid. 59. Hardr. 45. [2 Atk. 504. So if the award releases, but leave it to the court to give directions to settle the form; *aliter*, if they award that the court shall settle the release first, and the arbitrators will afterwards consider whether they shall order it. *Ibid.* So if they recommend it to the parties to appoint a receiver, and if they do not, request the court to do it, the award shall not be avoided, for it is not a delegation of their power, but a recommendation; and if the parties do not comply, it is surplusage. *Ibid.* 501.]

The arbitrators are personally trusted with the authority, and it is not within their power to assign it; therefore, if an award be to stand to the determination of a stranger, this is void; but if the award be, that an arbitrament made by *J. S.* shall stand, this is good, because it is their own award, though it refers to the act of another; but though the arbitrators cannot transfer their power, yet they may award that others shall do a ministerial act in subserviency to their award; for what is done by such persons, is done by them as servants and instruments of the arbitrators, and is the act of the arbitrator himself; as that such a conveyance should be made as counsel should direct, such costs paid as the prothonotary should tax (*a*), is a good award.

If the submission be to *Randolphus S.*, and the award is made by *Randulphus S.*, the award is not good, because they cannot be taken to be the same person, being different christian names. Roll. Rep. 271. *Sed qu.* If a court would set aside the award for this trifling mistake, if it appear to be the person meant? [(*a*) But not as any but the officers of the superior courts should settle. *B. R.* H. 181. 2 Stra. 1025.]

Cro. Jac. 315. 584. Hob. 218. Sid. 59.

The arbitrators cannot reserve to themselves a further power, since that would enable them to make a double award, without the interposition of those who empowered them at first.

3 H. 4. 1. b. Roll. Abr. 250. ‖(*b*) Therefore an alteration by the arbitrator in the award, though only to correct a mistake in figures, is void if made after the delivery of the award, and even after it is ready for delivery, and notice thereof given to the parties; but the award in its original state will stand good. Henfree v. Bromley, 6 East, 309. Irvine v. Elnon, 8 East, 54. However, if the arbitrator make affidavit of his having committed a mistake, the courts will set aside the award unless the parties will consent to refer the matter back to him. Rogers v. Dallimore, 6 Taunt. 115.; but see 7 Dow. & Ry. 774.‖ (*c*) Cro. Eliz. 676.

The arbitrators cannot make their award by parcels at several times, for when they have made an award they have executed their authority, and can do no more (*b*); and therefore if two submit all debts, trespasses, *&c.* and the arbitrators one day make an award of the debts, and of the trespasses another day, this is not good as to the trespasses, but they may deliberate of one thing one day, and of another the other day, and then make an entire award of the whole: also, an award made in the night is good, for the party's attendance is not requisite; but where an act cannot be done without personal attendance of a third person, it cannot be in the night. (*c*)

Sid. 281. 2 Keb. 10.

If a submission is made to *A.* and *B.*, when their occasion will permit, convenient time must be given after request; and if no arbitration be then made, the parties may revoke.

Curtis v. Potts, 3 Maule & S. 145.

‖And it is bad plea to an action of debt on an award under a general submission, that the arbitrator did not make his award within a reasonable time; for the party should shew a request, and on refusal, that he revoked the authority of the arbitrator.

Macdougall v. Robertson, 4 Bing. 435. 2 Younge & J. 11.

Where the submission was in the *Scotch* form, and the award to be made betwixt the and the day of next, or any other day to which the submission might be prorogated, it was held, that the absence of date was immaterial, as it was equivalent

equivalent to a general authority, to be executed within a reasonable time.‖

If there be a submission to arbitration, and if they cannot agree before the first of *May*, then the submission is made to *J. S.* to be the umpire, to be made before a certain day then next to come; if the arbitrators never discourse about the matter, so as there is not any disagreement between them, yet if they do not make an award before the day, the umpire may determine the matter; for these words, *if they cannot agree*, are not to be taken literally, but only that if they do not make an award, that then, *&c.*

Roll. Abr. 261. ‖And if they in fact disagree they may appoint an umpire, and he may make his umpirage immediately without waiting for the day. Smailes v. Wright, 3 Maul. & S. 559.‖

If the condition of an obligation be to stand to the award of certain persons, *A.* and *B.* and *J. S.* being umpire for both parties, in this case an award by *A.* and *B.* is good (*a*); for *umpire*, in the common signification of the word, denotes a person that is to make an end of the matter, if the others cannot.

Roll. Abr. 261, 262. Osborne and Rogton. (*a*) If a submission be to four, and to the umpirage of *J. S.*, the four and *J. S.* may join in making the award; otherwise, if their power had been divided in the submission, as if it had been to the four, and if they could not agree then to *J. S.* Bulstr. 184. *Vide* Hardr. 44. *Sed qu.* In this last case if the five join in the award, is it not the award of the four? [If arbitrators join with the umpire in the deed of umpirage, it is merely surplusage, and the deed is good. The distinction taken in Bulstr. 184. is absurd. 1 Black R. 463. 3 Burr. 1474.] ‖See Bates v. Cook, 9 Barn. & C. 407. *acc.*‖

If the condition of an obligation be to stand to the award of *A.*, *B.*, *C.*, and *D.*, *ita quod* the said award before such a day be made in writing by the said *A.*, *B.*, *C.*, and *D.*, or any two of them, under their hands, *&c.* any two of the arbitrators, without the rest, may make an award; for though by the first part they are bound to stand to the award of those four, yet their power is divided by the subsequent words, and the *ita quod* is but an explanation of the condition, and the whole makes but one sentence.

Yelv. 203. Sallows v. Gilling. For this *vide* Vent. 50. 2 Keb. 57. Cro. Jac. 400. Moor, 849. Roll. Rep. 223. 375. 3 Bulstr. 62. 68. Barnes, 57. ‖But if one die, an award cannot be made after his death. 5 Bro. & Bing. 214.‖

If the arbitrators and umpire have the same time allotted them to make their award in the submission, as to the umpire it is not absolutely void; for if one of the arbitrators die, or absolutely refuse to meddle, then the umpire may determine the matters, otherwise not; for two different judges cannot have a concurrent jurisdiction of the same thing; and a disagreement between the arbitrators at their first meeting, gives no power to the umpire to interpose, because, though they do not agree at their first meeting, they may at the next.

2 Sand. 131. Sid. 428. 455. Roll. Abr. 261. Raym. 187. 1 Lev. 285. *Vide* T. Jones, 168. 2 Ventr. 110.

The arbitrators may choose the umpire before their own time is expired, for that is no relinquishing the arbitration, but a prudent provision in case they should disagree; and therefore an award by them at any time before their time expired, is good, and an award by the umpire in that time is void.

Roll. Abr. 261. Cro. Car. 263. 2 Sand. 132. Raym. 206. Lutw. 544. Salk. 70. pl. 2. S. P. Ld. Raym. 222. 12 Mod. 120. *per Holt*, and 2 Mod. 169. *cont.* [In 2 Term R. 644. it is expressly determined, that the arbitrators may elect an umpire the very instant they begin to take the matter into consideration, and that this is the fairest way of choosing one.] ‖See Bates v. Cooke, 9 Barn. & C. 407. *acc.* And so in Harding v. Watts, 15 East, 556. the Court of K. B. determined that the arbitrators might appoint the umpire either before or after the expiration of the time for making their award, provided he was appointed before the time for making

making his umpirage expired. And if the arbitrators disagree before the time for making their award expire, they may appoint an umpire *immediately*, and he may make his award before the arbitrators' time expires. Smailes v. Wright, 5 Maule & S. 559. And it need not be stated on the face of the umpirage that the arbitrators had disagreed. Sprigens v. Nash, 5 Maule & S. 193. The Court of C. B. have in one case laid down that the arbitrators cannot appoint an umpire until the time for making their award has expired. Beck v. Sargent, 4 Taunt. 232.; but this was not the point *decided* in the case, and the position is not consistent with the cases above; and see 8 Taunt. 694. The appointment of the umpire need not be stamped. Routledge v. Thornton, 4 Taunt. 704.‖

Mod. Rep. 274.

The condition of a bond was, if the arbitrators make an award on or before 19 *Feb. &c.*; and if they do not make it before, *&c.* their authority doth not determine till after the 19th, and the award cannot be made by the umpire before the 20th.

Roll. Abr. 261. Sid. 428. Godb. 241. 2 Sand. 132. *Vide* Salk. 70. *cont. Vide* Lev. 174., and Salk. 72. pl. 2. Ld. Raym. 671. 12 Mod. 512.

If the arbitrators have time to the 10th of *June*, and if they agree not to nominate one to determine it by the said 10th, here if the arbitrators choose an umpire, that determines their power; for it seems plainly the design of the parties, that either one or the other may determine it by that time, and not that both shall have concurrent jurisdictions.

‖*Sed vide suprà.*‖

Roll. Abr. 262. ‖Where arbitrators have the ordinary power to appoint an umpire, they cannot determine on some of the questions referred, and leave others to the umpire. Tollit v. Saunders, 9 Price, 612.‖

If the arbitrators make an award of part during their times, the umpire cannot make an award of the rest, unless the submission be, that if the arbitrators make an award of part, or of none, then the umpire may make an award of the part remaining or the whole.

2 Vent. 113, 114. Tryppit and Eyres; adjudged by three judges against *Pollexfen* C. J., who held, that *C.* might have proceeded notwithstanding his refusal; and there could not be two concurrent jurisdictions in several persons. 3 Lev. 263. S. C. *Vide* Salk. 70. pl. 2. where, *per Holt*, if the arbitrators choose an umpire who refuses, they cannot revoke or choose again, for they have executed their authority; *aliter*, if they choose him on condition he do accept; but *Rooksby* doubted whether an express condition would make a difference, because it seemed to be implied.

If the condition of an obligation be to stand to the award of *A.* and *B.*, so as the said award be made before such a day; and if they make no award, then to stand to the award of such umpire as the said *A.* and *B.* shall nominate, so as the said umpire make his award before another day, and the arbitrators before the first day make no award, but afterwards name *C.* to be umpire, who thereupon immediately refuses, and the arbitrators afterwards nominate *D.*, who before the last day makes an award; this is a good award, for the nomination of *C.* to be umpire did not make him so; but when he refused, it amounted to no more than a bare proposal to him; and the form of pleading always is *suscepto super se onere arbitri*, so that it is the acceptance makes him umpire.

Oliver v. Collings, 11 East, 367. (*a*) To obviate any doubt on this point, which does not appear quite settled, a provision to this effect may be inserted in the submission.

‖It appears (*a*) that, where one umpire refuses to act, the arbitrators are authorized to appoint another; but if the umpire accepts and acts on his authority the dissenting of the parties is of no avail: the arbitrators have no power to appoint a second.‖

If

If the condition of an obligation be, that whereas *A.* and his son of one part, *&c.* have submitted to the award of *B.* and *C. ita quod, &c.* before 1 *May*, and if they make none, to the award of such umpire as they should choose, to be made before the 1 *June*, and the arbitrators make no award, but choose an umpire who makes an award, but *quoad* the son awards nothing; this is a void award, for though the *ita quod* be in the clause referring to the arbitrators, and the award be made by the umpire, yet the *ita quod* relates by construction to the umpire as well as the arbitrators. Lev. 139, 140. Bean and Newberry. Keb. 790. 832. 857. S. C.

‖Where an arbitrator has power to enlarge the time for making his award to *any other day*, he is not confined to a single enlargement of the time. 1 Taunt. 509. 4 Taunt. 658.

And where the order of reference contained a proviso that the arbitrator should make his award before a certain day, and if he was not then ready that the time should be enlarged, till such day as a judge should think reasonable, and the arbitrator enlarged the time, by endorsement, on the day before the original time expired, but the judge's order was not obtained till after the time expired, it was held that the time was well enlarged. (*a*) Reed v. Fryatt, 1 Maule & S. 1. (*a*) The judge's order in this case was obtained before the award was actually made, but where the arbitrator made his award *before* the judge's order was obtained, it was held that he had no authority, and the award was bad. Mason v. Wallis, 10 Barn. & C. 107.

Where the order of reference provided that the award should be delivered to the parties, or, if they should be dead before the making the award, to their personal representatives before a certain day, with liberty to the arbitrators to enlarge the time for making the award, it was held that the arbitrators had the same power of enlarging the time after the death of a party as before. Tyler v. Jones, 3 Barn. & C. 144.; and see 2 Barn. & C. 179.

Where the condition of the arbitration bond is that the award shall be made before a certain day, and the parties before that day by *deed* endorsed, agree to enlarge the time till a subsequent day, an action may be maintained on the bond for nonperformance of the award made within such extended time; for the indorsement, operates as a new defeasance in substitution of the first. Greig v. Talbot, 2 Barn. & C. 179.

But if the subsequent agreement were not by deed, it could not operate as a defeasance, and there would be no remedy on the bond, but only on the agreement.‖ Brown v. Goodman, 3 Term R. 592. And that a deed can only be altered or defeated by deed, see Thomson v. Brown, 1 Moo. 358. Davey v. Prendergrass, 5 Barn. & Ald. 187. Bulteel v. Jarrold, 8 Price, 467., and 2 Saund. 47. *a.*

[An award made by the umpire merely on the evidence as stated by the arbitrators, without any re-examination of the witnesses, if he were not required by the parties to re-examine them, is good.] Hall v. Lawrence, 4 Term R. 589.

‖Arbitrators in general are bound by the rules of evidence, which govern the courts of law. 1 M'Clel. & Y. 160.

Where the arbitrator is empowered by the order of reference to examine the parties to the suit on oath, he may in his discretion examine a party in support of his own case, or may waive the objection to a witness, that he is interested and ought to have been a party. Warne v. Bryant, 3 Barn. & C. 590. 5 Dow. & Ry. 501. Lloyd v. Archbowl, 2 Taunt. 324.; *sed vide* 8 Taunt. 694.

8 Taunt. 461. 5 Taunt. 348. 4 Taunt. 659.

Arbitrators are entitled to a fair remuneration for their trouble, and it is a frequent practice to insert the costs of the award in the award itself; and if an excessive sum is awarded, it is subject to taxation by the officer of the court; or if the sum is not fixed, it would seem the officer may assess it.

1 Bos. & Pull. 93.

If one of the parties pay the whole fee for the award, the other party may be compelled by attachment to pay his proportion.

Ibid.

And it has been said that the arbitrator may enforce payment of his fee by attachment.

Styl. 465. 4 Esp. N. P. C. 47.; *sed vide* Gow's N.P.C. 7.

If an express promise has been made, it would seem the arbitrator may sue for his remuneration; but it has been held that there is no *implied* promise to remunerate him.‖

(E) The Award itself, or final Determination of the Arbitrators or Umpire.

21 E. 4. 39. b. 10 Co. 57. Dyer, 242.

HERE we must observe that the courts of justice have of late been more liberal in the construction of awards than formerly, and that many of the nicest distinctions to be met with in the books, are by no means to be admitted as precedents in expounding awards at this day; and this the courts do in furtherance of justice, and for quieting controversies; however, as an award is a judgment, and can only be expounded by itself, without the aid of an averment of matters *dehors* to explain the meaning of the arbitrators, it is necessary that it should appear on the face of it.

1. *That it be made according to the Submission.*

Plow. 396. Dyer, 242. ‖See Winter v. Lethbridge, 13 Price, 533.

If an award be made of any other thing than what is contained in the submission, it is void; for no act is my own, or binding on me, unless done by me, or by commission from me. Prosser v. Goringe, 3 Taunt. 426. Bonner v. Liddell, 1 Bro. & Bing. 80.‖

Dudley v. Mallery, 3 Leon. 62.

If arbitrators award to do an act to a stranger, this is good.(*a*) Anon. 1 Leon. 316. [(*a*) But such an act must appear to be for the party's benefit. Bedam v. Clerkson, 1 Ld. Raym. 123.]

Anon. Moor, 3. p. 11.

But an award that an act should be done by a stranger, is void, because he is not within the submission.

Sams v. Pitt, Moor, 359. 10 Co. 131. But if he hath any remedy in law or equity to compel the stranger to do it, the award is good. Roll. Abr. 248, 249. Stile, 152. Upon this principle, an award that one of the parties shall be bound with sureties is bad. Norwich and Norwich's case. Show. Rep. 82. 3 Mod. 272. S. C. 3 Leon. 62. Thursby v. Halburt, [An award that all prosecutions shall cease in all actions between *A.* and *B.* will not extend to suits where *A.* is plaintiff, and *B.* and others are defendants. Barnardiston v. Fowler, 10 Mod. 204.]

10 Co. 131, 152. 1 Roll. R. 437. Vandlore and Trip, Roll. Abr. 242. 2 Roll. R. 192. Cro. Eliz. 809. Cro. Jac. 353. 447. 663. Poph. 134.

If two submit to an award all actions, and the arbitrators award a release of all actions till the time of the award, some books have said that this is void for the whole, because it extends to things partly in the submission and partly to things out of it, and it is one entire act; for, say they, to do that act they are not obliged, because not within the submission; and to do an act relating only to things contained in the submission, is another act from what is awarded; (*a*) others have said that this is not void, unless

unless there are shewn on the other side causes of action arising between the time of reference and of making the award, otherwise none shall be intended: and then the release only relates to the things in submission. Sid. 365. 2 Mod. 169. (a) Hob. 190. Sid. 154. Moor, 885.

Hutt. 29. 1 Salk. 74. Bunb. 250. [Award of general releases under a special reference is good for the matters referred, and void as to the rest. 2 Black. R. 1115. So on a submission by an executor and an administrator in those characters, an award that they execute general releases to each other, is good, for the court will not intend that any thiug is ordered to be released except the matters in dispute between the parties. 1 Term R. 691.] ‖8 Taunt. 698.‖

But it has been resolved, and seems now settled, that the act is not entire; for he may release all actions to the time of the submission; for though there is one deed of release awarded, yet, that deed relates to several things that are dividable in their own nature one from the other, and so it shall be good for what is in the submission, and void for the residue. 3 Lev. 188. 2 Mod. 169. Salk. 74. pl. 14. 3 Lev. 413. 2 Lev. 3.

The arbitrators cannot bind a man's liberty or right to real things, where personal things are submitted; and therefore if they award service for two years, or a release of the right of lands in satisfaction for a trespass, this is void; for nobody can be supposed to submit more than his personal estate to answer a personal injury, for that only might be taken in execution for it by the common law; and that may be bound to answer it: therefore if the arbitrators award a horse, money, a quart of wine, in satisfaction for a trespass, this is good; for here a new personal duty is raised instead of the former, and to satisfy out of the personal estate is necessarily implied in the submission, for this is a means necessary to quiet the matters. 9 E. 4. 44. Roll. Abr 243. pl. 12, 13. 6 Mod. 221. Salk. 76. pl. 19. Roll. Abr. 243. *cont.*

If two submit to award all quarrels concerning tythes in a place certain, and the arbitrator awards that one shall pay to the other 20*l.*, and the other shall release to him all actions; this shall be intended all actions concerning the tythe, unless the contrary appear on the other side, and the actions may be severed; and this shall be good for the acts in the submission, and void for the rest. Palm. 107. Roll. R. 362. 2 Roll. R. 192. Cro. Jac. 664.

A submission of all debts and demands, and a release of all judgments, executions, and extents awarded, is a good award. 2 Sand. 190. Roberts and Marries.

A submission of all matters between the plaintiff and another, and an award made of things that the party hath in right of his wife, is good; for these things are comprehended under the words *all matters*. 20 H. 6. 18. 3 Bulstr. 65. [This point does not appear in the case in the Year-Book referred to in Bulstr.]

On a submission of all injuries, an award of all debts, duties, and trespasses, is a good award; for whatever is against law is an injury. 3 Bulst. 312, 313.

A submission of all actions now depending, and an award of all actions, good; for it shall be intended actions depending. Cro. Eliz. 66. 858. Where the words *de et super præmissis* restrain the award to the thing submitted. Cro. Eliz. 861. 8 Co. 97. Cro. Jac. 200. 351. Roll. Abr. 257. Sand. 32. 6 Mod. 232. A submission of all controversies touching money laid out for his wife when she was sole, at her request, and the award of 340*l.* for all sums laid out for the wife when sole, omitting at her request; this is

is void, because they award another thing than that which is contained in the submission. Cro. Jac. 640.*

* *Qu.* If the submission be recited in the award, whether the award shall not bear reference to the terms of the submission, and be construed accordingly; *i. e.* to mean *at her request*, and be good.

[Green v. Waring, 1 Black. R. 475.] Under a reference of all matters in difference between partners, the arbitrators may award a dissolution of the partnership. ‖See 1 Taunt. 549.‖

Tattersall v. Grote, 2 Bos. & Pull. 131. ‖But they cannot award that a part of the sum paid as a consideration for the partnership shall be refunded.

Morley v. Newman, 5 Dow. & R. 317. Where partners agree to dissolve, and the terms and conditions are to be settled by an arbitrator, he has authority to award that one shall not during the life of the other carry on business within thirteen miles of the place in which they had done.‖

1 Black. R. 475. So between a master and apprentice, they may award the indentures of apprenticeship to be delivered up.

Prosser v. Goringe, 5 Taunt. 426.; and see Miller v. Robe, *Ibid.* 461. Atkyns v. Baldwyn, 1 Stark. R. 209. ‖So also where it was referred to an arbitrator to ascertain what particular lands of a certain farm were tytheable to each of two rectors of adjoining parishes (both parties to the reference), and to devise all means to prevent future litigation between the parties, and the arbitrator made his award, stating that it was impossible to ascertain and distinguish the particular pieces of land, and awarding certain undivided proportions of the whole tythes to each rector, it was held that this award was within his authority.

Bonner v. Liddell, 1 Bro. & B. 80. Where the parties to a suit had entered into an agreement for a lease of mines for sixty-three years, the lessee to be allowed three years from 1st *May* 1801, for winning the colliery, without payment of rent, and to have power to begin to bore and win immediately, and all matters in difference were referred, with power to the arbitrator to direct a lease *according* to the agreement, and he directed a lease for sixty-three years, from 1st *May* 1804, it was held that he had exceeded his authority, and his award was bad.

Jackson v. Clarke, 1 M'Clel. & Y. 200. Where an arbitrator to whom a cause was referred before issue awarded thus, "I award that a verdict in this cause be finally entered for the plaintiff, with 284*l.* 12*s.* damages;" it was held that he exceeded his authority in awarding a verdict, and that as the award consisted of only one sentence, that direction could not be rejected.‖

Malcolm v. Fullarton, 2 Term R. 645. Under a reference *of all matters in difference between the parties in the cause*, the arbitrators may travel out of that particular cause, and take into consideration any cross demands between the parties, though not pleaded by way of set-off: and the costs being to abide the event makes no difference. But under a reference of *all matters in difference in this cause between the parties*, they are confined to the matters in dispute in that cause only.

Smith v. Muller, 3 Term R. 626. (*a*) By *Buller* J. But this distinction in the terms being perhaps too refined for the general understanding of mankind, it is recommended (*a*) to make the former a reference *of all matters in difference between the parties*, omitting the words, *in the cause*, and the latter, a reference

reference *of all matters in difference in the cause*, omitting *between the parties.*

Assignees of a bankrupt having received a sum of money from a debtor to the bankrupt as due to his estate, and having commenced an action against the same debtor for a further demand on the same account, to which the general issue only was pleaded, and this cause being referred to arbitration, it was holden, that, under the general reference above stated, the arbitrators might award that the assignees should repay a part of the money which they had already received, if it appeared to have been paid by mistake. Malcolm v. Fullarton, 2 Term R. 645.

A demand as executor may be taken into consideration under a general reference.] Elletson v. Cummins, 2 Stra. 1144.

There is a controversy between *A.* and *B.* on the one part, and *C. D.* and *E.* on the other part, and *C.* for himself, and *D.* and *E.*, submits the matter, and promises to stand to the award; if the award be that *C.* shall pay so much in satisfaction of the controversy, it shall bind him, though it concerns *D.* and *E.* who are strangers to the submission, inasmuch as the thing awarded is to be done by him, and not by the strangers to the submission. Roll. Abr. 244.

If there be a controversy between the parson and his parishioners, whether tythes shall be paid in *specie* or not, and they submit all controversies, and the arbitrators award that they shall pay so much a-year for tythes; this is good, for that was the debate on the award. (*a*) Roll. Abr. 254. (*a*) If the submission be of a suit depending in an *ejectione firmæ*, and the award be of the right of the land, it is not good. Roll. Abr. 246. If the submission be of all actions personal, *sectis et querelis*, they cannot make any award of any real suit, for the word *personal* refers to all that comes after the copulative; but if the submission be of all actions personal, *ac sectis et querelis*, they may; for the word *ac* makes a plain distinction between the several parts of it. Roll. Abr. 246. If the submission be of a term, and all that belongs to it, and the award is made of the rent which shall become due next *Michaelmas*, the award is not good, because it may be extinguished by surrender, eviction, &c. before *Michaelmas*. Roll. Abr. 245. If the submission be of all actions, they cannot make an award of causes of actions; but otherwise if the submission be of all actions and quarrels, for the word *quarrels* comprehends causes of action. Roll. Abr. 245.

If the submission be of all controversies to the time of the submission, and the award be that one of them should deliver up an obligation made since the submission, in satisfaction of all matters, *&c.* this is good, because the bond is given only in satisfaction. Roll. Abr. 245. p. 10. If the submission be of all actions depending between *A.* and *B.*, an award cannot be made of any action depending by *A.* and his wife against *B.* being out of the submission. Roll. Abr. 246. This must depend on the intention of the parties, where that can be collected with certainty.

An award may be good, though part of it be made of a thing not within the submission; as if an award be to pay 1000*l.*, and to procure a stranger to be bound to pay 22*l.* per annum, the plaintiff must lay the breach in not paying the 1000*l.*, for as to the other part it is wholly void. For this *vide* Leon. 304, 305. Cro. Jac. 448. 10 Co. 131. Roll. Rep. 437. Cro. Eliz. 758. 809. *acc.* Kelw. 43. *Semb.* 5 Co. 78. *cont.*

If an arbitrator go beyond the terms of the submission to direct the mode in which any of the matters ordered by the award is to Aitcheson v. Cargey,

15 Price, 639.; and see S. C. to be done, that direction may be rejected as a nullity, as forming no part of the award.‖

2 Barn. & C. 170. 2 Bing. 199. 13 Price, 533. M'Clel. 253.

2 Roll. R. 46. If an award be good for part, and void for part, the plaintiff may assign the breach, that the defendant did not perform the thing submitted, *nec performavit in aliquo*; for it shall refer only to that in the submission, for the rest is void, and not to be performed.

Poph. 134. Cro. Jac. 149. *Semb.* If the arbitrators award on one side an act contained in the submission, and on the other side an act out of it, this is a void award for the whole; for this is unequal, because there is something on the one side awarded only, and nothing on the other; for what they intended to balance it with on the other appears to be void.

2 Sand. 293. So if a lease be awarded to the party for life, the remainder to *J. S.*, the remainder is void to the stranger. Cro. Eliz. 758. If the arbitrators award 10*l.* to one of the parties, and 5*l.* to a stranger, this is good as to the party himself, and void for the stranger.

Hooper v. Hooper, M'Clel. & Y. 509. ‖Where an arbitrator to whom a cause was referred at *nisi prius* found that the plaintiff was entitled to a right of way for carriages, which he had at first claimed by his declaration but afterwards abandoned, this was held an excess of his jurisdiction, and the award was set aside *pro tanto*.‖

Nichols v. Grunnion, Hob. 49. Baspole's case, 8 Co. 98. Middleton v. Weeks, Cro. Jac. 200. Sallows v. Gurling, Cro. Jac. 278. Ormelade v. Cooke, Cro. Jac. 355. An award may be good, though made of less than is contained in the submission; as if the submission be of all actions, trespasses, demands, and controversies, and the award be made of some only, this is good; for no more shall be supposed to be made known to the arbitrator; and if there be other causes of action in being, and they were made known to the arbitrator, they must be shewn on the other side; and this as well where the submission is conditional by *ita quod* (*a*), as where it is absolute: for the award being made *de præmisis* (*b*), shall be supposed to settle all things.

For this *vide etiam*. Brownl. 65. 2 Brownl. 310. Sid. 12. Dyer, 216. 242. Hard. 45. [4 Leon. 49. Lutw. 554. Hawkins v. Coclough, 1 Burr. 274. But where the submission is of certain things specifically named, with a provision or clause, *ita quod*, the arbitrator ought to make his award of all, otherwise it will be void. Baspole's case, 8 Co. 98. Hamond v. Hatch, Goldsb. 125. p. 14. (*a*) This conditional clause is usually expressed by the words, "*Ita quod de præmissis:*" but the expression, "so as the *same* award be made and delivered "by a particular day," admits of a similar construction, the "*same*" referring to every thing before mentioned. Risden v. Inglet, Cro. Eliz. 838. A proviso that an award be made on or before a particular day, implies a proviso that it be made "of the premises," though that be not expressed. Lee v. Elkin, Lutw. 545. Where there is a provision for the appointment of an umpire, the conditional clause, if inserted with respect to the arbitrators, extends to him, though it be not repeated. Bean v. Newbury, 1 Lev. 139.] ‖But see *antè* 274, as to the clause *ita quod*, &c. (*b*) And where an action of tort was referred, and the defendant gave evidence before the arbitrator of a set-off due from the plaintiff, and the arbitrator awarded a verdict for the plaintiff damages 2000*l.*, without expressly noticing the defendant's set-off, the court presumed that the arbitrator had taken all claims into consideration, although his award was not stated to be made *de præmissis*. Gray v. Gwennap, 1 Barn. & A. 106.; and see Smith v. Johnson, 15 East, 213. Dunn v. Murray, 9 Barn. & C. 780.‖

Baspole's case, 8 Co. 98. Hamond v. Hatch, Goldsb. 125. p. 14. [But where the submission is of certain things specifically named, with a proviso or clause *ita quod fiat de præmissis* the arbitrator ought to make his award of all, otherwise it will be void.]

‖Thus

‖Thus where the reference was of all actions and controversies between the plaintiff and defendant, and *also* of and concerning the value to be put on the hop-poles and potatoes in certain land, and *also* concerning the rent to be paid by the plaintiff to the defendant for other land, together with the costs, *&c.* so as the said award were made and ready, *&c. &c.*, and the arbitrators by their award recited that they had heard the parties and their witnesses, and considered *all* matters and things referred to them, and then awarded on the other matters, but did not notice the rent to be paid by the plaintiff to the defendant, the court held the award bad, since it appeared on the face of it that a matter was specifically referred on which no award was made.

Randall v. Randall, 7 East, 81.; and see George v. Lonsley, 8 East, 13.

So also where there were two causes, one between *A.* and *B.* and the other between *A.* and *C.*, and an order of reference was made, in the first, of all matters in difference, and by a subsequent order *C.* was made a party to the reference, and all matters in difference between *A. B.* and *C.* were referred to the arbitrator, so as he made his award of and concerning the premises on, *&c.*, and the arbitrator made two awards, in one of which he awarded that *A.* was indebted to *B.*, without noticing *C.*, and, in the other, awarded that *A.* was indebted to *C.*, without noticing *B.*, both the awards were held bad, as not determining all matters in difference between all the parties according to the condition.‖

Winter v. Munton & White, 2 Moo. R. 723.

An award of one particular thing for the ending of a hundred matters in difference, is sufficient; as, where the submission was of all matters in controversy, and the award taking notice of several matters, ordered the defendant to pay to the plaintiff four pounds for arrears of rent, and towards the repair of the house.

[Hopper v. Hackett, 1 Lev. 132. 1 Keb. 758.]

Where specific subjects of difference are submitted, but without the conditional clause "of and concerning the premises," it is said the arbitrator may make his award of any of them, without considering the others.

Baspole's case 8 Co. 98. a. But see King v. Hammerton, 1 Barnard. K. B. 316. where the general principle, here laid down, is contradicted; ‖*et vide suprà* that this principle is not correct.‖

As it is of several particular things, said Lord *Coke*, so it is of several particular persons; and therefore if two of the one part, and one on the other part, submit themselves, the arbitrator may make an arbitrament between one of the two of the one part, and the other of the other part, and it will be good.

8 Co. 98. a. *Vide* 2 R. 3. 18. Bro. tit. *Arbitrament*, p. 44. cited in Plowd. 289. Bean v. Newbury, 1 Lev. 140. 1 Keb. 885. *cont.*

Where the submission was by two plaintiffs on one side, and defendant and his wife on the other, of all matters and controversies between them, "or any of them;" the award was holden good, though nothing was awarded concerning the defendant's wife, on account of the words "between them or any of "them."

Joyce v. Haines, Hardr. 399.

If *A.* and *B.* on one side, and *C.* on the other, submit to the award of *J. S.* all matters between them; *J. S.* may make an award

Arnold v. Pole, Roll. Abr. tit.

Arb. D. 5. Carter v. Carter, 1 Vern. 259. ‖See the observations on this case, 1 Bro. & Bing. 362. 369.‖

award of any matter between *A.* alone and *C.*, for the submission shall be taken distributively, and perhaps there was no matter between *B.* and *C.*

Athelston v. Moon, Com. Rep. 547. ‖*Sed vide* Garland v. Noble, 1 Moo. 187.‖

A submission of all matters in difference between the parties, when there are more than one on one side, is the same as a submission of all matters between the parties, or either of them; and therefore on such a submission an award of a sum to be paid by one of the two or more to the single party is good.

Harris v. Painter, Roll. Abr. tit. Arb. O. P. cited in Lutw. 1628.

But if, in such case, it appear in the submission that there were differences between the person on one side, and all the parties on the other, and the submission be with the provisional clause; the award must comprehend all the parties, because the submission is under a condition that it shall do so.]

Winter v. White, 1 Brod. & Bing. 350.

‖In a late case, where *A. B.* and *C.* had entered into arbitration bonds to *D. E. F.*, reciting that all the six had been in partnership, and that differences had arisen between the above bounden *A. B.* and *C.* and the above-named *D. E. F.* respecting the partnership trade, and that it had been agreed between the above-bounden *A. B.* and *C.* and the above-named *D. E. F.* that all differences between the parties should be referred to the award of two arbitrators, and the condition was, that *A. B.* and *C.* should abide by the award of the arbitrators, and a counter bond in the same form was executed by *D. E.* and *F.* to *A. B.* and *C.*, and it appeared before the arbitrators that there never were any disputes between *A. B.* and *C.* collectively on the one side, and *D. E.* and *F.* collectively on the other; but the differences existed among the six severally in relation to their joint partnership; and the arbitrators awarded, amongst other things, that *B.* should pay a certain sum to *A.*, the Court of Common Pleas held that the arbitrator had not exceeded his authority in awarding a sum from one of the three parties of the one side to another on the same side. *Richardson* J. dissented, on the ground that as *A.* could not have sued *B.*, his co-obligor on the bond, the submission did not extend to any differences between them individually, but only to matters between the three parties on the one side and the three parties on the other.‖

See Bro. Abr. tit. Arbitrement, pl. 44.

Dyer, 243. 2 Roll. R. 243. Bulstr. 110. Roll. Abr. 245. Cro. Jac. 277.

If the award be conditioned to be delivered in writing under hand and seal, the circumstances must be observed, or the award is void; and therefore if it be delivered under seal only, it is not sufficient.

2 Mod. R. 77, 78. Palm. 97. Lutw. 560. 1 Stra. 116. That the arbitrator, if he cannot write, ought to set his mark on the award. Bulstr. 110.

Carth. 159. 2 Sid. 38. 1 Stra. 116. Everard v. Patterson, 6 Taunt. 645.; and see 2 Saund. R. 62. n. 3. and the cases there collected.

‖However, if it be averred to be under hand and seal, it will be intended to be in writing. But if it is only averred to be in writing, this is insufficient, since it cannot be intended to be under hand and seal; and if the submission is "so that the arbitrators make their award under their *hands*," it is insufficient to aver it to be "*duly* made in *writing*," without adding *under their hands.*‖

If

If two submit all actions till the ninth of *June, ita quod arbitrium fiat de præmissis*, and an award is made of all actions till the seventh, some have said this is less than the submission, and void; but the better opinion is, that this is well enough, especially unless there be shewn on the other side an action arising between the seventh and ninth. Roll. Rep. 362. 2 Roll. R. 195 Cro. Car. 216, 217. Cro. Jac. 578. 8 Co. 97. ‖3 East. 450.‖

[Where the submission to an award was that it should be made on or before the first day of *Michaelmas* term, and the time was enlarged *until* the first day of *Hilary* term, Lord *Thurlow* held that an award made on the first day of *Hilary* term was good, that it was an enlargement of the time *in statu quo*, and therefore must include that day. Knox v. Simmonds, 3 Bro. Chan. R. 358.

The awarding of costs is incidental to the power of an arbitrator: a provision therefore in the reference that the costs shall abide the event of the award, is a restriction of the power which he otherwise necessarily hath of giving costs at his election. 2 Term R. 644.

By the terms *event of the award*, must be understood *the legal event*, and therefore under this provision the party shall pay only such costs as he would have been liable to pay if a verdict had passed against him. Costs therefore shall not be taxed against executors, nor shall plaintiff be entitled to any, if his original demand be found by the arbitrators to be under forty shillings. So where in an action of trespass for pulling down the plaintiff's gates and assaulting him, the defendants justified to all the counts except one under different rights of way, and pleaded not guilty to the whole, and the arbitrators awarded the defendants a right of way, but different from those claimed in the pleas, and gave five shillings damages for the assault, which they found was committed in the exercise of the right of way negatived by the arbitrators; it was holden that the plaintiff was entitled to no more costs than damages; for the arbitrator's award is not equivalent to a judge's certificate under the statute of 22 & 23 Car. 2. c. 9. 3 Term R. 138. Swinglehurst v. Altham, Hingham, and another, executors, v. Hassell, Hil. 41 G. 3. Butler v. Grubb, Hil. 23 G. 3. K. B.

An award to the plaintiff of "the costs by him sustained in "the said action to be taxed by the proper officer," does not include the costs of the reference, but is confined merely to those of the action.] Browne v. Marsden, 1 H. Black. R. 223.

2. *It ought to be certain.*

As an award is in nature of a judgment, it ought to be wholly decisive; for if it doth not determine the matter, it becomes the cause of a new controversy: therefore if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give bond to the value of the land; for then the sense of the award must be supplied by averment: now if it hath the credit of a judgment, there can be no interpretation made of the award, but by the words of the award itself; for if it receives its meaning from any matters out of the award, the mind of the arbitrators is only guessed at, and not expressed: but the parties intended to be obliged only by what the arbitrators themselves declare 5 Co. 77. Salmon's case. Cro. Eliz. 432. S. C. Roll. Abr. 263. S. C. Moor, 559. S. C. Roll. Rep. 271. Dyer, 242. Yelv. 98. [The certainty of an award may be judged of according to a

common intent, and consistent with fair and reasonable presumption: therefore, where the submission was in general terms, "of all actions, &c.," and the arbitrator recited *one*, which was in fact depending, referring to the submission, as authorising him to determine it, the award was holden sufficiently certain, for there was no probable presumption of any other cause of complaint, the parties not having desired to be heard upon any more than that one. Hawkins v. Coclough, 1 Burr. 274.]

declare to be their award; and were the bond to be according to the value, they cannot assign their power to any person to assess the value.

Cro. Jac. 314. Thine and Rigby. Jenk. 348. S. C. 2 Stra. 1024.

So if the arbitrators award that one party shall give security to the other for the payment of 16*l.*, this is not a good award, because it does not appear what security, whether by bond or otherwise.

S. P. An award to enter into an obligation for the payment of a sum of money, without mentioning the sum, is void for uncertainty. Lev. 88. Sid. 270. ‖An award, finding a debt due, but containing no order to pay it, cannot be enforced by attachment. Edgell v. Dallimore, 3 Bing, 654.‖

Simmonds v. Swaine, 1 Taunt. 549.

‖But in a case, where the arbitrator awarded that the defendant should pay to the plaintiff a certain sum, to be paid, or secured to be paid, within a week from the award, and the plaintiff assigned a breach that the defendant did not within a week pay, or secure to be paid, *&c.*, the court held the award sufficiently certain, and gave judgment on demurrer for the plaintiff.

Lawrence v. Hodgson, 1 Younge & J. 16.

An award that *A.* or *B.* shall do an act is bad for uncertainty.‖

Roll. Abr. 264. p. 9. Massey and Aubrey. Stile, 365. S. C.

If the condition of an obligation be to submit to an award all controversies between *A.* and *B.*, and an award is made that *A.* shall permit *B.* to enjoy certain leases of lands purchased from *J. S.*, and that *B.* shall pay the rents, and perform the covenants, and deliver to *A.* a true copy of the leases, and pay the arrears to the time of the purchase from *J. S.*, this is a good award as to the rents and covenants, though not particularly specified; for though generally it is true that an award is to be interpreted by its own words, and not by any matter out of the award, which doth not appear in the words; yet when the words of an award have relation to things certain, out of the award, these things may be averred; for that is the express mind of the arbitrators, which they have expressly referred to; but as to the arrears the award is void, because they have not referred to any matter that falls it hin the cognizance of *B.*, for he cannot compel *A.* or *J. S.* to set the time of the purchase; and an award of what cannot be certainly done is not a certain determination.

Roll. Abr. 263. p. 8. March, 18. S. C.

If an award be that one shall acquit the other of an obligation of 200l. *aut eo circiter*, and the party is bound in an obligation of 105*l. aut eo circiter*, this is a good award.

Roll. Abr. 265. p. 6. 254. p. 15. Markham and Jennings. Yelv. 97. S. C. Brownl. 92. S. C. Cro. Jac. 149. S. C.

If an award be that one shall pay the other 6*l.* on the twenty-first of *May*, and that the other shall release his right in certain lands *prædict. primo die Maii*, omitting *vicesimo*, not good, because there was not any such former day before mentioned, and so the mind of the arbitrators not understood.

Roll. Abr. 263.

If an award be made between *A.* and *B.* touching certain quarters

ters of malt delivered by *A.* to *B.*, that *B.* shall pay to *A.* so much for every quarter, as a quarter of malt was then sold for, this is void; because not said at what market price; for one market may be much dearer than another. Hurst and Bambridge.

[An award, "that the defendant shall deliver certain goods "particularly named, and three boxes, and *several* books, with- "out naming the books," is uncertain: the books should have been particularly described, unless it had been said that the books were within the boxes, by which they would have been sufficiently ascertained. So, an award "that one of the parties shall de- "liver up to the other a certain writing obligatory, or a certain "bill obligatory which he had before," is altogether uncertain, for it does not say of what sum, or of what penalty the bond is, or of whom it was obtained.] Cockson v. Ogle, 1 Lutw. 550. Bedam v. Clarkson, 1 Ld. Raym. 124.

If *A.* and *B.* merchants, and *C.* and *D.*, with all the other owners and mariners, submit to the award of *J. S.*, concerning a ship taken by way of reprisal, and *A.* and *B.* enter into an obligation on one side, and *C.* and *D.* on the other side, and 1000*l.* is awarded to *C.* and *D.*, to the use of themselves and the rest of the owners and mariners, this is a good award, though every man has not a certain allotment, for *C.* and *D.* submit jointly in the name of the rest; and therefore an award of any thing to them as one person, without subdivision, is good; and *C.* and *D.* being intrusted for the rest, they are bound to make a reasonable division; if not at common law, at least in Chancery. Roll. Abr. 249. Stile, 133. 136. 152. S. C.

If an award be made that *A.* shall pay *B.* his day's work, and task work, and *B.* shall then pay 25*l.* to *A.*, and then they shall make each other general releases, this is a void award, and cannot be helped by averment that he paid such a certain sum for day's work and task work; because the award is void in itself, by not settling the certain sum; and if that is void upon which the subsequent payment and releases are to be made, the whole award must be void. 2 Sand. 292. Pope and Bret, 2 Keb. 736. S. C.

An award is made of 40*l.* and mutual releases; but if it shall appear to the arbitrators that one of them stands obliged, *&c.* that then so much shall be deducted, this makes the whole award void; for it is uncertain how much will be due; but if the award had been that if any bill of debt appears to such a sum, that this sum certain should be deducted, this perhaps would have been a good award; and though he awards mutual releases, which would make a final end of all, yet it appears it was to be after payment; and therefore that part of the award shall not stand alone, for that is contrary to the intent of the award; so if the arbitrators make an award with a *proviso* (*a*) at the end of it, that if they do such an act the whole award shall be void, the whole award is void; for the award ought in present to be certain. Winch v. Saunders, Cro. Jac. 584. Palm. 145. S. C. (*a*) Kinge v. Fines, 1 Sid. 59.

An award that one shall pay part of the charge of the voyage, and allow his part of the loss that shall come to the ship upon account, is good; for it may be reduced to certainty, Roll. Abr. 251. pl. 14. An award that one of the parties shall account with the other, not good, because the matter not settled. Fitz. Abr. tit. Award,

Award, 57. An award that one shall pay a moiety *cujusdam debiti*, &c. held not good, for the uncertainty. Roll. Abr. 263. *Quære?* And *vide* 6 Mod. R. 231. where an award that joint-tenants should make partition by mutual conveyances, though it did not point out what part each of the parties was to have, was holden good. ‖See Cargey v. Aitcheson, 2 Barn. & Cres. 170. 2 Bing. R. 199.‖

Wohlenberg v. Lageman, 6 Taunt. 255. ‖So also an award that two parties should pay a certain debt in proportion to their several shares in a certain ship, without specifying what those shares were, was held sufficiently certain, since there was no dispute referred, as to the amount of the shares.

Love v. Hoyneybourne, 4 Dow. & R. 814. So an award which directs an executor to pay a sum out of assets, but which does not determine whether he has assets, is not void for uncertainty.

Dicas v. Jay, 5 Bing. 281. So where the declaration contained eleven special counts for negligence, and also common counts for money paid, *&c.* and the arbitrator, under an award of *nisi prius*, found that the plaintiff had good cause of action for 23*l.* 14*s.* 10*d.*, and directed a verdict to be entered up for that sum, it was held sufficiently certain.‖

Dyer, 242. Roll. Abr. 263. p. 5. If the submission be of 200 acres, called *Kelstorne Ling*, and the award be concerning the waste lands in the town of *K.* this award is void, and cannot be helped out with an averment; so if money be awarded to be paid by one, and it is not said in satisfaction of what he owes the other, that cannot be averred.

Stile, 28. If an award be that one of the parties shall pay to the other so much as is due in conscience, this is a void award.

Five pounds awarded for quit-rents and other small things, void for the uncertainty. March, 144.* An award to pay so much money as such land is worth, void for uncertainty. Skin. 248. *arguendo.* [In the case from March an infant was concerned.]

* *Qu.* If it is a final payment?

6 Mod. R. 244. Salk. 76. 2 Salk. 498. 2 Ld. Raym. 1076. Arnote and Breame; by three judges against *Holt* C. J. who seemed of a contrary opinion. If *A.* commits a nuisance to *B.* by erecting scaffolds on his own ground, and the arbitrators award that the scaffolds shall be removed, it must be understood that they are to be removed by *A.* on whose grounds they are; for though any person may by law remove a nuisance, yet the arbitrators, who are judges of equity as well as law, must be understood to intend it of him who committed the nuisance, and therefore the award not void for uncertainty.

Beale v. Beale, Cro. Car. 383. Hanson v. Liversedge, 2 Vent. 242. An award to pay the charges of such a suit, is good; because it is the intent of the arbitrators it should be reduced to a certainty by the attorney's bill, who is the only person that can know the certainty. (*a*)

Linfield v. Ferne, 3 Lev. 18. But *vide* 3 Lev. 414., where the award was to pay all expenses of a suit, and all reasonable expenses *circa sectum præd.*; and it was admitted *per cur.* to be void for uncertainty; but to pay such costs or charges as the master or prothonotary shall tax, has always been held good. Sid. 358. Carth. 156. 2 Wils. 267. 1 Barnard. K. B. 463. (*a*) And the proper officer of the court may tax it. ‖Cargey v. Aitcheson, 2 Barn. & C. 170. 2 Bing. R. 199.‖

Salk. 69. pl. 1. Ld. Raym. 247. An award was, that one of the parties, he, or his executors, should release; and my Lord *Holt* inclined to think that it may be construed that *he and his executors* should release.

[An

[An award "that the one shall seal and deliver a demise to "the other, *or* his assigns, is certain enough; it shall be under- "stood to himself." Wats v. Philips, 1 Keb. 335.

An award "that the plaintiff shall pay the defendant a certain "sum on a particular day, and that then the defendant shall "reassign the land mortgaged to him by the plaintiff," is sufficiently certain, though it do not say for what term the reassignment shall be, whether for years, life, or in fee; for it shall be understood to be for the whole interest mortgaged. Rosse v. Hodpes, 1 Ld. Raym. 254.

It is no bjection to an award that it is conditional, as that one of the parties shall enjoy a house for three years and a half, and shall pay his rent every half year; and that if he fail in payment, the award for the enjoyment of the house shall be void. So that he shall pay the other 10*l.* on condition that each shall acquit the other (*a*); for it shall be taken as a positive injunction that they *shall* acquit each other. Ferser v. Proud, Cro. Jac. 423. Linfield v. Feme, (*a*) 3 Lev. 18. Kyd, 156.

So it may be made with a penalty to attach on the nonperformance of a preceding part; as to pay 12*l.* on two several days, and on default of payment the first day, to pay the whole 12*l.* immediately after. Kockill v. Wetheral, 2 Keb. 858.

Where it is left to a subsequent event to ascertain precisely the thing awarded, it will be sufficient if that event must necessarily happen; as if the submission be with respect to a way leading to a house, and the award be, that the one shall give a bond of 300*l.* to the other, payable at three years' end; and in case the way be taken away, then that he shall pay less by a certain sum, and if not, a certain sum more. Collet v. Powell, 2 Keb. 670. ‖Pedley v. Goddard, 7 Term R. 75. Storke v. De Smeth, Willes R. 66.‖

An award in the alternative, that the party shall do one thing or another, is not liable to the objection of uncertainty; for when he has done one of the things he has performed the award; as if the award be that he shall deliver up to the other party a certain deed, or pay him 50*l.*, and such an award in the alternative seems to be the best mode of compelling a party to exert himself to procure the performance of what is not immediately in his power.] Kyd, 137. Lee v. Elkins, 12 Mod. 585. Lutw. 545. S. C. ‖See Simmonds v. Swaine, 1 Taunt. 549.‖

3. *It ought to be equal and mutually satisfactory.*

Awards must not be on one side only; this must be understood thus; that all controversies being between two parties, that which is awarded to be done to one must be an advantage to both, so as to end the controversy, and discharge one, as well as give satisfaction to the other; for if it doth not, it is manifestly unjust; and therefore, whenever it appears to the court that, notwithstanding the award, the thing remains a duty as before, and is not discharged, that apparently is an award on one side, and consequently is void; not that where one party is by the award to have something paid him, or the like, and not the other, that that award should be naught; for perhaps nothing may be due to him, and he might be the only trespasser in the case. Roll. Abr. 253. 8 Co. 98.

Thus in case of a trespass submitted, the arbitrators award that Roll. Abr. 253,

254. Hob. 49. (a) But if an award be that the obligor in a singlebond shall pay the money, that had been no award, without saying that he should be discharged; for payment, without a discharge and acquittance, will not discharge a single bond. Hob. 49.

one shall pay the other 3*l.* this is void, because only on one side; for it is not said for what, and so the trespass is not discharged, and then the other party hath no advantage by the award: but if it were awarded *de et super præmissis*, it would be well enough; likewise if the award had been that he shall pay 3*l.* for a trespass, it had been good, and yet one only was to do an act, but then the trespass by that award had been discharged. (*a*)

7 H. 6. 40. Roll. Abr. 253. p. 2. [But if the award recite a trespass committed by the plaintiff against the defendant, and another by the defendant against the plaintiff, and for that reason order, "that the one shall be quit against the other, and the other against "him;" the objection of want of mutuality will not lie against it. 7 H. 6. 41. 21 H. 6. 9. 22 H. 6. 39. Bro. Arbitrament, p. 33.

A. and *B.* submit all actions had by *A.* against *B.*, and all actions by *B.* against *A.*, and the arbitrators award that *A.* shall go quit of all actions had by *B.* against him, this is naught; because they say nothing as to the other actions.

Cro. Jac. 314. An award was made that one of the parties should be bound with sureties, such as the other should approve, in the sum of 150*l.*, to be paid him at such a time, and that they should seal mutual releases; and the court inclined that the award was void; for if the party did not like the sureties he was not to seal a release, so it is but an award of one side. 3 Mod. 272, 273. ‖But see Simmons v. Swaine, 1 Taunt. 549., that an award to pay money, or give security for it, is good.‖

An award that one should have such trees, and that the other should give him security to pay 16*l.*, is void; because it is not certain what security; and then that part of the award being void, the other part must be void too; for else it would be an advantage to one only.

Roll. Abr. 253. If one party alone be ordered to do something, and nothing else appears to the court, it shall be presumed that he alone was the wrong-doer, and the award is good, if it appears that he is by the award discharged of all actions that might be brought against him for that wrong; but when it appears that the arbitrators design both parties satisfaction for the wrong done each of them, there, if the satisfaction designed one be not well awarded, the whole shall be void for the partiality.

Ibid. 251. A naked award is no good plea in trespass, unless something be awarded to the plaintiff in amends; for if there be no trespass, there is nothing about which an award can be made; and if there be one, and the arbitrators do not award satisfaction, they do not act according to the design of their institution, for they are not indifferent, and so there is no good award.

Id. ibid. So an award that the owner shall have parcel of his own goods. *Vide* 1 Roll. Abr. 252. If an award be, that whereas the parties are indebted each to the other 40*l.* they should acquit each other, a good award; the same law where each have done the other a trespass. Roll. Abr. 252.

If trespass be of beasts taken and determined, and they arbitrate that the owner shall have the beasts again, this is void, for it is against natural justice to give him his own again, without satisfaction for the unjust taking and detention.

Roll. Abr. 252. An award that one shall go to *Rome* or *Paul's*, not good, because to nobody's advantage.

9 E. 4. 44. An award that two shall intermarry, no good award, for that ought

ought to be at the parties' choice; and the bodies of the parties are not submitted to the power of the arbitrators. Roll. Abr. 252.

If the award give satisfaction for slanderous words spoken of a man about a crime which it appears was pardoned, that award is void; for if the crime be pardoned, no harm could come to him by speaking them, therefore the award is unequal. Sid. 178. If there be an award that one shall pay so much money for costs in a suit for words, the words must be shewn, otherwise it doth not appear that the award is just and equal. Sid. 12. *Vide* 2 Vent. 242. this case cited; and there the court seemed dissatisfied with this opinion, and said that Siderfin was but a young reporter.

If an award be, that if one will make his law that he did no trespass, that then he shall go quit, it is not good, for that cannot be pleaded in bar of an action; for it supposes, contrary to the submission, that there was no trespass; neither can it be averred that the award was for the same trespass the action was brought for, for it supposes no trespass. 46 E. 3. 17. b. 19 H. 6. 37. Roll. Abr. 261. Dyer, 356.

There are controversies between *A.* and *B.*, and *A.* and *C.* as attorney to *B.* submit to an award, the arbitrators award so much money to *A.*, and that *A.* and *C.* shall release to each other, to the use of each other; this is void, because the award is on one side; for *B.* cannot take advantage of the release, for that is to the use of *C.* Carth. 412. Bacon and Dubarry. Salk. 70. pl. 3. S. C. Ld. Raym. 246. Skin. 679. Comb. 439. 12 Mod. 129. 1 Wils. 28. 58.

The award may be beneficial to the party, though a thing is awarded to be done to a stranger to the submission; as if the arbitrators award that one of the parties shall pay money to the servant of the other. 3 Leon. 62. But an award to pay money to a mere stranger is said to be void. Roll. Abr. 247. But *vide* Salk. 74. pl. 13., where, by *Holt*, it is good, and shall be intended for their benefit. But an award that the parties shall in such proportion discharge a debt by bond in which they are jointly bound, is good, though the obligee be no party to the submission. Roll. Abr. 247. If two brothers submit to arbitration, and one of them is awarded to pay so much to his mother yearly, this is good; for the payment being to be made to his mother, shews it to be a benefit to him. Salk. 74. No judgment was given in this case.

If an award be to pay so much money in discharge of all actions, a release shall be intended to be awarded, unless the contrary be shewn on the other side. 2 Roll. R. 1. [But see Nichols v. Granwin, Brownl. 58. Hob. 49.] An award is made *super præmissis*, that one shall pay 20*l.* to the other at *Michaelmas* next, and then the other shall release to him all actions personal; this shall be understood a release to the time of the award, not till *Michaelmas* next. Roll. Abr. 256.

[An award that all suits shall cease, is equivalent to an award of a release. Strangford v. Green, 2 Mod. 228.

So that all "controversies" shall cease, and that the one shall pay 12*d.* to the other, although he have nothing given to him. 1 Roll. Abr. tit. Abr. (K) 10. Harris v. Knipe, 1 Lev. 58.

An award was made "of and upon the premises," that one should pay the other 10*l.* at a certain day, and that the parties aforesaid shall continue in love and friendship as formerly; it was holden to be an award on both sides, and that it should be intended in satisfaction of all matters between the parties, more especially as it was said, that the parties should be friends as formerly. Roll. Abr. 254. p. 12. 260. p. 1. ‖And even without the words "of "and upon the "premises," such an award would now be considered conclusive, unless it was clearly shown that other matters were brought before the arbitrator, on which he had made no award. Gray v. Gwennap, 1 Barn. & Ald. 106.‖

Ormelade v. Coke, Cro. Jac. 354. Hob. 49. 1 Freem. 285. 266. (a) Hopper v. Hackett, 1 Lev. 132. (b) Hawkins v. Coclough, 1 Burr. 277.

An award "that the one shall pay 10*l.* to the other in satisfaction of a trespass," is good: for both parties have benefit, the one receiving money, and the other being discharged of the wrong. So an award "that one shall pay so much *for* arrears of rent (*a*)," the word *for* implying that it is to be in satisfaction of the arrears. So for having made the first breach in the law, implies that the sum awarded shall be taken in satisfaction.(*b*)

Elliott v. Chevall, Lutw. 541.

An award recited that there had been considerable dealings between the plaintiff and the defendant, that the plaintiff had paid to the defendant all his demands, and that 40*l.* were due to the plaintiff, and then ordered that the defendant should pay that sum to the plaintiff. It was holden that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40*l.* by the defendant was intended to be in full satisfaction of the debt.

Kyd, 153. Tomlinson v. Arriskin, Com. Rep. 528. Cooper v. Hirst, Lutw. 539.

It seems now not to be necessary that an award should express that a sum awarded to be paid, or an act to be done, in favour of one of the parties, shall be in satisfaction; or that it should contain any equivalent terms: a discharge to the other must necessarily be presumed from the payment of the sum, or the performance of the act.]

4. *It must be of a Thing lawful and possible.*

Roll. Abr. 248. (*c*) If they award a sum of money to be paid at a day past, it is void.

If the arbitrators award a thing impossible *ex naturâ rei*, it is void (*c*); but if they award a thing which cannot be done, but not in the nature of the act itself contradictory or repugnant, this may be a good award (*d*); for there is no construction to be made of the award, but by the words thereof.

8 E. 4. 1. b. If they award that a man shall make an obligation immediately, this is no good award; for time is required to the making. 18 E. 4. 21. But *quære*, and *vide* 2 Brownl. 311. and Salk. 69. pl. 1. (*d*) As an award that one shall pay 20*l.* where he hath not 20*d.* is good, for no contradiction appears in the award itself. 19 E. 4. 1. Awards that one shall turn the river of *Thames*, kill, steal, forge a deed, &c. are void. Co. Lit. 206.

Roll. Abr. 248.

If an award be that one shall make a feoffment to another of an acre, and immediately after deliver the charters; this is good, because they may be delivered in the same instant.

Leon. 316. 3 Leon. 62. Hard. 46. Moor, 3. 359.

An award that a stranger shall do an act is void (*e*), because another in his natural freedom is not supposed within my power.

(*e*) But an award to do an act to a stranger is good, because it obliges only to an endeavour; and this shall be supposed to be for the other party's benefit. Leon. 140. 10 Co. 131. Roll. Abr. 249. Roll. Rep. 270. An award to be obliged by sureties, void as to the sureties. 2 Sand. 337.

Roll. Abr. 249. So an award that one shall surrender his copyhold into

An award to levy a fine is good; for though it is an act of the court, yet by the law and public justice of the kingdom it is not to be refused to any man; but if the award be to command the justices to do it, this is no good award, for the parties in effect pray

pray leave to agree from the king himself, which is quite different from the nature of a command.

the hands of two of the tenants of a manor, who shall present it, is good. Roll. Abr. 247.

An award to pay so much *apud domum J. S.* good; for he is not bound to pay it in the house, but as near as he can to it; or it shall be intended a common inn, and if the party will not let him pay there, it has been said that the endeavour is sufficient, for they cannot award any thing that will make the party a trespasser. Roll. Abr. 249. Roll. Rep. 6. Cro. Car. 226. 2 Bulstr. 39. Freem. 205. 3 Lev. 153.

‖If an arbitrator on a reference of differences between a lessee and a neighbouring land-owner, award that the lessee shall do an act for the benefit of the neighbour, which would be waste on the estate of the lessor, this award is bad. Alder v. Savill, 5 Taunt. 454.

And no court will enforce an award which directs a party to do an act which is criminal.‖ 1 Swanst. R. 55.

An award that one of the parties should discharge the other of a bond in which both were bound to a stranger, is a good award; for it shall be intended that the money was to be paid at a day to come; and therefore he might then tender it and acquit the other; and if the day of payment be past, he may pay the penalty, and compel the other to give a release, in a court of equity. (*a*) Jones, 431. Cro. Car. 541. (*a*) And now by stat. 4 Ann. c. 16. § 12. payment after the day, of principal and interest is good.

An award that one of the parties shall discharge the other from his undertaking to pay a debt to a third person, a good award; for by the award he is set in the place of the other person, and the creditor upon payment is compellable in equity to give a release. 1 Mod. R. 9. Beckett and Taylor.

An award the tenth day of the term to stay the suit, and judgment given in the action that term; in an action for nonperformance, and *non assumpsit* pleaded, it was moved in arrest, that every judgment given was as of the first day of the term, and so the award to stay the suit then was altogether impossible; but it was holden that though this might have been a good objection upon a special demurrer, where it is shewn for cause, yet now the court must give judgment on this record only; and it doth not appear on this record when judgment was given on the other. Yelv. 35. Hays and Wright.

If *A.* and *B.* submit to the award of *J. S.*, and he awards that *A.* shall pay to *B.* 30*l.* within two months next following, and that upon payment thereof they shall give mutual releases to one another, and within the said two months *B.* dies, the money shall be paid to his executor, who thereupon must release, for the award creates a duty. 2 Vent. 249.

5. *It must be final.*

An award may be good for part only, but then it must be final as to that part. 19 H. 6. 56. 8. E. 4. 10.

An award that all suits shall cease is a final award (*b*); so an award that one of the parties shall not sue an obligation (*c*); for this (*b*) 2 Mod. 227. Eq. Cas. Abr.

48. Barnes, 56. Lev. 58. S P. [In 2 Stra. 1024. That all manner of proceedings (if any) depending at law, shall be no farther prosecuted,

this amounts to an extinguishment of the debt. An award that a suit in Chancery shall be dismissed, a final award (*d*); so if the arbitrator award a *retraxit* (*e*); an award that one shall not prosecute nor proceed in such a term, seems to be good (*g*); but an award that one of the parties shall be nonsuit is not good, because the party may begin again (*h*); so that each party shall discontinue their actions which they have against each other (*i*); for this is not a final determination.]

holden not to be final: but see 6 Mod. 34. *cont.*] (*c*) Roll. Abr. 54. (*d*) Salk. 75. pl. 17. 6 Mod. 231. ‖See Pearse v. Pearse, 9 Barn. & C. 484. *acc.*‖ (*e*) 5 H. 7. 22. (*g*) Cro. Jac. 525. (*h*) 19 H. 6. 36. Roll. Abr. 540. 6 Mod. 282. S. P. admitted. (*i*) 5 H. 7. 22. [An award "that each of the parties should pay his own charges at law, and that the defendant "pay the plaintiff 5*s.* for his making the first breach," was holden to be good; for it must necessarily be presumed that the suits were to cease, and the 5*s.* to be paid by the defendant to be taken as a discharge. Hawkins v. Coclough, 1 Burr. 274.]

Blanchard v. v. Lilly, 9 East R. 497.

‖But in a late case, an award that certain actions should be discontinued, and that each party should pay their own costs, was held final and good, as it in effect amounted to an award of a *stet processus*.

Jackson v. Yabley, 5 Barn. & Ald. 848.

And where an action of covenant, together with all matters in difference between the plaintiff and defendant, was referred to an arbitrator, and the costs were to abide the event, and the arbitrator awarded that the plaintiff had no claim against the defendant, on account of the alleged breaches of covenant, or on any other account, this award was held final, although it did not expressly put an end to the suit.

Dickins v. Jarvis, 5 Barn. & C. 528.; and see Hayllar v. Ellis, 6 Bing. 225.

And an award that "nothing was due to the plaintiff," was held final, as intending that the plaintiff had no right to recover in the action.‖

2 Atk. 501.

[If an award direct that debts due from the parties jointly shall he paid by them in moieties, and then mentions three such debts only, the court will not presume that there are more.]

Sid. 59. Cro. Jac. 584. Hob. 218. Palm. 110. 146.

A conditional award not good, because not final to determine matters in difference; the same law where any thing is referred to the arbitrator's future judgment or exposition.

Price v. Hollis, 1 Maule & S. 105.

‖But in a late case, where a question of law as to the construction of a statute was left to the determination of an arbitrator, and he gave his opinion in favour of one party, but at the same time recommended that the printed statute should be compared with the parliament roll before the matter was settled, under a doubt that the statute was misprinted, this determination was held final.‖

Selsby v. Russel, Comb. 456.

An award "that if the plaintiff, on account prove certain "articles against the defendant then he shall pay so much as the "plaintiff was damnified thereby," is not final. So also, "that "if the defendant make out upon oath before a judge, any disbursements made on account of the plaintiff, that the plaintiff "shall pay them; but in case the defendant do not prove these "matters within a certain time limited, then the parties shall "give general releases;" this is not final.

So

‖So also, where the award was that the defendant should pay to the plaintiff a certain sum, unless within a certain time (which extended beyond the time for making the award), the defendant exonerated himself by affidavit from certain receipts of money, in which case they were to be allowed out of the sum to be paid by him to the plaintiff, this award was held conditional and inconclusive, and the court refused to enforce it by attachment.‖ Pedley v. Goddard, 7 Term R. 73.; and see Storke v. De Smeth, Willes R. 66.

[But an award of a thing to be done at a future day, if such thing must then be absolutely done, is final; as to pay money at three several days to come. (*a*) So to give a note or a bond for the payment of money at a future day. (*b*)] (*a*) Palm. 110. *per Doddridge* J. (*b*) Booth v. Garnett, 2 Stra. 1082.

If the arbitrators award general releases within four days after the award, and if in ten days after the releases so made the party dislike the award, upon payment of ten shillings the award shall be discharged; here the award is good, and the proviso to make void the award after such releases is altogether void and repugnant; for if the obligation be once forfeited by nonperformance of the award, it can never be discharged by the award itself; but if the arbitrators award general releases within four days after the award, and if ten days after the award made the parties dislike the award, *&c.* the award shall be void: this award is not good, because not final and decisive; for the parties may dislike the award within the four days. Poph. 15, 16. Sherry and Richardson, 2 Roll. R. 189. Grove and Saunders, Kyd, 146.

If the arbitrators award that *A.* shall beg *B.*'s pardon in such manner and such place as *B.* shall appoint: as to this part the award is void, for the arbitrators ought to have made a final determination of the matter themselves, and not to have left the manner and place of begging pardon, which in this kind of satisfaction makes the most considerable part, to the judgment of *B.* Salk. 71. pl. 5. Glover and Barrie. *Vide* Sid. 12. That an award that one of the parties shall make his acknowledgment before the mayor of *C.* is good.

When the arbitrators award a thing not submitted, with a reservation to themselves of a future power of judging of the matter, and they award a thing within the submission; this is good for the thing within the submission, for as to that it is final, and void for the residue. Palm. 146. Cro. Jac. 315. 584.

If they arbitrate that all controversies shall cease, except that concerning one bond, this is final; for as to the bond they arbitrate that it shall continue in force. Cro. Jac. 277. 400.

[An award that *A.* should execute a covenant to indemnify *B.* against a *qui tam* action begun at *A.*'s instance in the name of another person, was holden to be good, for it was not in the power of the arbitrators to order the suit to cease, the poor being equally interested in it with the informer; and in this case too the informer was a third person. (*c*) Philips v. Knightley, 2 Stra. 903. 1 Barnard. 84. 151. 387. 457. 463. S. C. Fitzg. 54. 168. 270. (*c*) According to the report by Fitzgib. the informer was the plaintiff in the present action. ‖It appears that *Page* J. dissented from this decision, and all the justices agreed, that if the suit could have been released or otherwise discharged, the award would have been bad. 11 East, 190. n. (a).‖

It is enacted by statute 23 G. 3. c. 58. "that for every piece "of vellum or parchment, or sheet or piece of paper upon which "shall 23 G. 3. c. 58.

" shall be engrossed, written, or printed any award, there shall " be charged a stamp duty of five shillings."]

Brown v. Vawser, 4 East, 584.

‖An award, though under seal, is not a deed unless delivered by the arbitrator as such, and therefore if only delivered as an award, it requires only an award stamp.

However by the last general stamp-act, 55 G. 3. c. 184., the former stamps are repealed, and the same stamp is required upon all awards as upon deeds not requiring an *ad valorem* stamp. This stamp is 1*l.* 15*s.*

Goodson v. Forbes, 6 Taunt. 171. S. C. 1 Marsh. 525.

Where several parties to a reference have a community of interest in the subject matter referred (as in the case of the several underwriters on the same policy agreeing to refer the claims of the assured) the agreement of reference and the award, each only require one stamp.

Preston v. Eastwood, 7 Term R. 95.

The court will not set aside an award for a defective stamp, if no proceedings are taken to enforce it by attachment, for it may be rendered good by affixing a proper stamp, on payment of the penalty.‖

(F) The Construction and Effect of the Award, and herein of the Performance thereof.

2 Brownl. 311. Salk. 69. pl. 1.

AN award, as has been said, is to receive a liberal construction, and to be governed by the intent of the arbitrators, where no inconvenience will ensue; therefore, if the arbitrators award a thing to be done, without saying within what time, the party shall have reasonable time, because they must intend all things necessary to the doing the thing they award.

2 Vent. 249. Roll. Abr. 257. Cro. Jac. 277. Yelv. 205.

If the award be to pay money to *J. S.*, if he dies the money shall be paid to his executors; a submission of all actions, and an award of a release of all actions, except a bond, this is an award that the bond shall stand.

Cro. Jac. 423. Roll. Abr. 250. like case.

An award that one shall enjoy such a house, and pay the rent, else the award for enjoying the house to be void, is a good award; for the award is absolute, unless upon his own fault; and the thing is reserved to the future judgment of the arbitrators.

21 H. 7. 28. Semb.

If a battery is submitted, and the award is, that one shall release, and the other pay him 10*l.*, the release must only be understood of the battery, and must be first performed before the 10*l.* shall be paid.

Moor, 3. Cro. Eliz. 211. *cont.* Cro. Jac. 423.

If an award be, that one shall make a lease to the other, rendering rent, and the lease be made, but the rent not paid, the obligation is not forfeited, for the award did not reach to the payment of the rent, which must be recovered by distress or action of debt; but if the award had been that he should pay the rents at such set times, the obligation would have been forfeited if they had not been paid; and in such case it is a sum in gross, and payable without demand, for the party must offer it to save his obligation.

It

It is an established rule, that an award may be good in part, though void as to other parts of it; and that the party is obliged to perform that which is well awarded, and excused as to that only which is void: but if an award is good as to one party, and void as to what is awarded to the other party, the award is void in the whole. 8 Co. 98. Sand. 52. Roll. Rep. 362. 2 Wils. 267. 293. Roll. Abr. 256. Lev. 58. Leon. 72. Roll. Abr. 244. Hob. 218.

2 Lev. 3. 2 Lev. 413. Cro. Eliz. 758. ‖Fox v. Smith, 2 Wils. 267. Addison v. Grey, 2 Wils. 293.; and see 2 Saund. 293. n. 1. Simmonds v. Swayne, 1 Taunt. 549.‖ [A mistake in matter of calculation, or an unintentional omission, which turns the balance to the other side than that on which it ought to fall, will not vitiate an award *in toto*. Ambl. 245.]

‖For then the one party cannot have the advantage intended for him as a consideration for what he was to do on his part. 2 Saund. 293. b.

And if it appears that the arbitrator has omitted to award upon some matter in difference, this will avoid the whole award; though the mere awarding on something beyond the submission will only render it void for that matter. Ingram v. Milnes, 8 East, 445.

And if an entire sum is awarded, as to part of which the arbitrator has clearly exceeded his authority, the courts cannot apportion the sum, but the award is void *in toto*.‖ Auriol v. Smith, 1 Turner, 121.; but see Bonner v. Charlton, 5 East, 144. George v. Lousley, 8 East, 13.

If the arbitrators award one thing on the one part, and the time expires before they award any thing on the other part, this is altogether void, and contrary to their authority, because it doth not finally determine the things contained in the submission equally on both parts. 36 H. 6. 12. 7 H. 6. 40.

If it be provided by the submission that the award should be notified or delivered to the parties in writing (*a*), it is no award till notified or delivered, because it is not according to the power in the submission. 8 E. 4. 11. 21. 1 H. 7. 5.

(*a*) But if there be no such provision, the parties must take notice of it at their peril; and if they do not the act awarded, it is a forfeiture of their obligation. 8 E. 4. 18. 21. 1 H. 7. 5. 8 Co. 92. b. *Vide* Keilw. 175. *cont.* [But this was not the point on which the judgment turned.]

If several persons of the one part, and several of the other part, submit themselves to arbitrament, provided the arbitrator deliver the award to the parties, or one of them, he is not obliged to deliver the award to one of each party, but it is sufficient to deliver it to any of the said parties. Dyer, 218.

But if two on the one part, and one of the other, submit to an award, *ita quod arbitrium fiat et deliberetur utrique partium prædict.*, the delivery of the award to one on the one part, and to the other of the other part, is not sufficient; for each party is each entire party: for each, by nonperformance, incurs the penalty, and each provides, in order to his performance, that it should be made known to him. 5 Co. 103. Moor, 642. Hungate's case. Cro. Eliz. 885.

If two men submit to an award, so that it be *paratum deliberari partibus* such a day, it need not be averred that it was *paratum deliberari, &c.* at the day, for the publication of the award itself is sufficient. Hard. 399. Cro. Car. 541.

If the submission be general, that the award shall be delivered before such a day, it may as well be delivered by word as by deed; and therefore *non deliberavit in scriptis*, in such case, no good plea. Dyer, 218. Salk. 75. pl. 15. S. P.

Debt

2 Keb. 462. Debt upon an award by word only, is within the statute of 21 Jac. 1. c. 16. of limitations, and must be sued within six years: it is otherwise of an award by specialty.

21 H. 7. 28. b. If there be an obligation to stand to an award, each ought to perform it on his own part, at the peril of his obligation.

If a sum of money be awarded one of the parties, and that they both shall give mutual releases, if he who is to receive the money refuses it; yet, upon a tender and refusal, he is as much obliged to sign a release as if he actually received it. Salk. 75.

4 H. 6. 1. a. 20 H. 6. 12. b. 21 H. 7. 28. 49 E. 3. 3. a. Roll. Abr. 267. *Vide* Salk. 69. pl. 1. 76. pl. 19. Carth. 117. and *quære*. If money be awarded and not paid, the party may either have his first action, or action of debt; for if there be payment, the first wrong was determined; but otherwise he cannot plead the award as a determination and bar of the wrong; for since the award of arbitrators doth not bind any man's property, as judgments at law do, it is fit the party, when he pleads it in bar, should shew an execution at the time appointed.

20 E. 4. 8. As to the performance of the award, if there be no time limited, it is to be performed in a convenient time.

Where the party shall be excused by the act of God, *vide* 21 E. 4. 70. Where the thing awarded to be done, becomes impossible by the act of a stranger, *vide* 2 Mod. 27, 28.

8 E. 4. 10. Though an award cannot be made part at one time and part at another, yet it may be performed part at one time and part at another; for the nature of the thing may require performance at different times and places.

2 Leon. 110. 181. In debt on an obligation for performing an award, by which award the parties were to give mutual releases, the defendant pleaded that he made a release to the plaintiff, and delivered it to *J. S.* for his use; and this was held a good performance of the award, for the defendant could not plead *non est factum*, neither could he countermand it; and as the arbitrators had not appointed any place where the releases should be delivered, if the plaintiff should absent himself, it would be very inconvenient. Cro. Eliz. 54. An award for one party to deliver a release or bond to the other, if that one party delivers it to *A.*, who delivers it to *B.*, who tenders it to the other party who refuses, this is a good performance of the award.

Roll. Rep. 7, 8. 2 Bulstr. 93 to 96. Cro. Jac. 340. [A matter was referred by consent at *nisi prius* to three of the jury, and before the award was made one of the parties served the arbitrators with a *subpœna* out of chancery. If the submission be of a Chancery suit, and the arbitrators award that the suit shall stay, and that one be quit against the other for all matters in the bill, it is sufficient performance to say that the other *stetit quietus*, though he did not procure an actual discharge; but where one by deed is obliged to acquit another of such a debt, or such a suit, it is not sufficient to save him harmless, but he must procure an actual discharge; but the award here being *quod staret quietus*, means no more than that the party should be acquitted by force of the award itself, and not that another discharge should be procured; and in this case if a new bill be exhibited, yet that is no disturbance to incur a forfeiture without process issuing out, as the *subpœna*, for till process the party is not actually molested.

This was holden to be a breach of the rule, and an attachment *nisi* was granted. Salk. 73. Under a rule of court to abide by an award, and not to bring any bill in equity, an award is made, that *A.* shall pay to *B.* 20*l.*: this award *A.* moves the court to set aside; but the court confirming it, he pays the money, and then files a bill: this is a high contempt in *A.* his counsel, and attorney. Rex v. James Wheeler, 3 Burr. 1256.]

2 Bulstr. 96. But if a man submits a rent-charge to arbitration, and the arbitrator

arbitrator award *quod staret quietus* of the rent, he who hath the rent ought to release the same to the other, in performance of this award, for to be quit of the rent supposes the demand not in being. If the award is *quod staret acquietus* from an information, this is not good, unless it be actually released, because the king may prosecute it 2 Bulstr. 96.

If an award be that the plaintiff shall not prosecute or proceed in a suit the same term, the entry of a continuance is no breach of this award, for otherwise the party can never afterwards go on in this action. Cro. Jac. 525. 10 Mod. 204. S. P. If an award be not to continue the suit, if the party continue it by attorney, this is a breach; but if the attorney continue it without his knowledge, it is no breach. Cro. Jac. 525.

If an award order a defendant to re-assign to the plaintiff an estate in mortgage, he is bound to do so without request. [Ld. Raym. 234.

An award that all suits shall cease between *A.* and *B.* does not extend to suits between *A.* on the one side, and *B.* and *C.* or *B.* and his wife on the other, so that the prosecution of such a suit is no breach of the award. 10 Mod. 204. Roll. Abr. 246.

Where an award was that one should make a lease for years to another rendering rent, and the lease was accordingly made, it was holden that the arbitration-bond was not forfeited by the nonpayment of the rent, because the lessor had his proper remedies for that by distress or debt; but if the award had been that the lessee should pay the rent, the bond had been forfeited. So if it be awarded that one shall enter into a bond for the payment of money to another, the entering into the bond is a sufficient performance of the award, nor will the nonpayment of the money, according to the condition of such bond, be any breach of the award. Mo. 3. p. 8. Stra. 903. 1 Barnard. 463.

Where the award orders a release to a time beyond the submission, a release to the time of the submission is a sufficient performance. Baker v. Rochester, 1 Sid. 365. Squire v. Grevell, 6 Mod. 34.

A considerable number of years having elapsed since the making of an award, is no objection to the party being called upon to perform it.] Sweet v. Hole, Ca. temp. Finch. 384.

An award is made to infeoff *J. S.* *J. S.* comes and desires the party to infeoff *J. M.* and him to the use of himself; (and it is done;) this is a good performance of the award, for though the construction of the sense of the award is to be taken on the express words, yet what is a performance of the award is to be taken according to the intent of the arbitrators. 3 Bulstr. 65.

A man cannot plead generally the award performed, but he ought to set forth the award, and therein how he hath performed it. Moor, 5. pl. 9.

(G) Of the Pleadings in Awards.

IF the arbitrators award money to be paid at a day to come, this is a good plea in bar in an action of trespass before the day, because it is *debitum in præsenti*, though *solvendum in futuro*; and 49 E. 3. 3. Roll. Abr. 267. *Note*; There if

is a difference between an accord with satisfaction and an award; for in an accord a man must plead present satisfaction, and it is no plea in bar to plead an accord with satisfaction at a day to come, for in all personal injuries the law gives damages as an equivalent; and when the party acccepts of an equivalent, there is no injury or cause of complaint, and therefore a present satisfaction is a good plea; but where the wrong-doer promises a future satisfaction, the injury continues till satisfaction is made, and consequently there is a cause of complaint in being, and if the trespass were now barred by this plea, he could have no remedy for the future satisfaction, for that supposes the injury still to have continuance; but where persons submit to arbitration, the arbitrators are judges of the injury, and if they award money payable at a day to come, that is a good award, and may be a good plea in bar to an action of trespass brought in the mean time, because this thereby becomes an immediate debt attainable by law. 5 E. 4. 7. Plowd. 5. b.

if a party might have an action of trespass before the day, and recover, he might have an action of debt after the day, and so a double satisfaction for the same thing.

Roll. Abr. 266. Salk. 76. pl. 19.

It was formerly holden, that an award of a release, a horse, a quart of wine, to enter into an obligation, or any other collateral matter in satisfaction, without performance, was no good plea in bar; for were it a good plea in bar, the plaintiff could have no remedy afterwards to compel the party to do the thing awarded, for by the bar the trespass would be nullified.

Carth. 578. between Freeman and Barnard adjudged, Trin. 9. W. 3. Salk. 69. pl. 1. S.C. Ld. Raym. 247. S. C. and the difference there taken, that by awarding a collateral thing to be done, a new duty is raised, and the old discharged, and then it may be pleaded in bar, though not executed; *secus* if a release only be awarded, which created no new duty. *Vide* Carth. 188.

But it has been since holden, in an action on the case upon a special promise made by the defendant to deliver a parcel of hops to the plaintiff on such a day and place, on a certain price agreed on, *&c.* to which the defendant pleaded in bar, that after the promise made, both he and the plaintiff referred all matters, and that the arbitrators awarded that the defendant should release the plaintiff, and that he should release the defendant of all actions and demands whatsoever; and alleged, that from the time of the award hitherto, he was always ready, and yet is, to release the plaintiff according to the award, *&c.* And upon demurrer to this plea, after several debates, it was adjudged, that this award was no bar to the action, because nothing was awarded but only mutual releases from each other, so that the award itself is no bar, but the thing awarded, when executed, would be a bar; and a difference was taken where any thing is awarded in satisfaction, there the award itself is a bar before it is performed; but where nothing is awarded but releases on both sides, there, when the award is executed, the release will likewise be a bar; and the court held, that the defendant may bring his action against the plaintiff for not releasing according to the award, and therein ought to recover all his damages and costs lost in the action against him.

‖And accordingly in a late case it was held, that a submission to arbitration and an award made, was a good plea where the parties have mutual remedies. Gascoyne v. Edwards, 1 Young. & J. 19. See 1 Will. Saund. 324. note (3).

Keilw. 121. Roll. Abr. 267. Dyer, 75. Hob. 49. Raym. 450. Salk. 69. pl. 1. Ld. Raym. 247. Carth. 378.

The above cases must be understood where the action was brought before the time for performing the award was expired; for if an award be to pay money at a day to come, and the money be not paid at the day, and afterwards an action of trespass be brought, this is no good plea in bar, for no man can plead this in bar without shewing he has paid the money; for it is against natural justice to make one default and wrong an excuse for another; but if the party tender it at the day, and the other

other refuse it, then it is a good plea in bar, it being his own fault, and he hath still a remedy for the money.

An award which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand. [Farrer v. Bates, All. 5. Clapcott v. Davy, 1 Ld. Raym. 612.

To an action of trespass a defendant may sometimes plead an award made on submission by the plaintiff and a stranger (*a*): so he may plead (*b*), that the trespass complained of was committed by the defendant and another, and that the matter was afterwards submitted to arbitration by the plaintiff, the defendant, and the other trespasser.

(*a*) 7 H. 4. 31. b. Bro. 44. b. p. 48.
(*b*) Thomlinson v. Arriskin, Com. Rep. 328.

To a plea of an award, the plaintiff may reply that the subject matter of his action was not included in the reference, though the terms of such reference were general, of all matters in difference, and the cause of action was in point of fact subsisting at the time of the reference.] 4 Term R. 146. ‖See Mitchell v. Staveley, 16 East, 58. Simmonds v. Swaine, 1 Taunt. 549.‖

If in an action of debt upon an award, the plaintiff declares that the arbitrators did make an award that the defendant should pay unto the plaintiff 10*l.*, this is a good declaration, though nothing is shewn to have been awarded on the other side; for it is sufficient for the plaintiff to set forth that part of the award which entitles him to his action: and if the defendant will impeach the award for any thing, he must shew it specially on his own part. Leon. 72. That the plaintiff may declare that *inter alia* it was awarded. Lit. Rep. 312. Sid. 161. Contr. 366. [In an action on the award itself it is necessary to set out in the declaration only so much as is sufficient to support the plaintiff's case: but in an action of debt on the arbitration bond, the whole demand must be set out at length, though *Holt* C. J. thought, that even in this case the omission of that which is void would not be material. 1 Burr. 278. 1 Salk. 72. There is this difference again between actions on the award itself, and actions on the arbitration bond: in the former case the plaintiff must state a mutual submission; in the latter, it is unnecessary, for by oyer it appears on the face of the condition, and the plea of *nul agard fait* admits it. 2 Stra. 923.]

In an action of debt upon a bond conditioned for the performance of an award, the defendant pleaded that the arbitrators did make an award that the defendant should pay to the plaintiff 3100*l.*, and should give to the plaintiff a general release, and pleaded that he had paid the money and given a release accordingly, but did not shew what on the part of the plaintiff was awarded to be done; and the plaintiff replied without shewing the other part of the award in his replication, and took issue that the defendant had not paid the money; and the defendant put in an insufficient rejoinder, upon which the plaintiff demurred; and *per cur.* the plaintiff cannot have judgment, because the award as set forth and agreed in pleading is void (*c*); but if the plaintiff would have helped himself, he ought to have shewn the other part of the award before he had taken issue. Sand. 326. Veal and Warner; but the court would not give judgment for the defendant, but suffered the plaintiff to discontinue, because they apprehended it to be only a trick in the pleading, for which the chief justice reprehended *Sanders*, who excused himself by reason of the severity of the award. 2 Keb. 568. S. C.

‖(*c*)) However, it does not seem clear that the award as set forth would now be held bad. See Serjt. Williams's note on the subject, 1 Saund. 327. a. (5th edit.) and the cases there cited.‖

If in debt upon an obligation conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*; and Yelv. 152. Cro. Jac. 220. Sand.

102. S. P. *arguendo, vide* Stile, 439. where it is said that the plaintiff can assign only one breach.

the plaintiff replies, and shews the award, he must also shew the breach, without which he hath no cause of action, for the obligation is guided by the condition; and though the defendant can make no answer to the breach, yet it ought to appear to the court that the plaintiff hath cause of action.

‖The doctrine in the text is recognised by *Holt* C. J. in 1 Salk. 138. and in Shelly v. Wright, Willes R. 12. The want of assigning a breach in case of an award is matter of substance, and bad on general demurrer. Hob. 198. 233. So if a bad breach be assigned, Com. Dig. Pleader (F), 14. and not aided after verdict, Hob. 198. Yelv. 153.; and yet the breach when assigned is not issuable or traversable, nor can the defendant give any answer to it; for the plea, as between the parties, has an issue before, and the breach is but an excrescency or surplusage. Hob. 198. 233. Yelv. 153.; for any answer to the breach must necessarily admit the existence of the award, and, consequently, be a departure from the plea. Sir T. Ray. 94. 1 Mod. 227. 1 Lev. 245. Though Serjt. Williams, 1 Saund. 103. note (1), lays it down that on this issue of *nul tiel agard* the defendant may shew the award to be void, yet the better opinion seems to be that he cannot. 1 Salk. 72. 1 Will. Saund. 327. b. *notis.* If the replication set out the whole award and it be void in law, the defendant should demur; if it set out only a part, omitting that which makes the award void, the defendant should set out the whole in his rejoinder and demur. Fisher v. Pimbley, 11 East, 188.‖

Sid. 290. (*a*) So if the defendant pleads a release. Brownl. 90. Yelv. 79.

But if in debt upon bond to perform an award, and *oyer* of the condition, the defendant pleads *non submisit*, the plaintiff need not assign a breach (*a*), for the defendant puts the whole stress of his cause upon a matter antecedent to the alleging of a breach; for, if there be no submission, there could be no award, and consequently no breach of it.

Leon. 304. Owen, 153. S. C. adjudged by three judges against] two, who held that the plaintiff should have shewn the whole award, and thereupon the law would have adjudged one part void, and not to be done. Leon, 140. S. C.* (*b*) So if the award be, that the defendant, together with a stranger, shall enter into a bond, in the assignment of a breach the plaintiff must not say that the defendant and stranger did not enter into a bond, for though both did not, yet the defendant alone might enter into bond. Godb. 165. [If an award be good in part, and bad in part, it is sufficient to assign a breach in that part which is good. 2 Wils. 293.]

If in debt upon an obligation conditioned for the performance of an award, the defendant shews that the arbitrators did make an award, that the defendant before such a day should pay to the plaintiff 100*l.*; or otherwise should procure one *A.*, being a stranger, to be bound to the plaintiff for the payment of 12*l.* per annum to the plaintiff for his life; and the defendant pleads that he hath performed the said award, and the plaintiff replies, that the defendant hath not paid the said 100*l.* without saying, nor hath procured *A. &c.*, yet this is a good replication; for the award as to that part is merely void, and therefore the plaintiff need not take notice thereof. (*b*)

* It would have been better if the plaintiff had shewn that neither the one thing nor the other had been done.

2 Wils. 267. Fox v. Smith. 293. Addison v. Gray.

[Where an award was that the defendant should pay to the plaintiff 16*l.* 10*s.*, and all such costs, charges, and expenses as the plaintiff had been put unto in a cause then depending between them, and that thereupon they should execute mutual releases, it was holden that the breach was properly assigned in the nonpayment of the 16*l.* 10*s.* only; for that the bond was forfeited by the breach of any one part of the award; and the recovery in this action would be a bar to any future action brought on the bond for the costs, *&c.* when ascertained.]

2 Brownl. 137.

In an action of debt upon an award, it is not necessary for the

the plaintiff in his declaration to lay time or place where the award or submission were made (*a*); but if the defendant denies either, the plaintiff may reply, that the award or submission was made at such a place.

(*a*) But where an award is pleaded in bar of a trespass, a place must be laid where the submission was made. Cro. Eliz. 66. The plaintiff need not set forth the *profert in curia*, because it is no deed. Stile, 459. ‖The execution of the submission by all parties must be proved. Ferrer v. Oven, 7 Barn. & C. 427.‖

[To a plea of *nul agard* the plaintiff replied that an award was made after the execution of the bond, and before the exhibiting of his bill (to wit) on, *&c.* in the condition mentioned. It was adjudged on a special demurrer, that the time of making the award is positively enough alleged under the *scilicet*, and that the defendant might have taken issue upon it. Bissex v. Bissex, 3 Burr. 1730.

In debt on an award to pay so much money and to execute mutual releases to the date of the arbitration-bond, judgment will not be arrested, because it does not appear upon the record that there was any arbitration-bond, though this perhaps may be a good objection at the trial. Bell v. Simpson, 2 Wils. 10.

In debt upon bond conditioned to perform the award of *J. S.*, so as it be made in writing under his hand and seal, *&c.* it is not sufficient for the plaintiff in his replication to state that *J. S.* made his award in writing, and to set it out; but he must shew that it was under his hand and seal, pursuant to the terms of the submission.] Henderson v. Williamson, 1 Stra. 116.

If there be a submission to the award of *J. S.*, so that the said award be made under his hand and seal, on or before the 5th day of *September* following, ready to be delivered at the shop of *J. N.* in the *Exchange*, *London*, and in an action of debt upon an award made thereupon, the plaintiff declares that the said *J. S.*, under his hand and seal, the fourth day of *September* following, *apud Castrum Eborum*, did make an award *ad tunc et ibidem parat.* to be delivered at the shop of the said *J. N.* in the *Exchange*, *London*; this is no good declaration, for the parties are not bound to take cognizance of the delivery elsewhere than at the place appointed. Cro. Jac. 577. By two judges against the chief justice, who held the publication there, and allegation that it was ready to be delivered at the said shop in *London*, was well enough; but it was adjourned. 2 Roll. R. 193. S. C. adjourned. 3 Mod. 331. S. C. cited as if adjudged. *Vide* 2 Lev. 68. Ld. Raym. 533.

If in debt upon an obligation conditioned for the performance of an award, so as, *&c.* the defendant pleads no award made, and the plaintiff replies, that *ante exhibitionem billæ*, *scilicet* the 24th of *June*, (which was a day within the submission,) the arbitrators made an award, *&c.* and the defendant demurs generally, the plaintiff shall have judgment; for though the plaintiff ought to have replied, that the arbitrators made their award before the day limited to them, yet this is form only, and helped by a general demurrer. Sid. 370.

But no action will lie upon the arbitration-bond, if it appear that the award was made after the time limited in the bond, though such time were enlarged by the mutual consent of the parties. [Brown v. Goodman, E. 29 G. 3. 3 Term R. 592. n.]

‖Unless the time be extended by an instrument under seal. Greig v.

Talbot, 2 Barn. & C. 188.

For where a bond was conditioned for performance of an award, to be made before the 1st of *February*, and by a deed-poll under seal, the parties gave further time to the arbitrators to make their award until the 1st of *March*, and the award was made before the latter day, it was held on demurrer, that an action was maintainable on the bond for nonperformance of this award, the terms of the deed-poll being a new defeasance to the bond, substituted for that in the bond itself. In *Brown* v. *Goodman*, it did not appear that the new agreement was by deed.‖

3 Mod. 330. 11 Mod. 170. 12 Mod. 234. 317. Ld. Raym. 115. 247. 533. 989. Lutw. 524. But for this, *vide* letter (F), *suprà*.

If in debt upon a bond conditioned for the performance of an award, so as it be made, *&c.* and ready to be delivered to the parties, or to such of them as shall desire the same; the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff replies, and sets forth the award, and shews a breach, but doth not say that it was ready to be delivered to the defendant, yet this is a good replication; for when the award is made, it is ready to be delivered to the parties, or to such of them as desire it, so that it must be desired; and if denied, the party may plead that matter specially.

2 Vent. 242. Harson and Liversey.

If in debt upon an obligation conditioned for the performance of an award in writing, or by word of mouth, the defendant pleads no award made, and the plaintiff replies, that at the time of the bond and award he had an action against the defendant for scandalous words, and that the arbitrator *ore tenus* did declare and publish his award in manner following, *viz.*, that the defendant should pay to the plaintiff *twelve guineas*, and all such money as he had expended *circa prosecutionem placitat. præd. &c.* this is a good award, and well set forth, although the award doth not mention any suit before; for he that sets forth a parol-award is not tied to the very words (*a*), but it is sufficient to shew the effect and substance of what was awarded by word of mouth.

(*a*) But if the award had been in writing in such form of expression, it had not been good. 2 Vent. 242. agreed *per curiam*.

Lee v. Elkin, Lutw. 545.

[An award was that the defendant should pay to the plaintiff 11*l.* on or before the 7th day of *May*, and the breach assigned in that the defendant did not pay the said 11*l. secundum formam et effectum arbitrii prædicti*: and the court held it to be well enough, though they said that it would have been more correct to have assigned the breach in the very words of the award.]

Moor, 3. pl. 9.

A man cannot plead generally the award performed; but he ought to set forth the award (*b*), and shew how he hath performed it.

(*b*) But if an award be to pay the rent mentioned in such an indenture, the defendant in pleading performance need not set forth the indenture, but refer generally to it. 1 Vent. 87. But if it be to be paid in such manner and at such times as is expressed in the indenture, then it must be set forth at large. Vent. 87. So if an award be to pay money given by will. Vent. 87.

8 Co. 82.

In pleading a countermand to a submission to arbitration, it need not be alleged that the party gave notice to the arbitrators, for without that it is no countermand; and therefore, if no notice be given, issue may be joined upon the point *quod non revocavit*.

If

If the submission be by word, though the award be by deed, the party may wage his law (*a*); for though a deed cannot be dissolved without deed, yet a verbal contract may be dissolved by word only; and this in its original is a verbal contract.

Co. Lit. 295. 2 Sand. 65. (*a*) And therefore an action of debt will not lie against the administrator, whose intestate was party to such an award. Cro. Eliz. 600.

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff sets forth an award with a *profert in cur.* and the defendant craves *oyer*, and then demurs for variance between the award set out in the replication and the *oyer*, and the variances appear material, the defendant must have judgment; otherwise, if the variance had been as to those parts in which the award was void; and though in debt on an award, the plaintiff need not set forth more than makes for him (*b*), yet it is otherwise in debt on a bond, for there the plaintiff must reply the whole award; and if such replication be without a *profert*, the defendant may reply *nul tiel agard.* (*c*)

Salk. 72. pl. 9. Ld. Raym. 715. 12 Mod. 534. Foreland and Marygold adjudged. (*b*) Sid. 161. Lev. 162. *Vide* Lit. Rep. 313. Burr. 278. ‖See 2 Will. Saund. 62 e.‖ (*c*) *Vide* Stile, 459., where it is said, that the plaintiff need not set forth a *profert* thereof *in curia*, because it is no deed. But it is the safest way.

If an award be made, that certain buildings erected on a wharf, which were a nuisance to the plaintiff, should be pulled down within thirty-eight days from the date of the award, *&c.* and upon *nul agard* pleaded, the plaintiff sets forth an award, but without date; yet this is well enough, for the date shall be computed from the making of the award, as a deed takes its date from the delivery, though actually dated on another day.

Salk. 76. pl 18. 2 Ld. Raym. 1076. 6 Mod. 244. Arnitt and Breame.

An award may be pleaded to a bill to set aside the award, and open the account (*d*); and it is not only good to the merits, but likewise to the discovery sought by the bill. (*e*) But if fraud or partiality are charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer, shewing the arbitrators to have been incorrupt and impartial. (*g*)

[Mitf. Eq. pl. 209. (*d*) 2 Atk. 295. 501. (*e*) 3 Atk. 529. 644. (*g*) 2 Atk. 396. 501.

A mere agreement to refer matters to arbitration, where no actual reference has taken place, or is depending, will not oust the jurisdiction of any court, either of law or equity.

Kill v. Hollister, 1 Wils. 129. Mitchell v. Harris, 2 Ves. jun. 129. 4 Bro. Ch. R. 311. S. C. Wellington v. M'Intosh, 2 Atk. 569. *Vide* Halfhide v. Fenning, 2 Bro. Ch. R. 336. *contr.* ‖Thompson v. Charnock, 8 Term R. 139. *accord.*; and it seems no action can be maintained for refusing to nominate an arbitrator according to such an agreement. Tattersall v. Grote, 2 Bos. & Pull. 131. And a court of equity will not decree a specific performance of such an agreement. Price v. Williams, cited by Lord *Eldon*, 6 Ves. 818. The case of Halfhide v. Fenning, *supra*, has been much questioned by Lord *Loughborough* in Mitchell v. Harris, 2 Ves. jun. 129., where his lordship over-ruled a similar plea pleaded to a bill for discovery *only*, the bill in Halfhide v. Fenning being for *discovery and relief*; and also by Lord *Eldon* in Street v. Rigby, 6 Ves. 815. And it seems that such a plea is not now sustainable either to a bill for discovery, or for discovery and relief. In one case, however, respecting the management of the Italian Opera House, the Court of Chancery refused to interfere till the parties had proceeded to a reference, on the ground of the peculiar nature of the subject, and the anxious provisions of the partnership deed for deciding all differences by arbitration. Waters v. Taylor, 15 Ves. 10.‖

[(H) In what Cases the Performance of an Award may be compelled by Attachment, and the Course of Proceeding to be taken in order to obtain it.

THE submission to arbitration being made a rule of court, an attachment is granted against the party refusing to perform the award, as for a contempt of that court of which the submission is a rule.

Edgell v. Dallimore, 5 Bing. 634.

‖If an award finds a debt, but contains no order to pay it, there is no contempt in not paying the money, and an attachment will not be granted.‖

Rex v. Myers, 1 Term R. 266.

The attachment in this case is only in nature of a civil execution, and therefore cannot be executed on a *Sunday*.

Walker v. Earl Grosvenor, 7 Term R. 171. Catmur v. Sir E. Knatchbull, *id.* 448.

‖And for the same reason, an attachment will not be granted against a peer or a member of the House of Commons, although they consent that it should issue.

Hopcraft v. Fermor, 1 Bing. 378.

The court will grant the attachment, though the party may be out of the jurisdiction, and the award and rule of court have been served out of the jurisdiction.‖

Robins v. Sayward, Stra. 441.

But the attachment is so far criminal, that the motion for it cannot be grounded on the affirmation of a Quaker.

‖But it seems now otherwise, since the attachment is regarded as civil process. Taylor v. Scott, cited Cowp. 394. Willes R. 292. n. (b).‖

1 Keb. 130. 138. 559. 1 Sid. 452. Sir T. Raym. 35. 152. 2 Keb. 22. 645. 1 Chan. Cas. 185. Hales v. Taylor, 1 Stra. 695. Stock v. De Smith, Cas. *temp.* Hardw. 106. Perry v. Nicholson, 1 Burr. 278. 1 Cr. Pr. 272. (1st edit.)

The courts of law were for some time rather scrupulous about interposing in this summary way in order to enforce obedience to awards; though the courts of equity, where the submission was under one of their rules, made no difficulty in doing it. And an attachment is not at this time what the party applying for it is entitled to *ex debito justitiæ*, but it is entirely in the discretion of the court whether to grant it or not; and therefore they have refused it where there hath been contrariety of evidence, or the case hath been a hard one, or the person against whom it hath been moved hath been a bankrupt, and incapable of paying the money awarded.

Davila v. Almanza, 1 Salk. 73. pl. 10.

If one of the parties revoke the submission, or hinder the arbitrators from proceeding in the award, the court will grant an attachment. (*a*)

‖(*a*) But not unless the submission has been made a rule of court before the revocation, otherwise there is no contempt. Milne v. Gratrix, 7 East, 608.; and see 1 Bing. R. 88. 6 Bing. 445.; but the party may have his action. 5 East, 266. 5 Barn. & A. 507.‖

1 Bing. R. 410.

‖The courts will grant an attachment where the nonperformance is either nonpayment of money or not executing any collateral matter.

1 Bos. & Pull. 93.

So also for nonpayment of costs awarded, and even for not paying the arbitrator the costs of the award.

Tidd's Prac. 888.

So also for not paying the share of the costs of the award to the other party who has paid the whole to the arbitrator.

So

So also for commencing a suit in equity contrary to the award. 5 Burr. 1526. 1 Marsh. 66.

But if it be doubtful whether the award be good or not, the court will not enforce it by attachment, but will leave the party to his action. 2 Dow. & Ry. 222.

A bankrupt cannot be attached for a demand due on an award before his bankruptcy, since it might be proved: and if he has been attached, and afterwards becomes bankrupt, the court will discharge him. Stra. 1152.

But if costs are awarded to be paid by him before his bankruptcy, but not taxed till afterwards, the bankrupt is liable to be attached for them, since they were not a debt proveable till taxation.‖ 9 East, 318.; and see 7 Barn. & C. 706.

If the party dies, there is no remedy by attachment against his representatives, for the contempt dies with him. Webster v. Bishop, 2 Vern. 444. Paterson v. Gross, 2 Barnard. 227. ‖Willes R. 315.‖ And therefore the court will not stay proceedings in an action upon the submission bond, or upon the award, though the party be in custody on the attachment. But they will not grant an attachment, unless under some very particular circumstances, where an action hath been already commenced. And if the defendant be taken in execution on a judgment, the attachment will be discharged. Stock v. De Smith, Cas. temp. Hardw. 106, 107.

Richardson v. Chancey, 1 Barnard. 386. ‖Badley v. Loveday, 1 Bos. & Pull. 81.‖

If exceptions are made to the award, though it be affirmed, an attachment will not be granted; for the nonperformance of it, whilst the matter was *sub judice*, was no contempt. Morris v. Reynolds, Salk. 73. pl. 11. 2 Ld. Raym. 857. S. C.

‖Where there appeared to be objections to the award which were pleadable to any action brought upon it, though not such as to induce the court to set it aside, they refused to grant an attachment.‖ In re Cargey, 2 Bing. 199. 9 Moo. 38.

The defendant, a feme sole, and the plaintiff agreed to a reference. The defendant was awarded to deliver up two notes, and pay a sum of money; she married, and her husband refused to pay; and it was a question, Whether the court could grant an attachment against both or either of them? Anon. *B. R.* 1 Cr. Pr. 272. (1st edit.) ‖See 5 Ves. 848. 3 P. Wms. 189.‖

The course of proceeding in order to obtain an attachment is this: the award must be tendered to the party against whom it is intended to move, and if he refuse to accept it, affidavit of the due execution of the award, and of such tender and refusal, must be made, and on that an application to the court to make the order of *nisi prius* a rule of court; a copy of this rule must then be served on the party refusing to accept the award: if he still refuse to accept it, an affidavit must be made of personal service of the rule, and of the disobedience to it; and then, upon application, grounded upon that affidavit, an attachment will be ordered. Kyd on Awards, 216. 1 Cr. Pr. 271. (1st. edit.)

When the award is accepted, but the money being demanded is not paid, an affidavit must be made of the due execution of the award, and of the demand and refusal of the money. But Kyd, 216. ‖Dodington v. Hudson, 1 Bing. 410.‖

Longman v. Holmes, 2 Black. R. 990.

a demand of the money made by a third person authorized so to do, by indorsement on the award unstamped, is sufficient without any warrant of attorney.

Brandon v. Brandon, 1 Bos. & Pull. 394.

‖A personal demand is necessary to ground an attachment, although a specific time and place are appointed for doing the act, and the demand (if of money) must be made of the exact sum due.

Strutt v. Rogers, 7 Taunt. 216.

And if a part of the sum is well awarded, and a part ill awarded, a demand of the whole will be insufficient.

Whitehead v. Firth, 12 East, 167.

But if the demand is confined to that part which is well awarded, the court will grant an attachment for so much.

Brander v. Penleaze, 5 Taunt. 813. *In re* Bower, 1 Barn. & C. 264.; and see 1 Chitt. R. 170.

The courts will not infer personal knowledge of an award from circumstances, in order to bring the party into contempt; but if personal knowledge is brought home to the party, this appears sufficient without a regular personal service.

Davis v. Vass, 15 East, 97. Wohlenberg v. Lageman, 6 Taunt. 251.

If the arbitrator has enlarged the time for making his award, and made it within the enlarged time, it is not enough that this is stated in the award, but the fact must be verified by affidavit, and it must also appear by affidavit, that the party against whom the attachment is sought had notice of the enlargement duly served on him.

Halden v. Glasscock, 5 Barn. & C. 390.

Where a cause is referred by a judge's order, made by consent of parties, and the time for making the award is also enlarged by a judge's order, it must be shewn on moving for an attachment, that the order enlarging the time was made by consent of parties, for otherwise the judge had no authority to make it.

Dickins v. Jarvis, 5 Barn. & C. 528.

But if the arbitrator has authority to enlarge the time by indorsement on the order of reference, and that order, together with two indorsements, is made a rule of court, it is not necessary, on moving for an attachment, to shew that the indorsements were duly made.

Handley v. Hemington, 6 Taunt. 561. S. C. 2 Marsh. 276.

Where, according to the terms of the award, something is to be done by one party previous to the performance by the other, the performance of such condition precedent, or a tender and refusal, must be shewn before the one party can obtain an attachment against the other for nonperformance of the award.

Pedley v. Goddard, 7 Term R. 73. Randall v. Randall, 7 East, 81. Mitchell v. Staveley, 16 East, 58.

If the award appear on the face of it to be bad for uncertainty, or not being final, or not embracing all matters within the submission, the court will not enforce performance of it by attachment, and it would seem that the court would refuse an attachment, if it appeared by affidavit that the arbitrator had omitted to award on a matter within the submission, and which was brought before him, since this would be a defence to an action on the bond or award, or an objection to the award, if the award were offered in evidence in bar of an action.

7 Term R. 73.

But corruption or misconduct on the part of the arbitrators, cannot be shewn for cause against the motion for an attachment.

If

If if be doubtful on the affidavits, whether the party has committed a contempt, the court will not grant the attachment. *In re* Cargey, 2 Dow. & Ry. 222.

It is no answer to the application for the attachment, that the party was proceeding to pay the money under the award, when it was attached in his hands by a foreign attachment from the sheriff's court of *London*; for the arbitrator's award is in fact like a judgment of the court, and the payment of the money under the attachment would be an answer to the proceeding in the sheriff's court.‖ Caila v. Elgood, 2 Dow. & Ry. 193.

Where the submission is made a rule of court, the award becomes so of course, and therefore the motion for an attachment is the next immediate step. 1 Salk. 71.

If the submission to the award be made a rule of court under the statute, the affidavit on which to move for an attachment need not be entitled in any cause, but those in answer must be regularly entitled. Bevan v. Bevan, 3 Term R. 601.

If the time limited by the submission expire without any thing being done, and a reference to a second arbitrator be submitted to, such submission must be made a rule of court, and must be by the parties to the record, else the court will not interpose by attachment. For the court cannot in such a case enter into the merits of the award, though with the consent of the parties, for there is a nullity of jurisdiction. Owen v. Hurd, 2 Term R. 643.

Where on a reference at *nisi prius* the plaintiff takes a verdict by consent for security(*a*) he may, upon an award being made in his favour, either enter up judgment on the verdict, and take out execution for the sum awarded, if it do not exceed the sum for which the verdict was taken, or apply to the court for an attachment. But he cannot enter up his judgment without the leave of the court, and for this purpose he must have an affidavit of the due execution of the award, and the demand and refusal of the money awarded, in like manner as on a motion for an attachment. (*b*) Kyd, 216.

‖(*a*) If the defendant has been held to bail, a verdict should be taken on a reference of the cause at *nisi prius*, otherwise the bail are discharged. 2 Saund. 72.

b. n.; but it is otherwise with respect to the sureties in a replevin bond. Moore v. Bowmaker, 6 Taunt. 379. 7 Taunt. 97. Where a verdict is taken for a certain sum, subject to the award of an arbitrator, he has no authority to award a larger sum; and if he does the award is bad, even to the extent of the verdict. Bonner v. Charlton, 5 East, 139. And the Court of K. B. refused to increase the verdict on affidavit that a larger sum was expected to be proved before the arbitrators; but *Ellenborough* C. J. seemed to think that as all matters in difference were referred, the arbitrators might, perhaps, award beyond the verdict as to the additional matters. Pearse v. Cameron, 1 Maule & S. 675.; and see Prentice v. Reed, 1 Taunt. 151.‖ (*b*) Forster v. Brunetti, 1 Salk. 84. Read v. Garnett, Barnes, 58.

‖But it is now held that this is unnecessary, and that the party may proceed to enter up judgment, and take out execution for the sum awarded, without any application to the court. Lee v. Lingard, 1 East, 405.

And this may be done without personal service of the award, but a rule for judgment must be first given. Borrowdale v. Hitchiner, 3 Bos. & Pull. 244. Hayward v. Ribbans, 4 East, 310.

And if a day is fixed for payment of the money under the award, execution must not be sued before that day. Callam v. Patterson, 4 Taunt. 319.

If a verdict is not taken at the trial, and the arbitrator do not expressl Grundy v.

Wilson, 7 Taunt. 700. Peters v. Anderson, 1 Marsh. 278.; and see 1 Chitt. R. 284.

expressly award one to be entered, the court has no authority to direct it, though the award decides the issues in the cause, nor can they order a nonsuit to be entered, unless the arbitrator direct it.

Woolley v. Clarke, 1 Barn. & C. 68.; *sed vide* 4 Moo. R. 300.

Where a verdict was taken subject to a reference to a barrister, and the arbitrator having been engaged in the cause declined to go into the case, the court gave liberty to the plaintiff to proceed to judgment and execution, unless the defendant would name another arbitrator.‖

Robinson v. Davis, 1 Stra. 526.

Upon an affidavit that the original award was lost by coming up in the *Bristol* mail, which was robbed, an attachment was moved for upon a copy of it, and granted *nisi*.

Knox v. Simmonds, 3 Bro. Chan. R. 561.

Where a reference has been submitted to under an order of the Court of Chancery, Lord *Thurlow* seemed to think, that the proper motion was not for an attachment, but that the party refusing to perform the award, should stand committed. And notice of such motion must be personal, not on the clerk in court. However nothing was done in that case, nor is the practice by any means settled.]

(I) Of compelling Performance of an Award by Bill in Equity.

Hall v. Hardy, 3 P. Wms. 189, 190.

WHERE the award is to pay a sum of money, it is said that a bill in equity to compel performance is improper: but where it is to do any thing in specie, a court of equity will sometimes lend the aid of its decrees to enforce the execution of it.

1 Chan. R. 86.

And a bill in general will lie for performance, either where the award hath been made under a submission entered into by order of the court, or where, though the submission be voluntary or

2 Chan. R. 304.

the award defective in circumstances, the parties have long acquiesced in it, or it has been in part executed.

3 P. Wms. 189, 190.

A court of equity will decree a specific performance of an award for conveying an estate, where the defendant hath received the consideration-money for doing it.

2 Vern. 24. 2 Chan. R. 304.

On a submission by bond, an award was made, not binding by form of law, by which the plaintiff was to pay the defendant 900*l.* and to seal a release to him; and the defendant was to assign several securities he had from the plaintiff. The plaintiff sold some lands to raise the 900*l.* expecting the defendant to receive it, as he gave him intimation he would, and tendered him the 900*l.* and a release executed by the plaintiff; and though there was no other execution on the plaintiff's part, and though the award was extrajudicial, and not good in strictness of law, yet the Lord Chancellor decreed it should be performed in specie.

Wood v. Griffith, 1 Swanst. R. 45.

‖The performance of an award is compelled in equity, on the ground that the award only ascertains the terms of a previous agreement between the parties, and although the court will not decree

decree the execution of illegal acts directed by the award, yet, if the acts are legal, the court will not enquire into their reasonableness, since it considers the determination of the arbitrator as conclusive, as the judge chosen by the parties. See Blundell v. Brettarch, 17 Ves. 242.

Specific performance cannot be decreed of an agreement to sell at a price fixed by arbitrators, where the vendor refused to execute the arbitration-bond, and it was therefore uncertain that any award would ever be made. Wilks v. Davis, 3 Meriv. 507.; and see Gourlay v. Somerset, 19 Ves. 431.

Where there is a palpable objection on the face of an award, the court may refuse to enforce it, but they cannot set it aside after the time limited by the statute has elapsed. ‖ Auriol v. Smith, 1 Turn. & R. 125.

On a bill of review to reverse a decree confirming an award, the plaintiff assigned for error, that the cause was referred to four commissioners, and but three certified; that a lease which he then insisted upon, was not in issue in the cause; and that he never consented to the certificate. But, notwithstanding these objections, as the decree had been acquiesced in sixteen years without any attempt having been made to impeach it, the court refused to reverse it. 1 Chan.R. 139.

Though a court of equity will not hold a defendant to an award, where the plaintiff hath neglected to perform his part within the time limited by the terms of it; yet if the defendant after such time accept part performance from the plaintiff, in that case a performance on his part to the extent of what he has accepted from the plaintiff will be decreed. Ca. temp. Finch, 22. ‖See Coote v. Jackson, 6 Ves. 12. Milnes v. Gery, 14 Ves. 400. Blundell v. Brettarch, 17 Ves. 242.‖

A. and *B.*, copartners, submitted differences between them to arbitration, and it was awarded that a part of the stock in trade should be deposited in the hands of a third person, part thereof to be delivered from time to time to either party who should pay any debt due from the partnership estate, the quantity to be in proportion to the money so paid by him. A moiety of the stock so deposited was afterwards taken in execution by separate creditors of *A.* as his property; upon which *B.*, the other partner, and the partnership creditors, filed a bill to set aside the execution, and to have the moiety of the stock so seized appropriated to the payment of their debts, insisting that it was specifically bound by the award and the execution. But Lord *Hardwicke* dismissed the bill, because the partnership creditors were not parties to the submission, or at all privy to the transaction, or under any obligation of abiding by the award. Thompson v. Noel, 1 Atk. 62.

Nor will a bill in equity lie to carry into execution an award on a voluntary submission, unless there has been an acquiescence in it by the parties to the submission, or an agreement by them afterwards to have it executed. *Ibid.*

(K) In

(K) In what Cases, when, and in what Manner Awards may be relieved against.

Wills v. Maccarmick, 2 Wils. 148.

WHEN an award is put in suit at law, no extrinsic circumstance, nor any matter or fact *dehors* can be given in evidence to impeach it: if it be open therefore to any objection of this kind, the defendant must apply for relief either to a court of equity by bill, or, if the submission has been made a rule of any court of law, to the summary and equitable jurisdiction of that court of which submission has been made a rule.

Braddick v. Thompson, 8 East, 344. Grazebrook v. Davis, 5 Barn. & C. 534.

‖The cases in the margin decide that partiality and improper conduct of the arbitrator cannot be made a defence on *nil debet* pleaded to an action on the award, nor can such matter be pleaded to an action on the arbitration-bond.

Cargey v. Aitcheson, 2 Barn. & C. 170. 2 Bing. 199. S. C. Fisher v. Pembley, 11 East, 188.

But if it appear on the face of the award, when set out on the record, that the award is bad, as being not according to the terms of submission, or as being uncertain, or not final, this may be made a ground of defence to the action upon it, either by demurring to the declaration if the whole award is set out, or by setting it out in any subsequent pleading, and demurring to its effect.

Mitchell v. Staveley, 16 East, 58. Ingram v. Milnes, 8 East, 445.

And so also it may be pleaded as a defence, where the reference is of all matters in difference, that other matters in difference were brought before the arbitrator, but that he made no award on them, since this avoids the award *in toto*.

Reeve v. Farmer, 4 Term R. 146.

And this defence may be shewn in evidence, if the award is given in evidence, without being pleaded; and in answer it may be shewn that the arbitrator had no notice of the other matters, and he may be called as a witness to prove this.‖

2 Ves. 315. 1 Atk. 64. 1 Salk. 73.

These objections being in general founded on the mistakes or misconduct of the arbitrators, who are judges chosen by the party himself, are received by the courts at first with a degree of caution and reserve: though, if made out to their satisfaction, relief is certainly afforded.

2 Vern. 705.

On a bill in equity, to set aside an award, Lord Chancellor said, that if it appears that the arbitrators went upon a plain mistake, either as to the law or the fact, the same is an error appearing on the face of the award, and is sufficient to set it aside: *aliter*, on a doubtful point of law, though the court on deliberation should be of a different opinion.

3 Atk. 495.

Hanson v. Liversedge, 2 Vent. 242. Young v. Walter, 9 Ves. 364. Chace v. Westmore, 13 East, 357. Sharman v. Bell, 5 Maule & S. 584.

‖The ordinary rule of the courts is, that on a general reference involving questions of law and fact, the parties constitute the arbitrator judge of the law between them, and the award shall not be set aside on the ground of a mistake in the law, unless it appears on the face of it that the arbitrator intended to decide according to law, and mistook it, in which case the award is not in effect his award, since he would not have made it had he known the law correctly.

Wohlenberg v. Lageman, 6 Taunt. 251. Campbell v. Twemlow, 1 Price, 81. Price v. Jones, 2 Young & J. 114.

Thus,

Thus, where it was referred to arbitrators to distribute the personal property of an intestate, and it was objected to their award that they had not followed the statute of distributions, the court directed the arbitrators to make affidavit whether they had intended to follow the statute in their award, or to decide merely according to equitable circumstances; and the arbitrators swearing that they had not conceived themselves bound by the fixed rule of law, but had decided according to the supposed intention of the intestate, the court discharged the rule for setting aside the award. Aynsley v. Goff, Kyd on Awards, 351.; and see Ching v. Ching, 6 Vesey, 282.

And so, also, if a mere unmixed question of law is referred to a professional arbitrator, the court will not disturb the award, unless an illegality appear on the face of it. Cramp v. Symons, 1 Bing. R. 104. Price v. Hollis, 1 Maule & S. 105. Steff v. Andrews, 2 Madd. R. 6.

Where, however, it appears on the face of the award that the arbitrator has decided contrary to law, the courts are bound to take notice of the objection, and to set aside the award. Cornforth v. Green, 2 Vern. 705.

Thus, where the arbitrator awarded a sum due from the plaintiff to the defendant for a moiety of losses paid by defendant on policies underwritten in partnership between plaintiff and defendant, the court set aside the award *pro tanto*, this part of the award appearing on the face of it to be illegal. Aubert v. Maze, 2 Bos. & P. 371. Ames v. Milward, 2 Moo. R. 715.

So, also, where it appeared by a paper containing his reasons, delivered with the award by the arbitrator, that he had decided on grounds contrary to law, the court set aside the award. Kent v. Elstob, 3 East R. 18.

But where no objection appears on the face of the award, and the arbitrator gives no explanation of the reasons of his decision, it is not sufficient to shew by affidavit facts which only raise an inference that the award was made upon an erroneous view of the law. Delver v. Barnes, 1 Taunt. 48.

And where the point of law is not clear and settled, the court will not set aside the award on an objection to the arbitrator's law. Ridout v. Pain, 3 Atk. 494.

Thus, where the captain of a vessel, at an intermediate port on the voyage, had sold certain goods of the charterers, to defray necessary repairs of the vessel, at a higher price than they would have fetched at the port of destination, and an arbitrator, to whom disputes between the charterers and the owner were referred, gave credit to the charterers for the full price obtained, and not for the price which would have been obtained at the port of destination, the court refused to set aside the award, since the legal question had never been decided. Richardson v. Nourse, 3 Barn. & A. 237.

And an arbitrator is not bound by a mere rule of practice, adopted by the courts for convenience, and not being a general rule of law. Therefore, if he allow interest in account where the courts of law and equity would not do so, it is no ground for impeaching his award. *In re* Badger, 2 Barn. & A. 691.

Though in general the courts will not set aside an award for a mistake in law, unless it appear on the face of it, yet it seems that in case of a decision perversely wrong the court would correct it, though the objection appeared by matter *dehors* the award, and

and more respect is shewn to the award of a legal arbitrator than of an ordinary individual on a matter of law.

Chace v. Westmore, 13 East, 357.

In a case above referred to, Lord *Ellenborough* C. J. said, "there was a great difference in these cases, in considering the "object of the reference and the description of the person to "whom the decision is confided by the parties. In ordinary "cases, where questions of fact are referred to one who is sup- "posed to be competent to deal with such questionss, though "not with questions of law, and a question of law happens to "arise on which he decides in a manner disturbing the whole "justice of the case, the court will enter into the enquiry, and "correct what was erroneous in the decision. But where a "doubtful question of law arises, it often happens that on such "very account they agree to refer to the arbitrament of a gentle- "man of the profession, meaning to refer the decision of the "law to him, and to abide by his determination of it:" and this doctrine was confirmed by his Lordship and the Court in *Sharman* v. *Bell*, 5 Maule & S. 584.: — "Where the merits "both in law and fact are referred to an arbitrator of common "knowledge, as we must presume a gentleman at the bar to be, "and there is not any question referred by him, the court will "not open the award, unless something can be alleged amount- "ing to a *perverse misconstruction* of the law, or misconduct on "the part of the arbitrator."

Ives v. Metcalf, 1 Atk. 62. Anon. 3 Atk. 644. Knox v. Simmonds, 1 Ves. jun. 369. Morgan v. Mather, 2 Ves. jun. 18.

So, also, where there is a mistake *in fact* apparent on the face of the award, or clearly appearing by affidavits, and admitted by the arbitrator (which is absolutely necessary, and Lord *Thurlow* always required his affidavit), the courts of equity will relieve against the award, or courts of common law, wherein the reference is a rule of court, will set it aside.

Anderson v. Darcey, 18 Ves. 449.

Rogers v. Dallimore, 6 Taunt. 111. Anon. 2 Chitt. R. 44.; *sed vide* Champion v. Wenman, Ambl. 245. Payne v. Bailey, 3 Brod. & Bing. 304.

Thus, in a case where the arbitrator awarded 41*l.* to the plaintiff, and afterwards discovered he had made a numerical mistake, and that his award should have been for 61*l.*, and gave notice of this error to the parties, on a motion to set aside the award the Court of Common Pleas said they would make the rule absolute, or send the matter back to the arbitrator, on which the defendant's counsel consented to amend the award by increasing the sum to 61*l.* The courts, however, have no authority to send the matters back for reconsideration, without consent of all parties; but in a late case, where the defendant refused this, the court, at the instance of the plaintiff, set aside the order of *nisi prius* for the reference, and the verdict and award.

Gordon v. Mitchell, 3 Moo. 241.

Where the award has a clear meaning on the face of it, the court will not allow affidavits of the arbitrator as to his intention in making it, to be read, in order to raise an ambiguity.

Pinkerton v. Caslon, 2 Barn. & A. 704.

Where an agreement stipulated that in case of breach of it the sum of 100*l.* should be received as a stipulated debt binding on each party, and an action of debt was brought for general

ral damages for breach of the agreement, and was referred to an arbitrator who awarded only 10*l.* damages, it was held that, in order to entitle the party to set aside this award, the affidavits must expressly state that this clause was pointed out to the arbitrator, and that he was required to act upon it.‖

Where it appeared that the arbitrator had made his award, notwithstanding he had been desired by one of the parties to postpone it till he could satisfy him as to some facts which the arbitrator had conceived to be against him, Lord *Talbot* set the award aside. 3 P. Wms. 362.

So where the objection was that a part of the evidence had been shewn only to one of the arbitrators, and not to both, and the arbitrator to whom it had not been shewn, swore, that he believed if he had seen it his award would have been different from what it was, Lord *Hardwicke* declared the award for that reason void. 2 Atk. 64. Kyd, 240.

So where one of the arbitrators has had an interest in the matter in controversy, or has been related to one of the parties; or where two of the arbitrators have by fraud or force excluded a third; or where they have heard one party, and refused to hear the other; or have chosen an umpire by lot; in all these cases the awards have been relieved against. 2 Vern. 251. 485. 514.

‖So if the arbitrator decide on his own view, without calling the parties before him (*a*), or if he make his award without fully hearing all the evidence which can be offered on both sides (*b*), unless indeed the parties assent to the case being closed (*c*); or if he examine a party (*d*) or a witness (*e*), in the absence of the opposite party (unless in the case of mercantile arbitrators, where this is frequently the practice (*g*),) although the arbitrator may make oath that such private examination had not influenced his judgment (*h*); these will, in general, be grounds for setting aside the award. But the award will not be set aside because the witnesses were not examined on oath, unless an objection were made on that ground at the time of the examination (*i*); nor on the ground of one of the witnesses being examined by the arbitrator after the evidence was closed on both sides, and the opposite attorney gone, unless the re-examination were brought about by management of the attorney for the party (*k*); nor because it was drawn by the solicitor of one of the parties, though such a circumstance is highly indelicate. (*l*)‖

(*a*) 2 Chitt. R. 44.
(*b*) 1 Bing. R. 384. 5 Barn. & C. 534.
(*c*) 1 Marsh. 404.
(*d*) 8 Taunt. 694. 3 Barn. & C. 590.; but see 12 Ves. 412.
(*e*) 4 Moo. 148.
(*g*) 1 Ryan & Moo. N. P. C. 18.
(*h*) 6 Ves. 70.
(*i*) 1 Bos. & Pull. 91.; *sed vide* 4 Price, 232.
(*k*) 1 Bos. & Pull. 175.
(*l*) 9 Ves. 69.

If one of the arbitrators use any expressions towards either party, which discover bias or prejudice in his mind, a court of equity will set aside the award, though there be nothing to impeach the conduct of the other arbitrator who joined with him in it. 2 Ves. 515.

Where the servant of an umpire had given out, before the time allowed the arbitrators to make their award was expired, that he was sure his master would give so much, and he afterwards did give so much, which was more than was awarded by either of the arbitrators; the court looked upon this as evidence of fraud and corruption, 2 Vern. 100.

corruption, and therefore decreed the arbitration-bond to be delivered up.

Ward v. Periam, 1720, cited by Ld. *Hardwicke* in 2 Ves. 316.

Where an award was made a rule of the Court of K. B., and on a motion on one hand for an attachment, and on the other to set aside the award, that court refused to interfere, and left the plaintiff to his remedy at law on the submission-bond, Lord *Macclesfield* considered this as a bare bond of award without being made a rule of court, and that therefore, as the one party was taking relief by his action, the other was entitled to take relief by bill in equity.

2 Atk. 155.

A bill was filed to set aside an award which had been made a rule of the Court of K. B. for corruption in the arbitrator; the defendant pleaded the award, and submitted to amend any errors. Lord *Hardwicke* said, that the K. B. was the proper court to examine into the corruption and partiality of the arbitrator; but as the answer was very loose and general, and there was an express submission to amend any errors, he ordered the plea to stand for an answer, with liberty to except.

Ambl. 245.

On a bill in equity to set aside an award, the court will not let the party go into any legal objections, except for partiality and corruption; but if the bill is for an account, and prays to set aside an award, there, in order to let in such account, the plaintiff may make legal objections.

Cas. temp. Hardw. 54.

Where the arbitrators took money of one of the parties alone for their charges without any bill delivered, and before the making of their award, Lord *Hardwicke* thought this a sufficient reason to set the award aside; for, if suffered, it would be hard to distinguish what is corruption.

2 Atk. 395. 501. 3 Atk. 529. 644. Mitf. Eq. Pl. 209.

If a bill to set aside an award for partiality or corruption be filed against arbitrators, the charges of partiality must not only be denied by way of averment in the plea; but the plea must be supported by an answer shewing the arbitrators to have been incorrupt and impartial.

2 Atk. 396.

But where the arbitrator has accepted of the office upon condition that the parties should undertake not to bring any bill in equity against him, but a bill is afterwards brought against him, and corruption and partiality are charged, the court will order his name to be struck out from being a party.

Andr. 299.

The misconduct of the arbitrators cannot be urged in answer to a motion for an attachment, but is a ground upon which to move to set aside the award.

Harrison v. Grundy, 2 Stra. 1178.

A motion to set aside an award under the statute, cannot be received till the submission is made a rule of court; and a consent in the submission-bond to make the award a rule of court, instead of the submission, it hath been adjudged, will not warrant the court's interposition. But see *Barnes*, 55. *supra* (B).

Freame v. Pinneger, Cowp. 23.

A motion to set aside an award under the statute for corruption must be made before the last day of the next term after the award is published, else it is too late, and an attachment for nonperformance may issue.

So,

So, a motion to refer back such an award to the arbitrator, though there be no charge of corruption, but merely upon the ground that he had not before had sufficient materials, must be made before the last day of the next term. 2 Term R. 781.

It was holden by Lord *Talbot* that in awards under the statute the confirmation of the submission must precede the making of the award; but this hath been over-ruled; and properly enough, for it may happen that the award may be made in the vacation, and before any term after the submission. 5 P. Wms. 362. 1 Barnard. 152. Kyd, 235.

The statute of W. 3. being made to put arbitrations where no cause was depending upon the same footing as those where there was one, and being only declaratory of what the law was in the latter case, it seems to follow, that objections which arise upon the face of the award may be made at any time; and that the limitation to the second term is confined merely to such objections as affect the conduct of the arbitrators. 2 Burr. 701. Barnes, 56, 57. *Id.* 55. *cont.* ‖It is now settled otherwise, and applications to set aside awards within the statute must be made within the time limited, although the objection appears on the face of the award. Zachary v. Shepherd, 2 Term R. 781. Lowndes v. Lowndes, 1 East R. 276. Where the submission is not within the statute the court are not absolutely limited as to the time for receiving an application to set aside the award; but they will in general cases guide their discretion by the rule laid down by the statute. Anderson v. Coxeter, 1 Strange, 301. Rogers v. Dallimore, 6 Taunt. 111. The time limited by the statute does not apply to awards made under orders of *nisi prius*. Synge v. Jervoise, 8 East, 466. Where an award within the statute was made after the essoign day, but before the *quarto die post*, it was held to be made *within* the term, so that a motion to set it aside might be made at any time before the last day of the term next following. *In re* Burt, 5 Barn. & C. 668. Where a cause is referred by order of *nisi prius*, a motion to set aside the award must be made within the time allowed for moving for a new trial, unless a sufficient reason for delay be shewn. Rawsthorn v. Arnold, 6 Barn. & C. 629.‖

It was formerly holden, that on a submission by consent under an order of a court of equity, exceptions might be made to the award, as to a master's report. But Lord *Thurlow* disapproved of this practice, conceiving that if it lay open to exceptions, it seemed rather a reference than an award: that the proper way is to move to set aside the award; and the topics in the exceptions will apply to such a motion. Cressly v. Carrington, 1 Vern. 409. 1 Chan. Ca. 186. Hide v. Cooth, 2 Vern. 109. Woodbridge v. Hilton, 1 Bro. Chan. R. 398. Price v. Williams, 3 Bro. Chan. R. 164. It is admitted that exceptions will lie to an award; but they must be only to such matters as appear on the face of the award, not to the facts in the award, or any matter *dehors*: an objection of that nature must be made upon motion to set aside the award, supported by affidavit. Dick v. Milligan, 4 Bro. Chan. R. 117.

To a bill in the Exchequer, to set aside an award for undue practice, the defendants pleaded (among other things) that the submission was made a rule of the Court of King's Bench, and that there had been no application to that court pursuant to the statute of 9 & 10 W. 3. A question therefore arose upon the statute, Whether a court of equity were not precluded from examining into the award? The Lord Chief Baron and Baron *Comyns* were of opinion that it was not, (the time in *B. R.* being elapsed,) but Baron *Carter* that it was, Baron *Hale dubitante*. At last the whole court agreed, that the plea should stand for an answer, with liberty of excepting to it. Bunb. 265. 1 Barnard. 75. 152.

A bill in equity will not lie against an arbitrator for a discovery 3 Atk. 644.

covery of the grounds upon which he made his award; but if there be any palpable mistake, or miscalculation, the party aggrieved may bring his bill against the party in whose favour the award is made, to have it rectified.]

Doe v. Brown, 5 Barn. & C. 384. 8 Dow. & Ry. 100.

‖Where an award is void, and nothing can be done upon it without suit, the court will not interfere to set it aside, because such a suit must fail. But where a cause is referred by order of *nisi prius*, and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered, although such award be void, (being made after a revocation of the submission,) yet the court will set it aside; for otherwise the party in whose favour the award is made will have judgment on the verdict, without any new proceeding to enforce the award.

Kennard v. Harris, 2 Barn. & C. 801.

A party, after receiving the costs of reference and award, which, by the terms of a rule of reference, are to be paid by the other party, cannot move to set aside the award.

Reg. K. B. Easter T. 2 G. 4. 4 Barn. & A. 539. See 6 Barn. & C. 629. 11 Price, 57.

Where a rule to shew cause is obtained in the Court of King's Bench, to set aside an award, the several objections intended to be insisted on at the time of making such rule absolute must be stated in the rule to shew cause. And the rule is the same in the Court of Exchequer.‖

ASSAULT AND BATTERY.

(A) What shall be said to be an Assault.

(B) What shall be said to be a Battery.

[(B 2.) In what Manner they are to be charged.]

(C) In what Cases they may be justified, and what Pleas may be pleaded to them, and of the Manner of setting forth the Justification.

(D) In what Manner they are to be punished.

(A) What shall be said to be an Assault.

Pulton, 4. a. 6 Mod. 173. 2 Roll. Abr. 545. Vent. 256. Hawk. P. C. 263.

AN assault is an attempt or offer, with force and violence, to do a corporal hurt to another, as by striking at him with or without a weapon, or presenting a gun at him at a distance to which the gun will carry, or pointing a pitch-fork at him, standing within the reach of it, or by holding up one's fist at him, or by drawing a sword and waving it in a menacing manner.

But

But if *A.* lays his hand on his sword, and says, that *if it were not assise time I would not take such language from you*; this is no assault, for it is plain he did not design to do him any corporal hurt at that time, and a man's intention must operate with his act in constituting an assault. Mod. 3. 2 Keb. 545. S.C. 10 Mod. 187. Law of Evid. 235. pl. 60. Gilb. Law of Evid. 256.

[The act of criminal conversation with another man's wife is an assault; force and violence being supposed in law to accompany this atrocious injury to the husband, in respect of whom the consent of the wife is as nothing.] 2 Salk. 552. 7 Mod. 81.

It seems agreed, that at this day no words whatsoever, be they ever so provoking. can amount to an assault, notwithstanding the many ancient opinions to the contrary. (*a*) Hawk P. C. 263. (*a*) But if very provoking language is given, without reasonable cause, and the party offended is tempted to strike the other, and an action brought, and the general issue pleaded, few juries would give damages to carry costs, and few (if any) judges would certify.

Every battery includes an assault; therefore, if the defendant be found guilty of the battery, it is sufficient. Salk. 384. pl. 56. Hawk. P. C. 263.

(B) What shall be said to be a Battery.

ANY injury whatsoever, be it never so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law. 6 Mod. 149. 172. Mod. 3. 3 Lev. 404. Hawk. P.C. 263. [And the act causing the injury need not proceed from the *immediate* assault of the defendant; as where the defendant threw a lighted squib into a market-place, which being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye; it was adjudged that this was actionable as an assault and battery. *Per* three justices, *cont. Blackstone* J. Scott v. Shepherd, 2 Black. R. 892. 5 Wils. 403. S. C. So if a person pushes a drunken man against another, and hurts him. Short v. Lovejoy, *coram Lee* C. J. Guildhall, 1752. Bull. Ni. Pri. 16.]

But to lay one's hands gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is not a battery. 2 Roll. Abr. 546. Hawk. P. C. 264.

So if two by consent play at cudgels, and one happens to hurt the other, as their intent was lawful and commendable, in promoting courage and activity, it does not seem to amount to a battery. Dalt. c. 22. Bro. Coron. 229. [But see the case of Boulter v. Clarke, at *Abingdon* Assises *coram Parker* C. B. who held that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful. Bull. Ni. Pri. 16. (4th edit.) So if one license another to beat him, such licence is no defence, because it is against the peace. Matthew v. Ollerton, Comb. 218.]

So if one soldier hurts another by discharging a gun in exercise, this cannot amount to a battery, though if it be done without sufficient caution, he is liable to an action at the suit of the party injured. Hob. 134. 2 Roll. Abr. 548. [Nothing but inevitable necessity shall excuse a trespass. Dickenson v. Watson, Sir T. Jones, 205. Underwood v. Hewson, Stra. 595. Raym. 467. 2 Black. R. 896.]

So if by a sudden fright a horse runs away with his rider, and runs against a man, it is no battery, and this may be given Gibbons v. Pepper,

4 Mod. 405. 2 Salk. 637. S. C. 1 Ld. Raym. 38. S. C.

in evidence on the general issue: but if it were occasioned by a third person whipping the horse, such person would be the trespasser.]

[(B 2.) In what Manner they are to be charged.

Michell v. Neale, Cowp. 828. ‖English v. Purser, 6 East, 395. *acc.* In these cases the declaration alleged that the defendant on divers, &c. *made an assault*, but an allegation that the defendant on divers days, &c. *assaulted* is good. Burgess v. Freelove, 2 Bos. & Pull. 425.‖

THE declaration cannot lay the assault on a day certain, and *on divers other days and times:* for an assault is one entire individual act, and cannot be laid with a *continuando:* and upon such a declaration the defendant could not prepare himself with a defence, because he could not know whether the plaintiff meant to go for one or twenty assaults.

Amyon v. Shore, 1 Stra. 621. (*a*) White v. Shaw, 2 Wils. 203. Douglas v. Hall, Barnes, 360. 1 Wils. 99.

In the King's Bench, where the action is by bill, the offence should be charged positively, and not by way of recital, with a whereas, *&c.*: but this is not material in the Common Pleas (*a*), for in that court the writ being set out in the declaration helps the want of a positive averment.

Newman v. Smith, 2 Salk. 642. ‖The plaintiff could not maintain an action for the personal injury to the servant, which was all that was alleged in the declaration in 2 Salk. 642.; but he may sue for the loss of service with a *per quod servitium amisit*, and may join a count of this sort with counts for an assault and battery of himself. Ditcham v. Bond, 2 Maule & S. 436.; and see Cro. Jac. 501.‖

The plaintiff may lay in his declaration many things in aggravation, for which he himself could not maintain an action; as "for making an assault upon his servants."

Russel v. Corne, 1 Salk. 119.

2 Stra. 1094.

In an action by husband and wife for a battery on her, *per quod* the husband's business remained undone; on motion in arrest of judgment, the declaration was holden good, because the battery itself is actionable, and the *per quod* only aggravation; and *Holt* said he would not intend the judge suffered that to be given in evidence.

Westbrooke v. Strutville, 1 Stra. 79.

The defendant gave in evidence that he was married to the plaintiff; and to encounter that evidence the plaintiff was permitted to prove that she had another husband living when she married the defendant.]

Wilson v. Edwards, 3 Barn. & C. 34. 5 Dow. & R. 622.

‖Where two defendants were held to bail for an assault and battery, and the plaintiff declared against one only, it was held that he might to do so.‖

(C) In what Cases they may be justified, and what Pleas may be pleaded to them; and herein of the Manner of setting forth the Justification.

Vide Hawk. P. C. 259. 26. and several authorities there cited. [(*b*) Where de-

IF an officer having a warrant (*b*) against one who will not suffer himself to be arrested, beat or wound him (*c*) in the attempt to take him, he may justify it. So if a parent, in a reasonable manner chastise his child, or a master his servant, being actually in his service at the time, or a schoolmaster his scholar,

scholar, or a gaoler his prisoner, or even a husband his wife; or if one confine a friend who is mad, and bind and beat him, *&c.* in such a manner as proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently lay his hands on another, and thereby stay him from enticing a dog against a third person; if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land (*d*) or goods, or of the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him and disturbing him; or if a man beat, wound, or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger; in these cases it seems the party may justify the assault and battery. (*e*)

fendant justifies under a sheriff's warrant, the production of it is not required, for it must be returned to the sheriff. Bateman v. Woodcock, Cro. Jac. 372.

(*c*) But a battery cannot in this case be justified by the *mere arrest:* the defendant must either plead that he gently laid his hands on the plaintiff in order to arrest him, and that he actually did arrest him; as in Patrick v. Johnson, 2 Lutw. 927. 3 Lev. 403. though that way of pleading has been doubted of; or that the plaintiff made resistance, and was going to rescue himself, and by reason thereof he beat him in order to secure him: for though an arrest implies an assault, yet it does not admit a battery; and further, an officer cannot justify beating a man without resistance. Truscott v. Carpenter, 1 Ld. Raym. 229. Williams v. Jones, Cas. temp. Hardw. 298. 2 Stra. 1049. S. C. (*d*) Where the injury is a mere breach of a close in contemplation of law, the defendant cannot justify a battery *without a request to depart;* but it is otherwise where any actual violence is committed, for there it is lawful to oppose force with force. Green v. Goddard, 2 Salk. 691. 2 Inst. 316. Seaman v. Cuppledick, Owen, 150. [Therefore a plea justifying beating and wounding the plaintiff by way of *molliter manus imposuit* to turn the plaintiff out of defendant's house is bad. Gregory v. Hill, 8 Term R. 299. But if the plea state that the plaintiff forcibly and with strong hand endeavoured to break and enter defendant's close, it may justify beating and bruising the plaintiff in defence of possession. Weaver v. Bush, 8 Term R. 78. The defendant cannot justify an assault in throwing water on the plaintiff in order to hinder the plaintiff from proceeding in obstructing an ancient window of the defendant. Simpson v. Morris, 4 Taunt. 821.] (*e*) So a churchwarden may justify taking off the hat, or laying hands on a person who is disorderly in church, and turning him out for disturbing the congregation; but it must be by a *molliter manus imposuit:* Howe v. Planner, 1 Saund. 13. So the defendant may justify even a *maihem,* if done by him as an officer in the army for disobedience of orders, or other military offence; and he may give in evidence the sentence of a council of war upon a petition against him by the plaintiff; and if by their sentence the petition was dismissed, it will be conclusive evidence in favour of the defendant. Lane v. Degberg, H. 11 W. 3. *per Treby* C. J. Bull. Ni Pri. 19.]

And on an indictment the party may plead not guilty, and give the special matter in evidence; but in an action of trespass he must plead it specially. (*g*)

6 Mod. 172.

[(*g*) Matter of excuse may in such case be either pleaded, or given in evidence under the general issue; but matter of justification must be always pleaded. Bull. Ni. Pri. 17. Co. Lit. 282. b. But where in an action for an assault and false imprisonment against the captain of a ship, who pleaded *not guilty;* the defendant cross-examined the plaintiff's witnesses as to expressions used by the plaintiff, which would have justified the imprisonment, they tending to create mutiny and disobedience; though this evidence was objected to, yet the judge admitted it, holding *what was said at the time* to be good evidence in mitigation of damages; for every thing which passed at the time was part of the transaction on which the plaintiff's action was founded, and therefore he could not be surprised by the evidence. Bingham v. Garnault, *coram Buller J. London,* 1788. Espin. Ni. Pri. 517.]

[It is no plea that the defendant hath been convicted on an indictment for the same assault, and paid a fine to the king; for this suit is instituted for the private redress of the party injured. So *vice versâ.*]

Bull. Ni. Pri. 16. 1 Stra. 68.

[And an action is maintainable for damages after the de-

Crosby v. Leng,

 fendant

12 East, 409. fendant has been *acquitted* on an indictment for the assault, unless the plaintiff is shewn to have colluded in procuring the acquittal.‖

Blake v. Grove, 1 Sid. 175. 1 Keb. 761. S. C. In trespass for assault and battery, the defendant justifies by a *molliter manus imposuit*, for due correction as his servant, and pleads over, that since the time the plaintiff *exoneravit et relaxavit* (without saying *per scriptum*) to the defendant the said matter: to this plea it was specially demurred for doubleness; and the opinion of the court was, that it was double; for though the release be not sufficiently pleaded, yet it is pleaded so as issue may be taken upon it, which will make it double.

Fetter v. Beale, 1 Salk. 11. [A former recovery is a good plea, notwithstanding subsequent damages: for the consequence of the battery is not the ground of the action, but the measure of the damages.

Yelv. 68. So, if a battery be committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action for the same battery brought against another.

St. 21 J. 1. c. 16. Blackmore v. Tidderly, 2 Salk. 423. The defendant may plead *not guilty within four years* next preceding the commencement of the suit; but *not guilty within six years* will be bad. (*a*)

‖(*a*) Only if objected to by special demurrer. Macfadzen v. Olivant, 6 East R. 387.‖

Co. Litt. 282. ‖2 Sand. 5. b.‖ See the stat. 7 Jac. 1. c. 5. which empowers justices of the peace, &c. to plead the general issue, and give the special matter in evidence. This being a transitory action, in which the time or place are merely inducement, the place cannot be traversed without special cause of justification, which extends to some certain place, as if a constable of a town of another county arrests the body of a man that breaketh the peace there, he may traverse the county, but he must not rest there; he must traverse all other places, saving in the town whereof he is constable.

Gibbon v. Pepper, 2 Salk. 637. Ld. Raym. 38. S. C. If the defendant *justifies* the assault and battery, he must *confess* it; or, on demurrer, the plaintiff shall have judgment.

Pendlebury v. Elmott, Cro. Eliz. 268. Truscott v. Carpenter, 1 Ld. Raym. 229. *Son assault* goes to the whole declaration; but a justification in any other way applies only to those parts, which it particularly takes notice of, and is therefore bad; nor will a general traverse as to the rest supply the omission. Jerome v. Phear, Cro. Eliz. 93.

Dr. Groenvelt v. Dr. Burwell, 1 Ld. Raym. 472. To the *vi et armis*, battery, and wounding, the defendant pleaded not guilty; and as to the *residue*, justified; it was objected, that here was no answer to the assault: but the objection was over-ruled, for the residue includes the assault.

Barfoot v. Reynolds, 2 Stra. 953. So in the case of a wife in defence of her husband. Leward v. Basely, 1 Ld. Raym. 62. In an action against a servant, if he pleads a justification in defence of his master, he must plead it thus: "That the plaintiff would have beaten his master if he had not interposed, "*prout ei bene licuit.*" For the servant can only strike to prevent an injury, not by way of revenge; and therefore where the servant pleaded, "That the plaintiff having assaulted the master "in his presence, he, in defence of his master, struck the plaintiff," the plea was holden ill on demurrer; for the assault on the master might be over when the servant struck the plaintiff.

The

The plea of *son assault* admits an assault; and therefore where the memorandum was generally of the term, and the plaintiff, on the defendant's failure in his plea, went on and proved an assault on a day within the term, the court held it well enough; for it was unnecessary for him to give any evidence at all, unless to aggravate damages; and he shall not be nonsuited, because it is amendable by a new bill. If this come out on the defendant's evidence, who has otherwise proved his plea, the defendant ought to have a verdict, unless plaintiff prove another battery previous, which in such case ought to be deemed the foundation of the suit.] Hay v. Kitchin, 1 Wils. 171. S. C. 2 Stra. 1271. by the name of Guy v. Kitchiner, Bull. Ni. Pri. 17.

‖If the defendant, in pleading a justification to a declaration for several different assaults, first aver that they are one and the same, and the plaintiff then takes issue on the substance of the justification, the case is confined by the pleadings to only one assault, and the plaintiff cannot give in evidence a second. But it seems to be the better opinion, that such an averment of identity is bad if demurred to.‖ Gale v. Dalrymple, 1 Ry. & Moo. Ca. 118.

In an action of battery, the defendant pleads that he was master of a ship, and that the plaintiff being his carpenter and servant in the ship, neglected his duty, and gave him saucy language, and that therefore *moderatè castigavit*; plaintiff replies *non moderatè castigavit*, and issue joined, and verdict for the plaintiff; and in arrest of judgment it was insisted, that *moderatè castigavit* was not a pertinent negative, the proper issue being *immoderatè castigavit*; but the court held it well enough, especially after verdict. Sid. 444. 2 Keb. 623. Vent. 70. S. C. Aubre and James.

In an action of assault and battery, and wounding, it was laid with a *mutilavit et sinistr. brach. fregit ita quod usum sinistri brachii amisit:* to this the defendant pleaded *de son assault demesne*; and on demurrer it was shewn for cause, that this being a heinous battery, and amounting to a mayhem, he should have shewn to the court that the assault was with such violence, that he could not otherwise have defended himself but by maiming the plaintiff; and the pleading should have been, that the plaintiff *mayhemasset et vulnerasset* the defendant *nisi, &c.* But the court held the plea good; and that it was matter upon evidence, whether the assault were proportionable to the battery; for if it were not, the issue would be for the plaintiff, although the plaintiff did make the first assault; for every assault will not justify every beating; but it must be such a one as may draw a probable danger and fear upon the person upon whom it is made. Sid. 246. Keb. 884. 921. S. C. between Danny and Lucy. Cockcroft v. Smith, Ld. Raym. 177. 2 Salk. 642.

In assault, *&c.* the defendant pleaded *son assault demesne*, and the plaintiff replied, that he was standing at his gate, and that the defendant being on horseback, offered to ride over him, whereupon he *mollitèr* assaulted the plaintiff in defence of himself, *quæ est eadem, &c.*; and on demurrer to this replication it was adjudged to be ill, because he thereby had confessed that he had made the first assault; for he should have pleaded *mollitèr manus imposuit* to hinder the riding over him. Lev. 282. Sid. 441. Mod. 56. 2 Keb. 597. S. C. between Jones and Tresilian.

Taylor v. Markham, Cro. Jac. 224. Yelv. 157. S.C. 1 Brownl. 215. S. C.

[In assault and battery, the defendant pleaded that he was seised of the rectory of *D.* in fee, and that the corn was severed from the nine parts, and for that the plaintiff would have carried away his corn, he stood in defence thereof, and kept the plaintiff from carrying it away; so that the harm which the plaintiff received was of his own wrong, *&c.* The plaintiff replied *de injuriâ suâ propriâ absq. tali causâ;* and, upon demurrer, the replication was holden to be good, because the plaintiff claimed nothing in the land or corn, but only damages for the battery, which is collateral to the title; and therefore a general replication was good; for in a mere assault and battery, the possession only can be material; but it is otherwise when the right may come in question.

Shingleton v. Smith, 2 Lutw. 1481.

To a plea of *son assault*, the plaintiff replied that the defendant attempted with his whole force to beat and wound a horse which the plaintiff had in his care; and that in defence of the horse he laid his hands upon the defendant, *prout ei bene licuit:* this replication was adjudged insufficient; for it ought to have alleged that the defendant had actually beaten the horse before the plaintiff laid his hands upon the defendant; as in the plea of *son assault*, in which the defendant always alleges that the plaintiff made an assault upon him, before he says that he defended himself, *&c.*

King v. Tebbart, Skin. 387. S. C. Comb. 227. by the name of King, v. Peppard. ‖That a justification of

A *mollitèr manus imposuit* will include a battery where the cause is sufficient; for to lay hands on another, against his will, is a battery: it will not indeed be a defence for a wounding: but if the battery be so outrageous, that a *mollitèr manus imposuit* is not true, it ought to be specially shewn by the plaintiff, ‖by a new assignment,‖ else it shall be a good justification.

'assaulting, seizing, and grasping," and so also of "ill-treating," admits a battery, see Smith v. Edge, 6 Term R. 562. Johnson v. Northwood, 7 Taunt. 689. 1 Moo. R. 420.‖

Ibid.

Where to a plea of *son assault*, the plaintiff replies *mollitèr manus imposuit*, and the parties agree in the time, there is no occasion for an averment that it is the same trespass, *&c.*]

Phillips v. Howgate, 5 Barn. & A. 220.

‖Where the declaration alleges an assault and imprisonment, and that during the imprisonment the defendant struck and pulled about the plaintiff, and the defendant justifies the assault under process of arrest against the plaintiff, and goes on to justify the striking the plaintiff by reason of his violent conduct, and in order to prevent his escape, and the plaintiff replies *de injuriâ*, &c. the defendant on this issue is bound to prove the whole facts alleged in justification; and if he fail in proving the plaintiff's violent conduct, the plaintiff is entitled to judgment.

Morrow v. Belcher, 4 Barn. & C. 704.

Where the plaintiff declared against three for a joint assault and battery, and two of them pleaded not guilty, to which the *similitèr* was added, and the third justified in defence of his freehold, to which the plaintiff replied, that he used more force than was necessary for defence, a rejoinder by all the defendants, that they did not use more force than was necessary, was held bad, and the plaintiff's replication good.‖

For

For damages in this action, see tit. "DAMAGES," (D)(E); and for costs, tit. "COSTS," (B) 3.

(D) In what Manner they are to be punished.

EVERY person guilty of an assault or battery, is subject both to an action at the suit of the party, wherein he shall render damages, *&c.* and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. Hawk. P. C. 264. A defendant is not to be held to special bail, unless the battery be grievous; in which case the writ may be marked for special bail. Carth. 278. An action of assault and battery is within the statute, which gives no more costs than damages. Vent. 256. For the penalty for assaulting a servant of a knight or burgess in parliament, *vide* the statute 5 H. 4. c. 6. For punishing those who assault any coming to parliament, or to the king's council, 11 H. 6. c. 11. Concerning an assault on a privy counsellor in the execution of his office, 9 Ann. c. 11. For which *vide* tit. *Felony*. For beating or challenging to fight for money won at play, 9 Ann. c. 14. and tit. *Gaming*. For the offence of assaulting in a church or church-yard, see 5 & 6 E. 6. c. 4. And that churchwardens who whip boys for playing in the church, or put off the hats of those who sit there with them on, or who gently lay their hands on an excommunicated person to turn him out, are not within the statute. Sand. 13, 14. Sid. 501. For striking within the king's palace, see Hawk. P. C. 86.

‖And if a party proceed both by action and indictment, the court will not compel him to make his election: and it is discretionary in the Attorney-General whether he will, on application, grant a *nolle prosequi* to the indictment.‖ Jones v. Clay, 1 Bos. & Pull. 191.

ASSIGNMENT.

AN assignment is the transferring and setting over to another of some right, title, or interest in things, in which a third person, not a party to the *assignment*, has a concern and interest. How far the privity of contract is destroyed by the assignment, and what remedies the parties may have against each other, is set down under the head of *covenants*; and therefore I shall here only consider,

What Things are assignable.

A POSSIBILITY, right of entry, or thing in action, or cause of suit, or title for a condition broken, cannot be granted or assigned over by law; for if this were permitted, it would promote maintenance, and prove prejudicial to such as, being able to contend with those with whom the original contract was, might find themselves depressed by a powerful adversary. Co. Lit. 214. Roll. Abr. 376. Skin. 6. pl. 7. 26. pl. 1. [But all rights, titles, and actions may be released to the terretenant, for this prevents suits and contentions. Lampet's case, 8 Co. 48. a.]

But

Co. Lit. 232. But though a bond, being a *chose in action*, cannot be assigned over so as to enable the assignee to sue in his own name (*a*), yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it.

(*a*) And by the modern practice he may sue for it in the name of the obligee, as his attorney; but there should be an express authority inserted in the assignment. [The king was always an exception to this rule, and his assignee may sue in his own name. Dyer, 30. b. p. 208. Equity has ever protected assignments of choses in action. 1 Ves. 411, 412., and courts of law will now take notice of them; as, where the obligee had assigned over a bond, and afterwards became a bankrupt, it was holden, that he himself might bring an action upon it, notwithstanding the bankruptcy. Winch v. Keeley, 1 Term R. 619. So it has been holden that in an action brought on a bond given to the plaintiff in trust for another, the defendant may set off a debt due from the person beneficially interested in like manner as if the action had been brought by him. Bottimley v. Brooke, M. 23 G. 3. C. B. Rudge v. Birch, M. 25 G. 3. *B. R.*, cited in 1 Term R. 621. and 4 Term R. 340. ‖But a defendant cannot set off a bond given by the plaintiff to a third party and subsequently assigned to the defendant, since the bond in such case was not given originally in trust for the defendant. Wake v. Tinkler, 16 East, 36. If the obligor, after notice of the bond being assigned, take a release from the obligee, and plead it to an action brought in the obligee's name for the benefit of the assignee, the court will set aside the plea; and in such case they will not give leave to the defendant to plead payment to the obligee. Legh v. Legh, 1 Bos. & Pull. 447.; and see Craib v. D'Aeth, 7 Term R. 670. note (b).‖ The assignment of a chose in action is a good consideration for a promise. 1 Roll. Abr. 29. Sid. 212. T. Jones, 222.; though the debt assigned be uncertain. Moulsdale v. Birchall, 2 Black. R. 820.] ‖An action of *indebitatus assumpsit* may be maintained by the assignee of a *Scotch* bond against the obligor in his own name. Innes v. Dunlop, 8 Term R. 595.; and so also by the assignee of an *Irish* judgment by *cognovit*. O'Callaghan v. Thomond, 3 Term R. 82.‖

2 Vern. 595. Also in equity a bond is assignable for a valuable consideration paid(*b*), and the assignee alone becomes entitled to the money, so that if the obligor after notice of the assignment pays the money to the obligee (*c*), he will be compelled to pay it over again.

(*b*) There must be a consideration paid. 3 Chan. R. 90. (*c*) 2 Vern. 540. But payment to the obligee without notice of the assignment, is good. Chan. Ca. 232. ‖After notice the courts of law will not give leave to the obligor to plead payment to the obligee. 1 Bos. & Pull. 447.‖

2 Vern. 428. 692. S. P. 764. S. P. ‖Priddy v. Rose, 3 Meriv. 86.‖ An assignee must take it subject to the same equity that it was in the hands of the obligee; as if on a marriage-treaty the intended husband enters into a marriage-brokage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor.

3 Lev. 312. Stephens and Hunham, 4 Mod. 48. Show. 290. 2 Salk. 563. S. C. pl. 1. Skin. 300. S. C. 1 Show. 290. S. C. If the administrator of a conusee of a statute extends the lands, and a *liberate* is returned, and before entry or recovery of the possession the administrator assigns his interest, the assignment is void, for by the *liberate* he has accepted the possession, and is estopped to say the contrary; and then by suffering the owner of the lands to continue in possession, this turns his possession into a right, which is not assignable before the possession be regained by ejectment or re-entry, or some lawful means.

10 Co. 47. [But interests in contingency respecting personal estates, are assignable in equity for a good consideration. Goring v. Bickerstaffe, 1 Chan. Ca. 8. Cookes v. Bellamy, 1 Sid. 188. Wind v. Jekyll, 1 P. Wms. 572. Kimpland v. Courtney, 2 Freem. 250. Theobald v. Duffey, 9 Mod. 101. Higden v. Williamson, 3 P. Wms. 132. Duke of Chandois v. Talbot, 2 P. Wms. 608. And a possibility, whether in real or personal estate, is transmissible and devisable. Sheriff v. Wrotham, Cro. Jac. 509. Pinbury v. Elkins, 1 P. Wms. If there be a devise of a term to *A.* for life, remainder to *B.*, *B.* cannot in the life-time of *A.* assign his interest, because he has but a bare possibility, for *A.* may outlive the number of years.

1 P. Wms. 566. King v. Withers, Ca. temp. Talbot, 117. Chauncy v. Graydon, 2 Atk. 616. Peck v. Parrot, 1 Ves, 236. Selwin v. Selwin, 2 Burr. 1131. 1 Black. R. 231. S. C. Dawson v. Killet, 1 Bro. Ch. R. 119. Barnes v. Allen, 1 Bro. Ch. R. 181. Moor v. Hawkins, 1 H. Black. R. 34. Roe v. Jones, 1 H. Black. R. 30. 3 Term R. 88.]

A personal trust which one man reposes in another, cannot be assigned over (*a*), however able such assignee may be to execute it.

(*a*) Trustee cannot assign his trust. 4 Inst. 85.

Vide head of *Trust*; nor a guardian, Vaugh. 180. Whether a pawnbroker, by reason of the special property he has in the pledge, can assign it. *Qu. et vide* 1 Bulst. 31. Owen, 124.

[Neither the full pay (*b*), not the half pay (*c*) of an officer in the army, can be assigned.]

(*b*) Barwicke v. Reade, 1 H. Black. R. 627. (*c*) Lidderdale v. Duke of Montrose, 4 Term R. 248. Flarty v. Odlam, 3 Term R. 681. *Contrà*, Stewart v. Tucker, 2 Black. R. 1137. By 1 G. 2. st. 2. c. 14. § 7. all assignments of seamen's wages are declared void.

‖An equitable assignment of a *chose in action* may be by parol.‖ Heath v. Hall, 4 Taunt. 526.

Several things are assignable by acts of parliament, which seem not assignable in their own nature; as promissory notes, by 3 & 4 Ann. cap. 9. bail-bonds by the sheriff, by 4 Ann. cap. 16. § 20. a judge's certificate for taking and prosecuting a felon to conviction, by 10 & 11 W. 3. cap. 23. § 2. a bankrupt's effects by the several statutes of bankruptcy. ‖Replevin bonds by 11 Geo. 2. c. 19.‖ 3 & 4 Ann. c. 9. 4 Ann. c. 16. § 20. 10 & 11 W. 3. c. 23. §. 2. ‖11 G. 2. c. 19.‖

ASSISE.

AN (*d*) assise is a remedy which the law hath appointed for the restitution of a freehold, of which the party has been disseised, and appears to have been in nature of a commission to put the disseisee in possession by trial at one assises.

(*d*) For the derivation and signification the word, *vide* Co. Litt. 153. b. 154. b. 159. b. It seems to have been of *Norman* extraction, *vide* Customier, 16., and to have been introduced in the reign of H. 2. as a more easy and expeditious method of recovering the freehold than was observed in the writ of entry; hence the writ of entry was afterwards called a writ of entry in the nature of an assise. *Vide* Fleta, 214, 215. *Glanvil* says it was *regale quoddam beneficium clementia principis de concilio procerum populis indultum.* Glanvil, c. 7. fol. 17. ‖See Roscoe on Real Actions, 61.‖

Assises are now seldom made use of except for the recovery of offices, being supplied by other actions less perplexed, and which yield a more expeditious remedy; but as they are still in force, it may be proper to consider the nature of them a little, under the following heads:

(A) Of the Nature of an Assise, and the Form of the Proceedings on it.

(B) In

(B) In what Cases an Assise lies.
(C) What Seisin is sufficient to maintain an Assise.
(D) How the Demandant must set forth his Title,

(A) Of the Nature of an Assise, and the Form of the Proceedings on it.

F.N.B. 177. Fleta, lib. 4. c. 4. f. 222. (a) For assises in *confinio comitatus, vide* Co. Litt. 153, 154. 7 Co. 3. b. 7 R. 2. c. 10. Keilw. 98. Booth, 211.

ASSISES are twofold. (a) First, an assise of a man's own possession, and that was called an assise of *novel disseisin*, which was a commission to the sheriff to reserve the tenements with the chattels found in them, and put them in peace till a jury had tried the cause, who were by such writ authorized to be returned at the assizes by the sheriff; and by the original practice in this assise, the sheriff used to take the tenements, together with the chattels found in them, into his own possession, till the right was tried; but because this proved inconvenient, for that the sheriff could not keep such possession, and turn it to the best advantage, especially where such an assise was long in dependence, therefore the practice altered, and the tenant was continued in possession until judgment; and by such writ the jury were empowered to enquire of damages, because the sheriff was to reseise the chattels as well as the frank-tenement; and therefore such damages being assessed by the jury were awarded to the tenant that recovered, as well as the frank-tenement.

F.N.B. 195. 2 Inst. 508. Booth, 206.

The second sort of assise is an assise of *mortdancestor*, which was, where the father, mother, brother, sister, uncle, aunt, nephew, or niece died seised of the lands, and a stranger abated; then the heir had such writ, and to such writ was required an immediate descent, as from father to son, or from brother to sister originally; and it seems by the statute of *Gloucester*, c. 6. it extended to uncles and aunts, nephews and nieces, because abatements had frequently happened upon the death of such relations; but the more remote relations were left to pursue their writ of entry as at common law.

For the form of the writ, *vide* Reg. 197. Plow. 73. 415.

The first process in this action is an original writ issuing out of Chancery, directed to the sheriff, commanding him to return a jury (who are called the recognitors of the assise).

F. N. B. 178. Booth, 210. 267. The demandant is to find surety to prosecute, and this he may do before the sheriff, or in court, if the sheriff returns that he hath not found pledges. Booth, 267.

F.N.B. 117. Booth, 265. (b) By *Magna Charta*, c. 12. assises are appointed to be taken *in proprio comitatu*; thereupon an adjournment *in banco, propter difficultatem*, &c. is given; but it was held no adjournment could be made by virtue of this act, unless the jurors gave a verdict; whereupon by *Westm.* 2. c. 3. an adjournment is given in case of a foreign voucher

Assises are to be taken in the King's Bench, or Common Pleas for the county in which they sit, and for all others are to be arraigned in their proper counties (b), but are to be adjourned for difficulty into the Common Pleas, as the court which has jurisdiction in all civil actions.

voucher in an assise of *mortdancestor*, within the equity of which are all foreign pleas, demurrers, and other pleas and proceedings, either before or after verdict in an assise. 2 Inst. 26. 423. *Vide* Roll. Abr. 131.

An assise is *festinum remedium* (*a*), and to be arraigned on the day the writ is returnable (*b*), on which day the demandant is to count (*c*), and the tenant (*d*) is to appear and plead instantly (*e*), unless the court thinks proper to allow him an imparlance, which it is said cannot be without shewing good cause.

Style Reg. 88.

(*a*) It is called *Festinum remedium*. 1. Because the tenant shall not be assoined. 2. Shall not cast a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any stranger except he be present, and will enter presently into warranty; so of receipt. 5 The parol shall not demur for the nonage of the plaintiff or defendant. 8 Co. 50. Booth, 262. For the manner of arraigning an assise, *vide* 3 Mod. 273. Keb. 3. Comb. 173. (*b*) But where neither the recognitors nor plaintiff appeared on the first day, the court adjourned the assise to the next. Salk. 82. pl. 1. (*c*) Otherwise he will be nonsuit. *Id. ibid.* (*d*) If there be several defendants, and any one of them do not appear the first day, the assise shall be taken by default against them. Salk. 83. (*e*) That the defendant may pray *oyer* of the writ and count, *vide* 2 Bulst. 160. and shall have an imparlance to a short day. Style's Reg. 88. But it must be on shewing good cause. Salk. 83. pl. 2.

When the plaintiff counts the defendant may plead in abatement (*g*), and over in bar (*h*), or may take the general issue *nul tort nul disseisin*.

Booth, 214.

(*g*) And such plea is not peremptory, though found against him. *Vide* Finch of Law, 385. Dyer, 310. Jones, 413. Cro. Car. 520. (*h*) Must plead over in bar at the same time that he pleads in abatement. Salk. 83. pl. 2.

If the tenant pleads a plea, which shews that the assise should not be taken, and such plea is triable by a jury, the recognitors of the assise may try it, and then the assise is said *transire in jurata*., and the assise and record adjourned into the Common Pleas.

Booth, 313, 314.

If a flat bar be pleaded to the assise, and issue is joined thereupon, the jury never enquire of the *seisin* or *disseisin*, but of the matter pleaded in bar, and of damages if the plea be found against the defendant.

Booth, 214.

But if the defendant pleads a colourable plea, then they are to enquire of the *seisin* and *disseisin*, which is called the taking the assise at large.

Vide Booth, 214, 215. And for colourable pleas, *vide* head of *Pleas and Pleadings*; and where the assise may or may not be taken at large. 10 Co. 90. Finch of Law, 416. Roll. Abr. 271—275.

Also if an infant pleads a flat bar, and the bar is found against him, yet the assise shall be taken at large, because the law not allowing the parol to demur in this action, which was *festinum remedium*, the *seisin* and *disseisin* was enquired of, that the infant's whole title might appear before the court.

Roll. Abr. 275.

By *Westm.* 2. c. 25. a certificate of assise is given, which is a writ for the party grieved by a verdict or judgment given against him in an assise, when he had something to plead, as a record or release, which could not have been pleaded by his baily; or when the assise was taken against himself by default to have the deed tried, and the record brought in before the justices, and the former jury summoned to appear before them at a certain day and place, for a further examination and trial of the matter.

Vide Booth, 215. 287. 4 Co. 4. b. 2 Inst. 26.

(B) In what Cases an Assise lies.

2 Inst. 412. 8 Co. 47. b. (a) An assise lies for the

AN assise lies for any thing a *præcipe quod reddat* may be brought for at common law, therefore it lies for an office. (a)

office of registrar of the Admiralty; for though their proceeding are according to the civil law, yet the right of their offices is determinable at the common law. 8 Co. 47. 2 Inst. 412. S. P. Of the mastership of an hospital, being a lay fee. 11 Co. 99. b. Of the office of filazer. Dyer, 114. b. And if a man be disseised of parcel of the profits of an office he may have an assise of that parcel only. 8 Co. 49. b. 2 Inst. 412. S. P. But for an office of charge and no profit an assise does not lie. 8 Co. 47. b. 49. b. 2 Inst. 412. S. P. (See however *post* (D), 334.) An assise lies for an office for life as well as in fee. 8 Co. 47. a. ‖Assumpsit for money had, &c. is now the common action for trying the right to an office, but it only lies for regular fees, and not for a mere gratuity given to the officer. Boyter v. Dodsworth, 6 Term R. 681.‖

(b) Does not lie of an annuity. 1 H. 3. 2. Booth, 263. 8 Co. 50. (c) By

It lies for one seised of lands, tenements (b), rents in fee-simple, tail, or for life, and for tenant by *elegit* (c), statute-merchant, staple, or tenant by recognizance in nature of a statute-staple.

the statute of 13 E. 1. c. 18. which see explained, 2 Inst. 396.

Vide Co. Litt. 159. 32 H. 8. c. 7. Vaugh. 204. *Vide* Danv. 578, 579.

It lies of tythes, pensions, and other ecclesiastical duties in temporal hands; but of a rent issuing out of tythes barely, no assise lies.

2 Inst. 411. (d) So at this day for a *profit apprender* the

There were at first but two forms of writs of assise of *novel disseisin*, either an assise *de libero tenemento* (d), or *de communia pasturæ*. (e)

writ must be general *de libero tenemento*, and the plaint special. 8 Co. 47. Co. Litt. 159. Because no special writ is given by the statute. Dyer, 83. (e) In ancient time they held themselves strictly to the forms in the register; and therefore because there was no writ of common of turbary, &c. it was held no assise lay thereof. 8 Co. 48. a. b. ‖If a common has been enclosed and enjoyed in severalty for twenty years, the entry of the commoner is barred, and he is driven to his assise of common. Hawke v. Bacon. Creach v. Wilmot, 2 Taunt. 159.‖

2 Inst. 411. (g) But now by the statute of Westm. 2. c. 25. a. speedy remedy is given in these cases *de profi-*

The assise *de libero tenemento* did lie of houses, land, rent, or other things which lay in *render*, but for profits *apprender*, which consisted *in capiendo, colligendo, habendo, recipiendo et exercendo* (g), no assise lay, but a *quod permittat*, in which there was great delay, and they who had but an estate for life could not maintain that writ.

cuis, &c. in certo loco capiend., &c. An assise does not lie of a way over certain land, but a *quod permittat*, for it is but an easement; but otherwise if it were appurtenant to land. 8 Co. 46. 34 Ass. 15. For an assise *a sovent distress*, *vide* Keilw. 20. 2 Inst. 413, 414. F. N. B. 178.

(C) What Seisin is sufficient to maintain an Assise.

Vide 2 Roll. Abr. 463.

AS the writ of assise restores the party to the actual seisin of his freehold, for so are the words of the writ, *facias tenementum illud seisiri, &c.* consequently the party that brings this writ must found it upon an actual seisin, which he has been divested of, for otherwise this remedy is not commensurate to his case.

Lit. § 565. Co.

Therefore if there be lord and tenant by rent-service, and the lord

lord grants the services to another, and the tenant attorns by a penny, this being given by way of attornment, is not sufficient seisin to ground an assise on; *secùs* if the penny had been given by way of seisin of the rent. Lit. 315. 1 Co. 9. 10 Co. 427.

If the lessor dies, and after the lessee for (*a*) years is ousted the heir of the lessor shall have an assise of *novel disseisin*, and not of *mortdancestor*, for the lessee's continuing in possession after the death of the lessor, was in right of the heir. *Vide* Roll. Abr. 270, 271. Keilw. 110. (*a*) If tenant at will be ousted, the lessor may have an assise. 21 E. 3. 34.

If a man leases for years, the remainder over in fee, and after the tenant for years is ousted of his term, he in the remainder may have an assise, because the freehold was in him at the time of the disseisin. Kelw. 109.

The taking of threepence of *A.* for a *capias* against *B.* is a sufficient seisin of the office of filazer *de banco.* Roll. Abr. 270.

If one be committed by the House of Commons to *A.*, who before and long after was in possession of the office of serjeant at arms to the house, and the prisoner compounds with *B.* for the fees, and gives him twenty shillings, this is a good seisin of the office by *B.*, for he cannot be disseised thereof but at his election; adjudged, and held likewise, that proving that *B.* being in the lobby of the House of Commons, took hold of the door of the house, and laid his hands upon the mace, then being in the hands of *A.*, to take it, but hindered by *A.*, was good evidence both of a seisin and disseisin. 2 Lev. 108. Cragg and Norfolk.

The serjeant of the mace to the House of Commons in an action upon the case for a disturbance, recovered damages; and whether this was a sufficient seisin, the damages being recovered in satisfaction of the fees (*b*), and he then being out of possession of his office, was doubted; some of the judges inclining one way, and some the other; and it was intended to have been found specially; but the plaintiff, being unwilling to stand to it, was nonsuited. Lev. 108. (*b*) If a tenant refuses to do suit of court, and the lord recovers damages against him, this is a sufficient seisin of the suit, because the damages are given as an equivalent, and in satisfaction for the suit. 4 Co. 9. b. So if a return irreplevisable be awarded, that is a good seisin of the rent for which the distress was taken; because such return is an absolute condemnation of the pledges; and being given as an equivalent for the rent, shall be looked upon as the rent itself. 4 Co. 9. b. 2 Roll. Abr. 464.

(D) How the Demandant must set forth his Title.

IT is a common learning, that in an assise the plaint (*c*) need not be so certain as in other writs (*d*), because the judgment is to recover *per visum recognitorum* (*e*); and if the plaint be but so certain (*g*) that the recognitors may put the demandant in possession, it is sufficient. Dyer, 84. (*c*) The plaint in an assise is as a count in other real actions, and must set forth seisin and disseisin within fifty years, pursuant to the statute 32 H. 8. c. 2. Booth, 212. (*d*) Stile, 30. Like point *per Rolle* C. J. (*e*) So though by default, and the damages released; for by intendment they had the view before the assises. 2 Bulstr. 159. Godb. 247. Cro. Jac. 334. (*g*) But a plaint *de uno tenemento* is not good. Stile, 77. It is uncertain, being a genus). But in an assise the plaint may be *de annuo reddito unius robæ vel* 20*s.* Dyer, 84.

In

Jenk. 33. By all the judges of *England*.

In an assise of rent in *D.*, the tenant cannot plead that in the said county there are two *D.*'s (*a*), without any addition to distinguish them, because the plaintiff shall recover *per visum juratorum*.

(*a*) So if two *D*'s, and none without addition, *per* Dyer, 84. b.

8 Co. 49. Webb's case.

In an assise for an office newly erected and constituted, the demandant in his plea must shew what fee or profit is granted for the exercise thereof; for this office cannot have a fee or profit appurtenant to it, as an ancient office may; and for an office without fee or profit no assise lies.

8 Co. 49.

But in an assise for an ancient office, the demandant in his plaint need not shew what fee or profit is belonging to it; for it shall be intended there is some fee or profit.

Jenk. 42. (*b*) Dyer, 85. b. S. P. 6 Co. 56. S.P. 1 Sid. 203.

In an assise for a rent-charge or seck, the demandant must make a title in his plaint (*b*); otherwise in an assise of land, for there possession, without any other title, is sufficient. (*c*)

(*c*) Where in a writ of entry in nature of an assise, the demandant counted of a gift in tail to himself, and of his seisin and disseisin; but was compelled to declare upon a seisin and disseisin only, because that was the ancient form. *Vide* 2 Ander. 100.

Dyer, 85. adjudged.

In an assise for a portion of tythes, the demandant in his plaint must make a title, for the seisin only is not sufficient, no more than in the case of a rent, or other profit in the soil or fee of another, which commences against common right; for in all these cases of necessity the commencement thereof must be alleged by him who will make title thereto, whether he be privy or a stranger; for it is against reason to charge the inheritance or freehold of another, without shewing some substantial foundation thereof.

3 Mod. 373. Savier and Lenthal;

In assise for an office, the demandant in his plaint must set forth a title.

by which book it appears, that the demandant not being ready to set forth a title, the assise was adjourned till the next day, when he appeared and set forth a title, and process was prayed against the defendants; but by Salk. 82. S.C. the demandant was nonsuited the second day for not counting; and the court told him he might bring a new assise. Comb. 173. S.C. and the plaintiff nonsuited. *Vide* Dyer, 114. pl. 63. 149. pl. 81. 152. pl. 9. 8 Co. 45. b. See 10 Mod. 125.

ASSUMPSIT.

8 Co. 92. Moor, 667. [The rise and progress of this species of action is very accurately traced in the third and last volumes of Mr. Reeves' Hist. of the Law.]

AN *assumpsit* is an action the law gives a party injured, by the breach or nonperformance of a contract legally entered into: it is founded on a contract, either express, or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract.

But

But here it must be observed, that the law distinguishes between a general *indebitatus assumpsit* and a special *assumpsit*; for though they come under the denomination of actions on the case, and the party is to be recompensed in damages alike in both; yet the first seems to be of a superior nature, and will lie in no case but where debt will lie (*a*); but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special *assumpsit* must be brought.

Salk. 25. 6 Mod. 128.

[(*a*) There is no foundation for this proposition. It is much more plausible to say, "That where debt lies an action on the case ought *not* to be brought." And that was the point relied upon in Slade's case, 4 Co. 92.; but the rule then settled and followed ever since is, "that an action of *assumpsit* will lie in many cases where debt lies, and in many where it does *not* lie. *Per* Ld. *Mansfield*, 2 Burr. 1008.] ‖Debt does not lie against an executor on a simple contract of the testator, except in the Exchequer, but *assumpsit* lies in such case; see Barry v. Robinson, 1 New R. 293. The objection, however, to an action of debt can only be taken on demurrer, 5 Taunt. 665. 1 Marsh. 280.; and see 1 Will. Saund. 216. b. *notis*. And where some of several instalments of a debt are due, it seems *assumpsit* lies though not debt. Rudder v. Price, 1 H. Black. 547.; and see 2 Bos. & Pull. 429.‖

Under this Head we will consider,

(A) In what Cases an Assumpsit is the proper Action.

(B) What Words create sufficient Certainty in a Promise.

(C) What is a sufficient Consideration to create an Assumpsit.

(D) Where the Consideration shall be said to be executed or continuing.

(E) Where the Promise shall be void, the Consideration being against Law.

(F) Where the Consideration and Promise shall be said to be sufficiently set forth and averred.

(G) What may be pleaded as a good Discharge and Performance of the Promise.

(A) In what Cases an Assumpsit is the proper Action.

IF *A.* and *B.*, having dealings with each other, make up their accounts, and *B.* is found in arrear, and promises to pay the balance, an *assumpsit* lies against him, and *A.* need not bring a writ of account. (*b*)

Cro. Jac. 69. Yelv. 70. S. P. Roll. Abr. 7. S. P. Roll. Rep. 396.

Moor, 854. 3 Black. Com. 162. ‖(*b*) In Com. Dig. Action upon the Case upon *Assumpsit* (A) 1. it is laid down that *assumpsit* lies wherever an account would lie, and the case of Wilkin v. Wilkin, 1 Salk. 9. Carth. 89. Show. 71. Comb. 149. is referred to. This was an action for not accounting for goods delivered by the plaintiff to the defendant for sale, and the defendant pleaded in abatement that he was the plaintiff's bailiff for sale of the goods, and therefore that the plaintiff ought to have brought account against him, — but the plea was held bad and judgment was given for the plaintiff, though, according to the reports in

in Carthew, Shower, and Comberbach, *Holt* C. J. appears to have doubted whether *assumpsit* ought to be brought by reason of the inconvenience of submitting long accounts to the jury; and Chief Baron *Gilbert*, Law Evid. 192. expressly says, "On *indebitatus* no evidence can be given of an account current, because such examination would be too tedious on issues," and this was so held by the *B. R.* 25 Car. 2. in Lincoln v. Parr, 2 Keb. R. 781. And in a modern *nisi prius* case, Scott v. Mackintosh, 2 Campb. 238, where the account had been running several years, and consisted of several thousand items, Lord *Ellenborough* held that *account* was the proper remedy, and the defendant refusing a reference, the plaintiff was nonsuited. However, in a subsequent case, Tomkins v. Wiltshire, 5 Taunt. 431. 1 Marsh. 115., the Court of Common Pleas held that *assumpsit* lies for the balance of an account however numerous the items, and *Gibbs* C. J. said, "the use of the action of account was where the "plaintiff wanted an account and could not give evidence of his demand without it." And in Arnold v. Webb, 5 Taunt. 432. note (*a*), *Dampier* J. held the same opinion at *Nisi Prius*.‖

Salk. 9. pl. 9. (*a*) Where it was objected that a sum of money given to merchandise with, could not be demanded of the party as a duty till he had neglected or refused to apply it according to the trust, held, that it was aided after verdict. Salk. 9. pl. 2. ‖But the action does not lie in such case until demand made, and the statute of limitations only runs from the demand, though after a long period has elapsed a demand may be presumed. Topham v. Braddick, 1 Taunt. 572.‖ If a man receives a sum of money to lay out to a particular use, and lays out part of it accordingly, an action of account only lies; but if no part of it is laid out, an *assumpsit* lies. 2 Show. 301. pl. 304. Ruled on evidence by Justice *Jones*, in the absence of the Chief Justice. *Vide* head of *Account*.

So, if *A.* gives money (*a*), or delivers goods to *B.* to merchandise therewith, and *B.* promises to render an account, *assumpsit* lies on this express promise, as well as account.

Roll. Abr. 9. Bro. Account, 81. Raym. 211. 2 Keb. 813. *Vide* Style, 131. 283. Cro. Jac. 602. A diversity where the account was for rent alone, and where for that *inter alia*; and *vide* Allen, 73. Style, 473. 2 Lev. 110. Vent. 268. where it is said, that the account alters the nature of the debt.

So if a tenant, being in arrear for rent, settles an account of the arrears with his landlord, and promises to pay him the sum in which he is found in arrear, an *assumpsit* lies on this promise.

Roll. Abr. 8. Hutt, 34. Cro. Eliz. 240. seems *contrà*. [(*b*) Wherever a man resorts to a higher security, the law will not raise an *assumpsit*. Toussaint v. Martinnant, 2 Term R. 100. So a promise by a defendant to pay a judgment debt obtained against him, in consideration that the plaintiff would stay execution thereon, is no ground for an *assumpsit*, for it is turning a judgment debt into a debt upon simple contract. But the promise would be sufficient if made by a third person. Anon. Cowp. 129. ‖The assignee of a *Scotch* bond may sue in *assumpsit* on it against the obligor. Innes v. Dunlop, 8 Term R. 595.‖ *Assumpsit* may be maintained on an *express* promise to pay the balance found due on the settlement of accounts upon the dissolution of a partnership, notwithstanding a covenant in the articles of copartnership to account and pay the balance, and that notwithstanding *most* of the items in such settlement relate to partnership transactions. Foster v. Allanson, 2 Term R. 479. Moravia v. Levy, *Ibid.* 483, notes. ‖But where the master of the plaintiff's vessel as their agent entered into a charter-party under seal with the defendant, which stipulated for delivery of certain goods to the house in which defendant was a partner, at a certain freight, it was held that the plaintiffs on delivery of the goods could not sue the defendant in *assumpsit* for the freight, since their remedy was on the charter-party. Shack v. Anthony, 1 Maule & S. 573.; and see Randall v. Lynch, 12 East, 179. Where, however, the plaintiffs by charter-party agreed to let a vessel to the defendants for a certain voyage for eight months, to commence from her sailing from *Gravesend*, and covenanted that she should proceed to any port in the *Channel* to take in goods, and afterwards it was agreed by parol that she should load in the *Thames*, and that the freight should commence from her clearing outwards at the custom-house, it was held, that the freight from her clearing till her sailing from *Gravesend* might be recovered in *assumpsit*, since the parol contract was distinct from the charter-party, and to be performed anterior to it in time. White v. Parkin, 12 East, 578. Where the wife entered into a contract under seal without any authority from her husband, hiring the plaintiff as her servant

But if the obligor in a bond, without any new consideration, as forbearance, *&c.* promises to pay the money, an *assumpsit* will not lie, but the obligee must still pursue his remedy by action of debt. (*b*)

servant on a voyage, and stipulating to pay her passage home to *England*, it was held, that as the deed did not bind the husband he might be sued by the plaintiff in *assumpsit* for the passage money. White v. Cuyler, 6 Term R. 176.‖ And the mere taking of a pledge by the lender of money for his security, will not preclude him from resorting to an *assumpsit*; for, to discharge the person of the borrower, there must be a special agreement to stand to the pledge only. South Sea Company v. Duncomb, 2 Stra. 919. Where the obligor of a *respondentia* bond by indorsement thereon agreed to pay it *to any assignee*, it was determined that the assignee might maintain a general *assumpsit* for it. Fenner v. Meares, 2 Black. R. 1269.] ‖See Lord *Kenyon*'s observations questioning this decision, 1 East, 104., which was also doubted by Lord *Ellenborough*, see 14 East, 587, *notâ*.‖

So if a man leases for years, reserving rent, an *assumpsit* will not lie, because it savours of the reality. Roll. Abr. 7. So though the lease be determined. Roll. Abr. 7. *Qu.* If there be an express promise to pay the rent? and *vide* Cro. Car. 343. Style, 463. Sid. 279. 2 Keb. 8. Lev. 179. and 3 Lev. 150. where it is resolved, that on an express promise (where there is no deed executed under seal) *assumpsit* will lie, but not on a promise in law. *Vide* Roll. Abr. 8., where it is held clearly, that an *assumpsit* will lie on a promise to pay a sum in gross. [Where the demise is not by deed, the landlord is empowered by stat. 11 G. 2. c. 19. § 14. * to bring the action for the use and occupation; and if in evidence on the trial, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not, therefore, be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered. Before the above statute was passed, it was holden that this action was maintainable for use and occupation, where there was no stipulation for any express rent. Mason v. Welland. Skin. 238. 242. S. C. in 3 Mod. 73. by the name of Mason v. Beldham. It seems, from the argument, though not directly stated by the reporters, that there was a demise by deed in this case, but no particular rent reserved.] ‖See tit. *Rent* (K), 7. Vol. VII.‖

* This statute seems to have escaped the recollection of the late Vinerian professor, in his comment on this species of action. See 3 Wooddes. 152, 153.

If *A.* is possessed of a term for years in certain lands, under a certain rent, the inheritance whereof is in the wife of *B.*, and *C.*, in consideration that *B.* will procure *A.* to assign this lease to him, assumes and promises that he will pay the rent to *B.* during the remainder of the said term; if *B.* accordingly does procure *A.* to assign, and the rent is afterwards arrear, *B.* upon this promise may have an action against *C.* in his own right, notwithstanding the rent grew due in the right of his wife. Leon. 43.

If in an action on the case the plaintiff declares *quod locasset* to the defendant a certain warehouse, the defendant promised to pay 8*s.* for every week he occupied the same, and avers that he occupied the same for twenty-seven weeks, and had not paid, *&c.* the action lies, for this is not a rent, but a mere promise in consideration of the occupation. Cro. Jac. 598.

If a lord of a manor assesses a fine upon a copyholder for his admittance, and dies, his executor upon the *assumpsit* in law may bring an action for it, because it depends not upon the inheritance, but is *quasi* a fruit fallen; adjudged by three judges against *Holt* C. J., who said, that it being a duty arising out of an inheritance, custom and tenure, it was not fit to be thrust into a declaration in an *assumpsit*. 3 Lev. 261. Shuttleworth and Garret, 3 Mod. 239. S. C. 1 Show. 35. S. C. Carth. 90. S. C. [Evelyn v. Chichester, 3 Burr. 1717. Whitfield v. Hunt, *B. R.* Hil. 24 G. 3. Dougl. 727., in not.] ‖See 3 Bos. & Pull. 346.‖

An *indebitatus assumpsit* (*a*) lies for money due by custom for scavage; adjudged upon a special verdict, by which it was found, 2 Lev. 174. Mayor of Lon-

don and Gory. Carth. 92. S. C. cited as good law, though the duty might be said to be the inheritance of the lord mayor: but *per Holt*, it arises out of things in the personalty. Vent. 398. S. C. adjudged; though objected, the customs of the city are confirmed by parliament, and so this is a duty by record. An assignee of commissioners of bankrupts may bring an *assumpsit*, and yet the debt is assigned by virtue of an act of parliament. Vent. 298. *per Cur.* 3 Keb. 677. [(*a*) That it will lie for tolls, see Mayor of Exeter v. Trimlet, 2 Wils. 95. Seward v. Baker, 1 Term R. 616. adjudged in the last case on a special demurrer.] ‖See 4 Maule & S. 288. Mayor of Reading v. Clarke, 4 Barn. & A. 268.; and *indebitatus assumpsit* will lie for chattels. Falmouth v. Penrose, 6 Barn. & C. 385.‖ that the sum demanded was due by custom, but that there was no express promise to pay it.

Rann v. Green, Cowp. 474. Dougl. 402. *arguend.* Bell v. Burrows, C. B. E. 5 G. 3. Bull. Ni. Pri. 129. ‖See 5 Term R. 130.‖ [An action of *assumpsit* is maintainable, where the demand arises by virtue of a public or private act of parliament.

Brown v. Bullen, Dougl. 407. ‖But now by 6 G. 4. c. 10. § 111. no action shall be brought against assignees for a dividend, but the Chancellor may upon petition order payment with interest and costs.‖ An *indebitatus assumpsit* lies against the assignees of a bankrupt for a creditor's share under an order of the commissioners for a dividend.]

Emerson v. Lashley, 2 H. Black. 248. ‖An *indebitatus assumpsit* does not lie (nor indeed any action) to recover costs ordered to be paid by an interlocutory order of an inferior court, although the defendant may not be liable to an attachment in the inferior court for not paying them; for no general duty arises from such order, which is subject entirely to the control of the court making it.

Smith v. Whalley, 2 Bos. & Pull. 482. But if parties bind themselves by agreement to obey the orders of a court, an action of *assumpsit* lies on such agreement.‖

Crawford v. Whittal, Dougl. 4. in not. ‖1 Camp. 255. 2 Camp. 502.‖ [An *indebitatus assumpsit* may also be maintained on the judgment of a foreign court, without stating the original cause of action.]

Buchanan v. Rucker, 9 East R. 192. Cavan v. Stewart, 1 Stark. R. 525. ‖But not on a judgment by default in a court in one of the colonies, where it appears on the face of the proceedings that the defendant was only summoned by nailing a copy of the declaration on the court-house door, it not appearing that the defendant had ever been present within the jurisdiction of the court.

Harris v. Saunders, 4 Barn. & C. 411.; and see 5 East, 473. 3 Taunt. 85. It is now settled that *assumpsit* lies on a judgment of the superior courts of *Ireland*, since, notwithstanding the union of the two kingdoms, such judgment has not the force and effect of a record in *England*.‖

Debray v. Adair, Sittings after *Easter*, 4 G. 3. cited in Term R. 343. [*Debray*, an officer, drew a bill on the agent of a regiment payable out of the first money which should become due to him, on account of arrears or non-effective money. The agent did not accept the bill, but marked it in his book, and promised to pay when effects came to hand. *Debray* dying before the bill was paid, his administratrix was allowed to maintain an action for money had and received against the agent, Lord *Mansfield* considering

sidering it as an assignment for valuable consideration with notice to the defendant.

An *indebitatus assumpsit* will not lie for money *lent* to a third person at the request of the defendant.] Marriot v. Lister, 2 Wils. 141. Butcher v. Andrews, 1 Salk. 23.

If a man by grant of the king hath fines *pro licentiâ concordandi*, and one will not pay a fine, he may have an *indebitatus assumpsit* for it. 2 Leon. 179. 2 Vent. 175. S. C. cited.

Neither debt nor a general *indebitatus assumpsit* will lie against the acceptor of a bill of exchange, for his engaging is but a collateral promise, on which a special action on the case lies, founded on the custom of merchants (*a*): but debt on a general *indebitatus* may be brought against the drawer (*b*), as for money received for the use of the party. Hard. 485, 486. and *per Hale*, if debt lay, an *indebitatus* would lie. Browne v. London, 1 Mod. 285.

1 Ventr. 152. S. C. 1 Freem. 14. S. C. 1 Lev. 298. S. C. 2 Keb. 695. 713. 758. 822. S. C. Hard's case, Salk. 23. S. P. agreed. 2 Lutw. 1594. S. P. agreed. ‖(*a*) But it is now settled that debt will lie by the drawer of a bill against the acceptor where the bill is payable to the drawer, or his order, and accepted for value received. Priddy v. Henbrey, 1 Barn. & C. 674.; and so by the payee of a note against the maker for value received. Bishop v. Young, 2 Bos. & Pull. 78.‖ [(*b*) Hodges v. Steward, Salk. 125. 12 Mod. 347. S. C. Skin. 346. Morg. Prec. 548. a declaration by administratrix of payee against drawer of a promissory note. So Ld. *Mansfield* held, that it may be brought by an indorsee against the person who indorsed it to him. Kissebower v. Tims, *B. R.* E. 22 G. 3. Bailey, 47.]

Also if *A.* delivers money to *B.* to pay over to *C.*, and gives *C.* a bill of exchange drawn upon *B.*, and *B.* accepts it, *C.* may have an *indebitatus assumpsit* against *B.* as having received money to his use (*c*), but must not declare only on the bill of exchange accepted. (*d*) See 3 Term R. 182. Vent. 153. (*c*) So if goods are received. Roll. Abr. 32. *Vide* tit. *Merchant and Merchandize.* ‖(*d*) This last point is not supported by the case Vent. 153., and there is no reason why *C.* in such case should not declare on the acceptance alone.‖

[*A.* being indebted to *B.* for brokage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the money due from *A.* to *B.* (the order not expressing how much, the *quantum* being then unascertained); whereupon *C.* lends *B.* a further sum; the order was afterwards accepted by *A.* It was holden by Lord *Loughborough* C. J., *Gould* and *Heath* J., *Wilson* J. *dissentiente*, that *C.* might maintain an action for money *had and received* to his use against *A.*: but the whole court concurred in thinking that an action could be maintained on the *insimul computasset.*] Israel v. Douglas, 1 H. Black. R. 239.

‖So also where the bankers at whose shop a bill was accepted payable, received from the acceptor the amount, in order to take up the bill, it was held that this money was money had and received to the use of the holder, and that he might sue for it in *assumpsit* against the banker. De Bernales v. Fuller, 14 East, 590. note (*a*).; and see Kilsby v. Williams, 5 Barn. & A. 815.

So also where the defendants were indebted to *T.* and Co., and *T.* and Co. were indebted to the plaintiffs, and *T.* and Co. enclosed to the plaintiffs the defendant's account current, with a memorandum at foot transferring to the plaintiffs the balance due from the defendants; and a correspondence then took place between the plaintiffs and defendants, which ended in the de- Wilson v. Coupland, 5 Barn. & A. 228.

fendants giving the plaintiffs a promissory note for the balance due, payable in three months, unless otherwise provided for by an arrangement with Mr. *S.*; no arrangement having taken place, and the three months being elapsed, it was held that the balance was recoverable by the plaintiffs as money had and received to their use.

Williams v. Everett, 14 East, 582. Wharton v. Walker, 4 Barn. & C. 163.; and see Yates v. Bell, 3 Barn. & A. 643. Grant v. Austen, 3 Price, 58. Scholey v. Daniel, 2 Bos. & Pull. 540.

But if the holder of the money never assents to the appropriation of it to the use of the third party, such party cannot recover it as money had and received, since there is no privity between him and the defendant. Thus, where the defendants had received bills from *A. B.*, with directions to apply the produce to pay his creditors, and amongst others the plaintiff, on their producing letters of advice from *A. B.*, and to mark the sums paid to each creditor on the back of his bill; and the plaintiff, before the bills became due, produced to the defendants his letter of advice, and offered an indemnity if they would indorse one of the bills; but the defendants refused to do so, or to act upon the letter, admitting, however, the receipt of it, and that the plaintiff was the person mentioned: it was held that the plaintiff could not recover his debt from the defendants as money received to his use, since, as the defendants had never assented to the terms of the letter, the money remained the property of the remitter, and there was no privity between the defendants and the plaintiff.

Stewart v. Fry, 7 Taunt. 339.; and that a deposit of money to take up a bill may be countermanded, see Whitfield v. Savage, 2 Bos. & Pull. 277.

And where the defendants, who had received money to take up a bill, called on the holder for that purpose, but the bill was not then in their hands, being sent back protested to prior indorsers, and the defendants having received fresh orders refused to pay the bill when afterwards presented; the court held that they were not liable to the holder in an action for money had and received, since the mere calling to take up the bill did not prevent their making a new appropriation of the money.

Hodgson v. Anderson, 3 Barn. & C. 842.

Where the creditor has once given an order to his debtor for payment of his debt to a third party, he cannot afterwards revoke the order, if there has been a pledge by the debtor that he will pay the debt according to the order.

Gibson v. Minet, 2 Bing. 7.

But if the debtor has not given such pledge, nor paid the money to the person in whose favour the order is given, nor passed it to his account, the creditor is in time to revoke the order, and may himself recover the money from his debtor.

Redshaw v. Jackson, 1 Camp. 372.

In an action by the holder of the bill against a party having received money from the acceptor to take it up, any defence may be set up by the defendant which might have been made by the acceptor if the action were against him.‖

Nightingal and others v. Devisme, 5 Burr. 2589. 2 Black. R. 684. S. C. ‖Jones v. Brinley, 1 East R. 1.‖

[An action for money had and received will not lie for stock.]

Pickard v. Bankes, 13 East, 20.

‖If a stakeholder receive country bank notes as money, the winner of the wager may recover the amount in *assumpsit* for money had and received, for between these parties the notes are treated as money.

An

An insurance broker having received credit in account with the underwriter for a loss on a policy, is answerable to the insured for money had and received, though no money is actually received by the broker.‖ Andrew v. Robinson, 3 Camp. 199. Wilkinson v. Clay, 6 Taunt. 110. See Rapp v. Latham, 2 Barn. & A. 795.

[Where a man has received money for the transfer of stock to be made at a certain day, and fails therein, an action for money had and received will lie against him for the difference-money, or damages sustained by not transferring the stock at the limited time; but in such action more than the consideration-money cannot be recovered. Dutch v. Warren, 1 Stra. 406. 2 Burr. 1011.

Where money has been paid on a contract to transfer one species of stock, and the party contracting to do so transfers another species, an action for money had and received will lie to recover back the whole consideration-money. Anon. 1 Stra. 407.

An *assumpsit* is a proper form of action where there has been an express warranty, but a warranty cannot be tried on a count for money had and received only.] Stuart v. Wilkins, Dougl. 18. Power v. Wells, Cowp. 818. ‖If the contract is rescinded by a return of the goods and acceptance of them by the vendor, then the money may be recovered back in an action for money had and received: but if the defendant has not accepted back the goods, or done any thing to rescind the contract, so that he has a right to try the question of warranty and breach, then the declaration must be special on the warranty. Weston v. Downes, Dougl. 23. Towers v. Barrett, 1 Term R. 133. Giles v. Edwards, 7 Term R. 181. Hunt v. Silk, 5 East, 449. Payne v. Whale, 7 East, 274. Levy v. Haw, 1 Taunt. 65.‖

The plaintiff declared upon an *indebitatus assumpsit* for 20*l. quas ei solvisse debuisset pro denar. per ipsum ad* (*b*) *jocum vocat. chartas pictas de defendente per querent. lucrat. et acquisit.*; and whether such a general *indebitatus* lay for money won at play, *dubitatur*, upon a writ of error *in Cam. Scacc.* upon a judgment by default; and though a case was cited wherein in *B. R.* 32 Car. 2. it had been adjudged that such action lay, and the greater part of the justices now inclined to be of that opinion; yet some of them said, they would give no more encouragement to such actions than needs must. 3 Lev. 118. Eggleton and Lewin. (*b*) Where an *indebitatus* was brought for 20*l.* won at a game called hazard, 2 Vent. 175. it was adjudged it lay, and that it might as well as if *pro opere* and *labore*. *Vide* Salk. 25. and tit. *Gaming*.

An *indebitatus assumpsit* lies for 20*l.* forfeited by the ordinances and constitutions of a company, for not serving in the office of steward of the company, according to a bye-law by them made. 2 Lev. 252. Barber-Surgeons of London and Pelson, adjudged upon demurrer. ‖See 2 Maule & S. 53.‖

[It lies by a personal representative for arrears due on a composition for small tithes, and for the profits of a donative before (*c*), and of a perpetual curacy after the bishop's licence. (*d*)] Rex. v. Bishop of Chester, Term R. 403. (*c*) But *quære* if the donative have been twice augmented, whether the licence be not necessary? *Ib.* (*d*) Powell v. Millbank, 1 Term R. 399. n.

If the king grants the office of comptroller of the customs to *A.* and 2 Mod. 260.

adjudged upon a special verdict between Arris and Stukely, 2 Jones, 126,

A. and *B. durante beneplacito*, and *A.* dies, and afterwards the king grants the said office to *C.*, and yet *B.*, under pretence of survivorship, exercises the said office, and receives the profit thereof, *C.* may have an *indebitatus assumpsit* for so much money had and received to his use.

127. 2 Lev. 245. S. P. between Howard and Wood, where the defendant, under pretence of title, received the fees belonging to the plaintiff, as steward of a court baron. ‖Where fees are annexed to the office, the action of *assumpsit* for money had and received is a convenient mode of trying the title to it. And where there are no fees, a *quo warranto* is necessary, 2 East R. 312. And the action will only lie for accustomed fees of office legally due,— not for mere gratuitous perquisites received by the person usurping the office. Boyter v. Dodsworth, 6 Term R. 681.‖

2 Mod. 263. and there said *per Cur.* that wherever an account lies, an *indebitatus* will lie.

So if one receives my rent under pretence of title, I may have an *indebitatus assumpsit* against him. (*c*)

[(*c*) But *Qu.* Whether, when the defendant claims the title, an action of *assumpsit* for the rents received will lie against him? *Wilson* J. in such an action nonsuited the plaintiff, and was of opinion that the mode of proceeding was either by ejectment; or in case that could not be brought, by an action against the tenant for the rent wrongfully paid by him to the person not entitled to it. Cunningham *et Ux.* v. Lawrents Clk. *Worcester* Spring Assizes, 1788. ‖But where a tenant had paid rent to his landlord for several years and was afterwards ejected at suit of a third party, who also recovered against him mesne profits for the time for which he had paid rent to his landlord, it was held that he might recover such rent back as money had and received, the landlord not setting up any title to the premises. Newsome v. Graham, 10 Barn. & C. 234.‖ An action for money had and received will not lie to recover back money paid for the release of cattle *damage feasant*, though the distress were wrongful; for various rights and questions may arise, which the defendant cannot in such an action be prepared to meet or controvert. Lindon v. Hooper, Cowp. 414.] ‖And see 15 East, 314. and Anscomb v. Shore, 1 Camp. 285. But where a landlord in distraining for rent has not allowed property tax, which he had covenanted to allow, the tenant may recover the amount as money had and received. Graham v. Tate, 1 Maule & S. 609.; and see Dawson v. Linton, 5 Barn. & A. 521.‖

Salk. 27. pl. 14. Jacob and Allen at Guildhall, *coram Trevor* C. J. [See *contrà*, Pond v. Underwood, 2 Ld. Raym. 1210.] ‖And see Sadler v. Evans, 4 Burr. 1984. Paley Princ. and Agent, 306.‖ [And where money is paid to a known agent, the action to recover it back ought to be against the principal, unless indeed it has been paid *malâ fide*, or under notice. Lady Windsor's case, 4 Burr. 1984. It will not lie against a revenue officer for an over-payment after he has paid it over. Whitbread v. Brookshank, Cowp. 69. Greenway v. Hard, 4 Term R. 553.] ‖But this case was decided partly on the want of notice of action to which the officer was entitled; and it has been since decided that if the money is paid to a bailiff who had exceeded his authority, under terror of a distress, and not for the express purpose of being paid over to his principal, the officer is liable to an action for money had and received, even after he has paid it over. Snowdon v. Davis, 1 Taunt. 359. And so it would seem wherever the money is obtained corruptly and illegally. Miller v. Aris, 1 Selw. Ni. Pri. 103. Townson v. Wilson, 1 Camp. 396.‖ [In the case of Campbell v. Hall, which was an action against a custom-house officer to recover back some duties, the duties were allowed by he attorney-general to remain in the officer's hands for the purpose of trying the question with respect to the right of imposing them

A. took out administration to a person supposed to have died intestate, and appointed *J. S.* his attorney, who received money, *&c.* and paid it to the administrator; afterwards a will appearing, the letters of administration were called in, and the executor brought an *indebitatus assumpsit* against the attorney; who objected, 1. that he acting only as attorney for him, who in fact was administrator, the receipt of the money was not his, but the administrator's; and 2dly, that the action ought to have been a special *assumpsit*, the money being received by special authority, and that expressly to the use of another. But the court held, that the authority being void, it was a receipt of so much money for the use of the plaintiff on an implied contract, for which an *indebitatus assumpsit* well lies.

them. Cowp. 804. Where money had been paid to the clerk of a company, who had paid it over to the company, but not entered it in his books, *Pratt* C. J. held, that an action would not lie against him for it; but if he had not paid it over, it would have lain against him or the company. Cary v. Webster, 1 Stra. 480. Buller v. Harrison, Cowp. 565.] ‖Cox v. Prentice, 3 Maule & S. 344.‖ [The deposit-money paid to an auctioneer, whether paid over by him to his principal or not, may be recovered in an action against him, upon objection to the title, or concealment of circumstances. Borough v. Skinner, 5 Burr. 2639.] ‖Edwards v. Hodding, 5 Taunt. 315. 1 Marsh. 877. Ker v Osborne, 9 East, 378.; but see Horsfall v. Handley, 8 Taunt. 136.‖

[But an authority given by *a court having competent jurisdiction* is not a *void* authority (*a*), though it may be afterwards vacated: therefore an action for money had and received will not lie to recover over again money which has been paid to an executor who has obtained probate of a forged will, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin. But if the supposed testator be *living* at the time of granting the probate, such action will lie, for in that case the authority is *void*, the ecclesiastical court having *no* jurisdiction.

Allen v. Dundas, 3 Term R. 125. (*a*) Upon this principle money paid upon a judgment, afterwards reversed for error, cannot be recovered back. Mead v. Death and Pollard,

1 Ld. Raym. 742. ‖*Sed vide* Feltham v. Terry, Cowp. 419.‖

And in all cases where the authority is merely void, a payment made under it is no discharge. As where the defendant, who had a house both in *America* and *London*, drew two bills in *America* of the same tenor and date on their house in *London*, in favour of the plaintiffs; one of them being lost, came into the hands of a third person, who *forged the payees' indorsement*, and received the amount of it from the defendants; afterwards the real payees sued them on the other bill, and recovered.

Cheap v. Harley, cited in 3 Term R. 127.

Where *A.* pays a debt he owes to *B.* to the attorney of a person suing *A.* in *B.*'s name, but without any authority from *B.*, the attorney is in that case answerable to *A.* in an action for money had and received, though he has actually paid over the money to his employer; and though he conceived that he was acting under the real authority of *B.*

Robson v. Eaton, 1 Term R. 62. ‖See Rogers v. Kelly, 2 Camp. 123.‖

Where money was ordered by the High Commission Court to be paid by the plaintiff to the defendant, it was allowed to be recovered back, as paid under a *void* authority. So it will if an agent has only given credit for it to his principal in his books, or on an account between them.]

Newdigate v. Davy, 1 Ld. Raym. 742. ‖3 Maule & S. 344.‖

If a feme sole marries a man, who in truth is married to another woman, and he makes a lease of her lands and receives the rents, she may bring an *indebitatus assumpsit* against him for so much money received to her use: adjudged after verdict, though objected, that he having no right to receive, the tenant remained still liable, and he had his remedy over against the husband; but the court held, that he being visibly a husband, the tenant was discharged, at least that the recovery in this action would discharge the tenant, as it would be a satisfaction to the true lessor.

Salk. 28. pl. 18. adjudged Hil. 6 Ann. in *B.R.* Hasser and Wallis.

If a sheriff levies money upon a *fieri facias*, the plaintiff may have

Comb. 430.

per Holt C. J. Salk. 12. S. C. have an *indebitatus assumpsit* against him for so much money received to his use.

Randall v. Bell, 1 Maule & S. 714. *diss. Ellenborough* C. J. ‖Where the defendant being the holder of a bill of exchange in trust for the plaintiff, brought an action upon it against the drawer, in which action the sheriff having been guilty of an escape on *mesne* process, the defendant sued him, and recovered damages to the amount of the bill; it was held that the plaintiff might recover the damages so recovered (allowing costs and expenses), as money had and received to his use, since the action for the escape might be considered a continuation of the original suit, by means of which the fruits of such suit were obtained.‖

Longchamp v. Kenny, Dougl. 137. [*Assumpsit* for money had and received lies for the value of a masquerade ticket, or such like ticket. (*a*)

‖(*a*) The ticket in this case having been intrusted to the plaintiff for sale got into the hands of the defendant, who refused to account for it, and the plaintiff paid the value to the owner, and then sued the defendant in assumpsit on the money counts; and it was held, that the value might be recovered as money had and received, since the defendant not producing it, a sale might be presumed; and the court inclined to think the plaintiff might recover on the count for money paid, &c.; and see Brown v. Hodgson, 4 Taunt. 189.‖

Menetone v. Athawes, 3 Burr. 1592. A shipwright who had repaired a ship, which by accident was burnt while in defendant's dock, was allowed to recover in this action the amount of the repairs.]

Comb. 341. Dewberry and Chapman. ‖It does not appear at what time this action was commenced. If it was not brought immediately after the binding, the decision would seem supportable on the ground, that the plaintiff having derived some benefit from the boy's teaching was not entitled to the whole sum paid, but only damages for not making him free. See Taylor v. Hare, 1 New R. 262.‖ If *A.* takes an apprentice, and receives 30*l.* with him, for which he is to teach him his trade, and make him free of the city of *London*, and being no freeman himself, the boy is bound likewise to a freeman; admitting that by the custom of *London* the last binding will not make him free without actual service, yet an *indebitatus assumpsit* will not lie, nor has the party any remedy, unless on a special action on the case for not making him a freeman.

‖But where the consideration on which money is paid fails, *assumpsit* generally lies to recover back the money.

Cripps v. Reade, 6 Term R. 606. Thus, where *A.* sold a term of years to *B.* and delivered to him the lease, but no assignment or conveyance was executed, *A.* undertaking, that if any thing happened, he would see *B.* righted, and it turned out that *A.*'s title was bad, and *B.* was evicted by the rightful owner, it was held *B.* might recover the purchase-money from *A.* as money had and received to his use.

Johnson v. Johnson, 3 Bos. & Pull. 162.; and see Elliot v. Edwards, 3 Bos. & Pull. 181. Bartlett v. Tuchin, 1 Marsh. 583. See Brec v. So also, where trustees for sale under a will sold premises to the plaintiff, and he paid the purchase-money, and took possession, and the trustees divided the purchase-money among the several *cestui que trusts* according to the will, but the conveyance was only signed by two of the trustees, and not by any of the other parties to it, and the plaintiff was evicted by a stranger in consequence of a defect in the title of the trustees under the will; it was held that the plaintiff might recover back in *assumpsit* from one of the *cestui que trusts*, the proportion of the purchase-

purchase-money received by him. In the first of these cases it is to be observed there was no conveyance, and in the last it was incomplete; but if a conveyance is regularly executed by the vendor, conveying to the vendee such title as the vendor has, then *caveat emptor* applies, and the money cannot be recovered back; though if there are covenants for title, there may be a remedy upon them. Holbech, Dougl. R. 655.

Where the purchaser buys an estate with all faults, and taking such title as the seller has, and the seller in answer to the purchaser's enquiries before the sale, has given him incorrect information as to the title, and the purchaser is afterwards evicted, he cannot recover the purchase-money as money had and received, unless the seller's misrepresentation was *fraudulently* made. Early v. Garret, 9 Barn. & C. 929.

If the plaintiff has received any benefit from the thing, he cannot recover back the money paid for it, as money had and received, on the ground of failure of consideration. Thus where the defendant agreed to let the plaintiff have the use of a patent obtained by defendant, in consideration of an annual sum to be paid by the plaintiff to the defendant, and the plaintiff, after using the patent and paying the annuity for several years, discovered that the invention was not new, it was held that having had the benefit of the invention for several years, he could not recover back the sums paid. Taylor v. Hare, 1 New R. 260.

If an annuity be set aside for an informality in the enrolment of the memorial, the grantee may recover back the consideration paid for it, as money had and received to his use. Shove v. Webb, 1 Term R. 732.

And this although some only of the securities are set aside by the court on motion. Scurfield v. Gowland, 6 East R. 241.

But this action lies not against a mere surety for the annuity, although such surety has joined in a receipt with the principal for the consideration-money; for the action must be founded on an equitable claim, and there is no equity in calling upon a surety to pay back money which the principal alone received. Stratton v. Rastal, 2 Term R. 370.; and see 2 Eq. Cas. Abr. 742.

So the putative father of a bastard, who pays before its birth a fixed sum to the parish officers to discharge him from all future responsibility for the maintenance of the child, may recover back so much of the money as remains unexpended, as money had and received to his use. Watkins v. Hewlett, 1 Bro. & Bing. 1.

So where the defendant without the authority of his copartners, sold to the plaintiff certain partnership goods, and received the money for himself alone, and in consequence of the defendant's want of authority, the goods were never delivered to th ‹plaintiff; it was held, that he might recover the price from the defendant, as money had and received to his use. Hudson v. Robinson, 4 Maule & S. 475.; and see Livesey v. Willis, 1 Marsh. 130.

5 Taunt. 446. Abbott v. Barry, 5 Moo. 98. 2 Bro. & Bing. 369.

The money must be received by the defendant to the plaintiff's use, and therefore where an agent receives money of the plaintiff to lay out in the purchase of an annuity on good security, and he lays Whitehead v. Howard, 2 Bro. & Bing. 372.

lays out on a bad security, and pays it over to the grantor of the annuity, the plaintiff cannot recover back this money as money had and received, but must sue on the special contract to lay it out securely. ‖

Salk. 22. pl. 2. Ruled by *Treby* C. J. at Guildhall, between Tomkins and Barnet. Skin. 411. pl. 7. S. C.

If three are bound in an usurious obligation, and one of them pays part of the money, and afterwards the obligee brings debt against one of the obligors, who avoids the bond for usury, yet the obligor who paid the money cannot (*a*) maintain an *indebitatus assumpsit* for it, for he is *particeps criminis*, and having parted with his money freely, he comes within the rule *volenti non fit injuria.*

6 Mod. 161. S. P. Comb. 447. S. P. [(*a*) It is difficult to discover what the action in this case was brought for: if it was merely to recover back what had been paid in satisfaction of principal and legal interest upon the usurious contract, the determination may be supported; for, so far as that went, the debtor was obliged, in natural justice, to pay; and therefore could not recover it back. But for all that had been paid beyond that, clearly an action would lie. Dougl. 696. Cowp. 200.; and see Astley v. Reynolds, 2 Stra. 915. *contr.* In cases of this kind the true distinction is this: if the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis.* The case of the solicitor, cited in Salk. 22. Skin. 412. Lewis v. Bourdieu, Dougl. 468. Andrèe v. Fletcher, 3 Term R. 266. Browning v. Morrice, Cowp. 790.] ‖Stokes v. Twitchen, 2 Moor R. 538. Thistlewood v. Cracroft, 1 Maule & S. 500.‖ [But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover. Smith v. Bromley, Dougl. 696. Cockshott v. Bennet, 2 Term R. 763. Nerot v. Wallace, 3 Term R. 17. Jaques v. Golightly, 2 Black. R. 1073. Jaques v. Withy, 1 H. Black. R. 65. Clarke v. Shee and Johnson, Cowp. 197.] ‖Williams v. Headley. 8 East R. 378.‖ [But if one of two parties concerned together in an illegal act (illegal only as being *malum prohibitum*, not as *malum in se*), pay money with the *privity* and at the *express request* of the other, such money may be recovered back; though in such a case the law will raise no *implied* promise. Petrie v. Hannay, 3 Term R. 418. Faikney v. Reynous, 4 Burr. 2069.] ‖See as to these cases, *post*, p. 372.‖ [And where money has been paid for another on a *legal* transaction, an action will lie for the recovery of it, though such transaction may be complicated with others that are illegal, and furnish no ground for its support. 3 Term R. 418. And with respect to the recovering back of money paid on illegal accounts, a distinction has obtained as to the state of the transaction at the time of bringing the action, whether the contract be then *executed*, or only *executory:* in the former case it cannot be recovered, in the latter it may. Lowry v. Bourdieu, Dougl. 468. Andrée v. Fletcher, 3 Term R. 266.] ‖And accordingly in cases of illegal insurance, if the period of the risk has elapsed, the insured cannot recover back the premium, although they cannot sue on the policy. Vandyck v. Hewitt, 1 East R. 96. Morck v. Abel, 3 Bos. & Pull. 35. Lubbock v. Potts, 7 East R. 449. And so in case of illegal wagers, if the event of the wager is decided, the loser cannot recover back from the winner his deposit; for he is not to be allowed to take the chance of the event being in his favour, and of the money being paid though not legally due, and afterwards when the event is against him to recover back the deposit. But if one party give notice to the other to rescind the contract before the event is determined, he may recover back his deposit. Howson v. Hancock, 8 Term R. 575., which seems to overrule Lacaussade v. White, 7 Term R. 535. Brandon v. Hibbert, 4 Camp. 57. Tappenden v. Randall, 2 Bos. & Pull. 467. Aubert v. Walsh, 3 Taunt. 275. Busk v. Walsh, 4 Taunt. 290. Eltham v. Kingsman, 1 Barn. & Ald. 683. Taylor v. Lendy, 9 East, 49. And where the wager is on an illegal battle or race, after the parties have fought or run, they still may recover back their deposits from a *stakeholder* if they give notice to him before he has paid them over. Cotton v. Thurland, 5 Term R. 405. Smith v. Bickmore, 4 Taunt. 474. Bate v. Cartwright, 7 Price, 540. Hastelow v. Jackson, 8 Barn. & C. 221. In strictness the parties, perhaps, should not be allowed to rescind the contract and recover the deposit, unless they do so before the risk is *altered* by the lapse of time. See observation of *Mansfield* C. J. 3 Taunt. 282., and note (*a*) 4 Taunt. 292.‖

Salk. 22. pl. 2. (*a*) *Vide* Comb. 447., where a person pays money for fees which were not due.

But if *A.* pays money to *B.* upon a mistake, as thinking that there was so much due on account (*b*), *&c.* he may maintain an *assumpsit* for it.

So

So if a man pays money upon a policy of assurance (*a*), supposing a loss, when in truth there was not any, he may bring an *indebitatus assumpsit* for so much money received to his use. Skin. 412. S.P.

(*a*) And whether he parts with his money by mistake, ‖that is, a mistake of fact,‖ or through fraud in the receiver, it is the same thing. Skin. 412. Salk. 22. S. P. Whip v. Thomas, 1 G. 1. Bull. Ni. Pri. 130. [In this form of action a man may recover back money paid under a warrant of distress upon a conviction, afterwards quashed. Feltham v. Terry, cited in Cowp. ‖419. 1 Term R. 387.‖; or in consequence of the judgment of a court not competent to enter into the merits of the case. Moses v. Macfarlane, 2 Burr. 1005. 1 Black. R. 219. S. C.] ‖But the authority of this last decision has been much and repeatedly questioned by distinguished judges. See 2 H. Black. 414. 5 Bos. & Pull. 169. 5 Taunt. 160. 7 Term R. 269. And it is now settled that where money is paid under compulsion of legal process, it cannot be recovered back in an action for money had and received, since if there is ground for recovering it this should have been a defence to the first action. Marriott v. Hampton, 7 Term R. 269. Gower v. Popkin, 2 Stark. R. 85. Knibbs v. Hall, 1 Espin. 84. Brown v. M'Knally, *Ibid.* 279. Kist v. Atkinson, 2 Camp. 63.‖ [And wherever the consideration on which it has been paid happens to fail, Shove v. Webb, 1 Term R. 732.] ‖Johnson v. Johnson, 3 Bos. & P. 162. Scurfield v. Gowland, 6 East, 241. Elliot v. Edwards, 3 Bos. & Pull. 181. Bartlett v. Tuchin, 6 Taunt. 259. Jones v. Ryde, 5 Taunt. 488. Watkins v. Hewlett, 1 Bro. & B. 1.‖; but the contract must be entirely rescinded. Towers v. Barrett, 1 Term R. 133.; for if it be still open, the plaintiff can only recover damages for the breach of it, and therefore must state it specially. Weston v. Downes, Dougl. 23. Power v. Wells, Cowp. 818. And the contract, where it does not determine by the original terms of it, but requires some act of the plaintiff to put an end to it, must be rescinded within a reasonable time, else he will be entitled only to damages. Compton v. Best, cited in 1 Term R. 136. Espin. 13.]

‖But in such cases if the money is paid voluntarily, and with full knowledge or full means of knowledge of all the circumstances of the case, it cannot be recovered back; since the rule *volenti non fit injuria* applies, and every man is bound to know before he pays money, whether the law renders him liable or not. The distinction is between an ignorance or deception as to the facts which excuses a party, and a mere ignorance as to the law which does not excuse him. Bilbie v. Lumley, 2 East, 469. Gomery v. Bond, 3 Maule & S. 378. Brisbane v. Dacres, 5 Taunt. 143. Reyner v. Hall, 4 Taunt. 725.

But if the payment be made under any species of compulsion, as where a pawnbroker refuses to deliver back the plaintiff's goods, unless paid illegal interest, or where the steward of a manor refuses a copyholder admission without an exorbitant fine, or where the sheriff takes excessive fees on issuing warrants in right of his office, the payment not being voluntary, may be recovered back if illegal. Astley v. Reynolds, Stra. 915. Leake v. Pigot, Selw. Ni. Pri. 86. Dew v. Parsons, 2 Barn. & Ald. 562.; and see Morgan v. Palmer, 2 Barn. & C. 734. Shaw v. Woodcock, 7 Barn. & C. 73. Holt's Ca. 546.

And so also, if a party with full knowledge of all the facts, promise to pay money claimed of him, and which he is not legally bound to pay, he is bound by such promise. Stevens v. Lynch, 12 East, 38.; and see 4 Taunt. 93.

If the plaintiff discounts for the defendant a navy bill, which turns out to be forged, and is refused payment on that ground at the navy office, and the plaintiff pay the money on it to a third party, to whom he had passed it, he may recover the amount from the defendant in an action for money had and received, all parties being ignorant of the fraud; for the money is paid under a mistake of fact, and the plaintiff is not in fault. Jones v. Ryde, 1 Marsh. 157. 5 Taunt. 488.; and see Fuller v. Smith, 1 Ry. & Moo. N. P. C. 49.

And it makes no difference, if the navy office on presentment pay the bill, supposing it genuine, and on discovering the forgery Bruce v. Bruce,

1 Marsh. R. 165. 5 Taunt. 495. n.

forgery, the party presenting it refund the money paid, and receive the same from the plaintiff, from whom he took the bill.

Price v. Neal, 3 Burr. 1354. 1 Black. R. 390.

But if the drawee of a forged bill accept and pay it, or pay it without acceptance, he cannot recover back the money from the party to whom it was paid, for the drawee is bound to satisfy himself that the bill is genuine.

Smith v. Mercer, 6 Taunt. 76.; but see Martin v. Morgan, 3 Moo. 635.

Nor can the bankers of the drawee paying a forged bill on his account, recover back the amount for the same reason.

Wilkinson v. Johnson, 3 Barn. & Cres. 428. (a) But where the notice of the forgery was not given to the party to whom the amount of the bill was paid till the *day after* the payment, it was held, that the party paying it could not recover the money back.

However, if the *London* correspondent of a supposed indorser of a bill which has been dishonoured by the acceptor, pay the bill on the application of the notary for the honour of such indorser, and afterwards on discovering that the names of such indorser, and of the drawer and acceptor are forged, give immediate notice (a) to the defendant to whom the amount was paid, in such time that notice of the dishonour may be sent the same day to the prior indorsers, such correspondent may recover back the amount from the defendant; since the money was paid by mistake, and the mistake was discovered before the defendant had lost any remedy on the bill, and the court also distinguished this from the former cases, since the plaintiffs here were neither the drawers nor acceptors of the bill nor their agents, and the defendants were in fault as well as the plaintiffs, since their calling on the plaintiffs amounted to an assertion that their principal's name was *actually* on the bill.‖

Cocks v. Masterman, 9 Barn. & C. 902.

6 Mod. 161. *per Holt* C. J. who said, that many such actions have been maintained for earnest in bargains, &c., ‖when the bargainor would not perform, and for premiums of insurance when the ship did not go the voyage.‖

So if *A.* gives money to *B.* to pay *C.* upon *C.*'s delivering up writings, *&c.* and *C.* will not do it, an *indebitatus* will lie for *A.* against *B.* for so much money received to his use.

Carth. 208. Hil. 3 W. & M. Stokeld v. Collinson, Comb. 186. S. C.

If one be named a commissioner to examine witnesses in a cause depending in Chancery or Exchequer, who officiates accordingly, he may bring an *assumpsit* for his labour and pains; for though he is to be considered as an officer of the court, yet he is not compellable to attend against his will; nor does the trust reposed in him make his taking a reward bribery, for the party is to take care to name such as will serve, and it is but reasonable it should be at the charge of him for whom he officiates.

Carth. 95. Duppa and Gerrard. Show. Rep. 78. S. C. Lies for fees due to the Usher of the Black Rod. 2 Stra. 747. See 12 Mod. 607.

The gentlemen ushers and daily waiters to the king brought an *assumpsit* against the defendant, in which they declared, that all gentlemen ushers, daily waiters, *&c.* time out of mind, had used to have a fee of *5l.* of every person who voluntarily accepted the honour of knighthood, and that the defendant (on such a day) had voluntarily accepted knighthood, and thereupon became indebted to them in *5l.*, and in consideration thereof had promised to pay the money, which he had not performed; and upon a demurrer to this declaration, it was adjudged this action would lie for this duty.

Where

Where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes themaway, an *assumpsit* for the money is the proper action, for *trover* will not lie for the goods, (*a*) because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree upon a price for present money, and the buyer takes the goods away without payment, *trover* lies, because the property is not altered (*b*) and therefore the taking away the goods without payment of the money, is an injurious taking, for which the action lies; but if a man sells goods on payment of money on a day to come, and the money be paid, and the goods not delivered, *trover* lies, because the property is in the buyer. (*c*)

Vide title *Trover and Conversion.*

‖(*a*) Unless the goods are bought with a fraudulent intention not to pay for them. Ferguson v. Carrington, 9 Barn. & C. 59. (*b*) But generally speaking the property in such case passes to the buyer on the sale, so as to throw on him all risk as to the goods, though the seller has a lien for the price, and the buyer cannot take them away without paying it. See 5 Barn. & C. 862. 6 *Ibid.* 392. 8 *Ibid.* 282. (*c*) That is, where the goods are in existence at the time of the sale; for if the goods are to be made, the buyer acquires no property in them till they are finished and delivered, notwithstanding he pays the price in advance. Mucklow v. Mangles, 1 Taunt. 318.; but see Woods v. Russell, 6 Barn. & A. 942. Atkinson v. Bell, 8 Barn. & C. 277.‖

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an *assumpsit* lies, in which the woman shall recover damages; for though matrimonial causes are regularly cognizable in the spiritual courts, yet the contract in the present case being executory, and revoked by the husband by the subsequent marriage, could not be enforced by ecclesiastical censures, as a contract *in præsenti* may; hence therefore, there being no adequate remedy in the spiritual courts, and marriage being an advantage, and the loss of it a temporal loss, it is fit that there should be a remedy in the temporal courts, otherwise there would be a failure of justice.

Carter, 233. Dickenson and Holecroft. Roll. Abr. 22. S. P. Leon. 147. S. P. Stile, 295. S.P. Keb. 866. S. P. Sid. 180. S. P. adjudged. 6 Mod. 172. S.P. *Vide* Carth. 467. Salk. 24. pl. 5. Ld. Raym. 386. 12 Mod. 214. 5 Mod. 511. Where on such a contract the man brought an action against the woman; and it was objected that it would not lie, because marriage was no advancement to him as it was to a woman; but this distinction was exploded. Such promises are good, though the time of marriage be not agreed on; but in such case it is necessary, to entitle the party to his action, to allege that he offered to marry her, and that she refused. Carth. 467. This action* must be founded on reciprocal promises; and, therefore, if the promise be on one side only, it does not bind, being only *nudum pactum.* Salk. 24. But if a man of full age, and a female of fifteen, promise to intermarry, and afterwards he marries another, an action lies against him; for though such promise may be said to be voidable as to the infant, yet it shall be good against the person of full age, who shall be presumed to have acted with sufficient caution; otherwise this privilege allowed infants of rescinding and breaking through their contracts, which was intended as an advancement to them, might turn greatly to their prejudice. Trin. 3 G. 2. adjudged between Holt and Ward, 2 Stra. 150. 637. Barnard. K. B. 209. Fitzgib. 175. 275. *Vide* head of *Infants.* These contracts are not within the statute of frauds. Cork v. Baker, Stra. 34. ‖An administrator cannot maintain the action for breach of promise of marriage to the intestate unless special damage is stated. 2 Maule & S. 408.‖

* This must mean where the defendant remains sole at the time of commencing the action.

(B) What Words create sufficient Certainty in a Promise.

ALL promises and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity

obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promisor, and are not to be rejected, if they can by any means be reduced to a certainty: Therefore,

Poph. 148. 2 Roll R. 104. S. C. [See a similar case, 1 Roll. R. 193. Cro. Jac. 417.]

If *A.*, in consideration that *B.* will marry his daughter, assumes and promises to give with her a child's part, and that at the time of his death he will give to her as much as to any of his children, except his eldest son; this is a good promise, for though a child's part in itself is altogether uncertain (*a*), yet being to give as much as to any of his children, the promise is certain enough, it being averred what the younger son had.

(*a*) But if a citizen of *London* promises a child's portion, this of itself is certain enough; for by the custom there it is known how much each child shall have. 2 Roll. R. 104. *per Montague* C. J.

Roll. Abr. 6. pl. 1. (*b*) But by Noy, 11. S. C. adjudged, because the words in the declaration were *asseruit* and *publicavit*, and it was not averred or shewn to whom. When a promise *firmam facere*, *Anglicè*, to make good a portion amounts to a promise to pay. *Vide* 2 Roll. Abr. 738. pl. 2. Cro. Car. 202. Pilchard v. Kingston.

But if there be a discourse between the father of *A.* and *B.*, in relation to a marriage between the said *A.* and the daughter of *B.*, and *B. tunc et ibidem* affirms and publishes to the father of *A. quod daret ei qui maritaret* his said daughter with his consent 100*l.*, and after *A.* marries the daughter of *B.* with his consent; yet this affirmance and publication of *B.* shall raise no promise upon which an action upon an *assumpsit* may be brought, (*b*) because these words do not include any promise.

Roll. Abr. 6. Cro. Jac. 506. S. C. (*b*) Where to warrant a debt amounts to a promise to pay it. *Vide* 2 Roll. Abr. 788.

If a bill of exchange be drawn on a merchant, and he sets his name to it, this, by the custom of merchants (*b*) amounts to a promise to pay it.

Roll. Abr. 14, 15. Barnard and Simon.

If a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l.*, this is a good *assumpsit*, though the time of assignment and payment be not appointed; for the 10*l.* shall be paid in a convenient time after the assignment, which also must be done in convenient time, and he shall not have time during his life.

Roll. Abr. 15. 27. S. C. (*c*) *Qu.* If an action will lie, the consideration being executed, and the promise seeming to be within the statute of frauds, 29 Car. 2. c. 3.? See *post* (D), and *suprà*, tit. *Agreements*. ‖The promise would seem to be *nudum pactum*, unless there were a consideration of forbearance by *B.* to sue *A.* at *C.*'s request, or some other consideration.‖ [If *A.* promise to pay *B.* such a sum, if *C.* does not, there *A.* is but a security for *C.* But if *A.* promise that *C.* will pay such a sum, *A.* is the principal debtor; for the act done is upon his credit, and not upon *C.*'s. *Per Lee* J. Fitz. 303.] ‖See 2 Term R. 80. Cowp. 227. 1 Barn. & Ald. 303.‖

So if *A.* be indebted to *B.* for certain things to him sold, and *C.* comes to *B.*, and promises him that if *A.* do not pay him the money, that then he himself will pay it, an action upon the case lies for *B.* against *C.* upon his promise, if *A.* does not pay the money in a convenient time. (*c*)

Roll. Abr. 15.

If *A.* is indebted to *B.* in 10*l.* and upon this *C.* promises that in consideration that he will forbear *A.* till such a day, if *A.* does not pay him the said day, he himself will pay him the said day;

day; this is a good promise, upon which *B.* may have an action against *C.*, for though *A.* had the whole day to pay it, and so it was impossible for *C.* to pay it the same day, if he did not pay it, yet the substance of the promise is to pay, and the time limited being impossible, is void, and then it ought to be paid on request.

If *A.* is indebted to *B.* in 10*l.* by obligation, and *A.* dies, and makes *C.* his executor, and *C.* having assets, *&c.* in consideration *quod daret diem solutionis pro uno anno*, promises payment; an action on this promise will lie against him (*a*), for though in proper sense a day cannot be given upon the bond, yet it shall be taken according to common parlance, *viz.* deferring the day of payment. Cro. Eliz. 643. (*a*) The plaintiff declared upon a promise to assign the shop of the defendant, and *transferre negotiationem*, &c. All. 67. Stile, 111.

If *A.* in consideration that *B.* will marry his daughter, assumes and promises to give to *B.* twenty *French* pieces; this is a good promise, for this, according to our usual speech, shall be intended *French* crowns, which are the common coin of *France*, and here known. Cro. Car. 194. Pointer and Pointer, adjudged.

If the plaintiff declares, that whereas there was a communication between the plaintiff and defendant, concerning the bark of certain wood, and that thereupon it was agreed that the defendant should give to the plaintiff two shillings per seam for all the bark of such wood as the plaintiff should cut, and that thereupon the defendant assumed and promised to have ready upon a certain day articles purporting the agreement, and an obligation for the performance thereof, *&c.* the declaration is not good, because not said in what sum the obligation was to be; and a certain sum cannot be intended, because the number of seams are altogether uncertain; but being a verdict upon the general issue (*b*), it was adjudged for the plaintiff; but *per cur.*, upon demurrer, or the special issue, it had been naught. Sid. 270. Please and Palfrey. Keb. 776. S. C. (*b*) Hob. 69, 70. Like point adjudged. Brownl. 11. S. P. adjudged.

But if there be an agreement (*c*) to enter into an obligation for performance of a thing of certain value, without mentioning in what sum, it shall be according to the value. (*d*) Sid. 270. *per cur.* (*c*) So upon a covenant to enter into a bond that *B.* shall enjoy such lands, it shall be intended in a sum to the value of the land. Samon's case, 5 Co. 78. a. Cro. Eliz. 432. (*d*) Of double the value. Cro. Jac. 116. adjudged. Heil. 89. like point *dubitatur*.——When for payment of money. Lev. 88.

In an *assumpsit*, the plaintiff declared that the defendant in consideration, *&c.* six months before the return of King *Charles* the Second, assumed to pay 20*l.* to the plaintiff, if *Charles Stewart foret Rex Angliæ infra* 12 *menses tunc prox. sequent.*; and adjudged a good promise, for the words shall be taken according to the subject matter, *viz.* that the king that was then out of possession, should be in possession within six months. Lev. 33. Keb. 56. S. C.

(C) What is a sufficient Consideration to create an Assumpsit.

CONSIDERATION is defined a cause or occasion meritorious, that requires a mutual recompence in fact or in law. Dyer, 336. b. Hardr. 72. 2Black. C. 443.

Doctor and Stud. 177., or Kelw. 50. Roll. Abr. 9, 10.

Therefore, if a man promises another to give him so much money at a day to come, or to build a house (*a*), without consideration, this is a naked promise, and will not oblige.

[So where a carpenter had undertaken to build a house, and had not done it, it was holden that an action would not lie. 2 H. 4. 3 b. 11 H. 4. 33. Ld. Raym. 919., and 5 Term R. 149. S. C. cited and agreed. It does not, indeed, appear that this case was decided upon the ground of its being a mere *nudum pactum* for want of any consideration, though Broke, in his abridgment of it, tit. Action sur Case, 40., has stated it to be so; the want of a written covenant, and the repugnance which the judges of those times felt to extending an action of trespass to instances of mere non-feasance, are the only reasons for the judgment assigned by the report.] (*a*) But if a carpenter promises to repair my house before a certain day, and he does not do it, by which my house falls, I shall have an action upon the case. 19 H. 6. 49. Roll. 9. S. C.——So if a carpenter undertakes to build a house for me, and does it ill, an action on the case lies against him. Roll. Abr. 9. Kelw. 78. S. P. So if a person undertakes to remove a quantity of brandy from *Brook-market* to *Water-lane*, and, by reason of his neglect, one of the casks breaks, an *assumpsit* lies against him, though it is not averred that he was a common porter, or that he had any reward. Salk. 26. pl. 12. 2 Ld. Raym. 909. Com. Rep. 133. 5 Salk. 11. Coggs and Barnard. *Vide* tit. *Bailment*.

Elsee v. Gateward, 5 Term R. 149.

‖If the defendant undertake to perform work, he is not liable for the mere nonperformance, unless there is a consideration for his promise, — and this neither in *assumpsit* nor case: but if he enter upon the work, and do it ill, he is liable though there were no consideration, for this is a misfeasance. Where the declaration stated, that in consideration that the plaintiff at defendant's request would retain the defendant to lay out money on annuity for the plaintiff, the defendant undertook to do his duty in the premises; and the plaintiff averred that he did retain the defendant accordingly, but that he would not do his duty, but on the contrary laid out the money on the personal security of a person in insolvent circumstances, the count was held bad in arrest of judgment, and the court relied principally on the ground of the defendant having no reward (*b*); also adverting to the absence of any allegation that he was an attorney.‖

Dartnall v. Howard, 4 Barn. & C. 345.; and see Bates v. Cort, 2 Barn. & C. 474.

(*b*) But *quære*, whether the defendant with reward would have been liable on this general count; for unless his duty on such a retainer with reward amounted to a *guarantee* of the sufficiency of the annuity (which certainly could not be) it is difficult to see how he could be held liable. It would seem that his duty even with reward would only extend to honesty, integrity, and common care.

2 Bulst. 269.

Also idle and insignificant considerations are looked upon as none at all; for wherever a person promises without a benefit arising to the promiser, or loss to the promisee, it is looked upon as a void promise.

3 Burr. R. 675. 4 East, 463. 4 Barn. & C. 8.

‖Any detriment to the plaintiff incurred at the request of the defendant is a good consideration for the defendant's promise: the request raises a presumption that it must be beneficial to the defendant.

Williamson v. Clements, 1 Taunt. 523.; and see Bailey v. Croft, 4 Taunt. 611. Longridge v. Dorville, 5 Barn. & Ald. 117.

Thus the giving a bond of indemnity by the plaintiff to the defendant at the defendant's request, to indemnify him against a bill of exchange drawn by the defendant, and which the plaintiff, the holder of it, had lost, was held after verdict to be a good consideration, for the defendant's promise to pay the amount of the bill; it being alleged in the declaration that the defendant was indebted to the plaintiff on the bill, and the bond purporting that the bill had been paid by the defendant.

Parker v. Bay-

But the laying out of money by the plaintiff merely for his own

own advantage, though done at the defendant's request, cannot be a consideration to support a promise by the defendant.‖

lis, 2 Bos. & Pull. 73.

If a lessee for years, in consideration the lessor will forbear to distrain corn in the shocks, assumes and promises to pay all such rent as is arrear, the consideration is void (*a*), because such corn is not distrainable.

Stile, 305. said. Hardr. 73. S.P. cited as having been adjudged.

[A promise to pay the debt of a person illegally arrested, in consideration of his being set at liberty. Randal v. Harvey, Godb. 358.; ‖or to pay extra wages to a sailor in consideration of extraordinary exertion on his part, for a sailor is bound to exert himself to the utmost for the ship. Harris v. Watson, Peake's Ca. 72. Stilk v. Meyrick, 2 Camp. 317.‖; or to pay money upon forbearance of a suit, when in point of law there is no cause of action. Lloyd v. Lee, 1 Stra. 94.; ‖or to pay in consideration of natural love and affection. Cro. Eliz. 755.; or pay money in consideration of past cohabitation, unless the defendant seduced the plaintiff. Binnington v. Wallis, 4 Barn. & A. 650.‖; or to revive a security, which is void in its creation. Cockshott v. Bennett, 2 Term R. 763.; or to fulfill an engagement entered into by an agent beyond the extent of his commission. Fens v. Harrison, 3 Term R. 757.; all these are promises without a consideration; for the consideration is the *material cause* of the contract. Fulb. Paral. 5, 6., and of course cannot be predicated of a nullity.] (*a*) *Vide* title *Distress*, that such corn is now distrainable, therefore an action would lie.

If the plaintiff declares, that in consideration the defendant was indebted to him in 20*l.*, the defendant did assume and promise to deliver several cattle to *J. S.* to the use of the plaintiff, and that the defendant had not delivered the cattle accordingly, *&c.* the consideration is void, because it does not appear that the debt was to be discharged thereby; and if not, the plaintiff notwithstanding might bring his action for the money, so that the promise is but *nudum pactum*.

Stile, 330. adjudged between Godwin and Butlin.

If *A.*, in consideration that *B.* will deliver to him a recognizance to read over, assumes and promises within six days to redeliver the same to *B.*, or to pay him 1000*l.*; this is a good promise, upon which *B.* may have an action against *A.*, for the consideration is sufficient.

Leon. 297. Cro. Eliz. 138. Like point cited.

If *A.* demises certain lands to *B.* rendering rent, and *B.* assigns to *D.*, after which rent becomes due, and *D.* in consideration that *A.* will shew him a deed, by which it may appear that such rent is due, assumes and promises to *A.* forthwith to pay the same; if *A.* does shew *D.* the indenture of lease, by which it appears that such rent is due, *A.* shall have an action upon this promise against *D.*; for when any thing, though never so small, is to be done by the plaintiff, it will be a consideration sufficient to ground an action.

Cro. Eliz. 67. 150. S. C. adjudged, but the promise there was in consideration, &c. to pay a rent-charge. Cro. Car. 70. like point adjudged.

If *A.* is lord of a manor, and a controversy arises between *A.* and *B.*, concerning a certain copyhold which *B.* claims to hold of the said manor, whereupon they submit to the judgment and award of *J. S.*; and in consideration that *A.* (*b*) had promised to abide thereby, *B.* assumes and promises that if the said *J. S.* shall adjudge the copy insufficient, that then he the said *B.* will forthwith deliver up to *A.* the possession thereof; this is a good consideration, the promise being reciprocal (*c*), and to avoid variances and suits.

Leon. 103. 4 Leon. 31. S. C. adjudged. (*b*) *Note*. Both promises must be made at the same instant, else they will be *nuda pacta*. Hob. 88. Cro. Eliz. 137.

2 Jones, 168. (*c*) 4 Leon. 3. the like point. March, 75. like point, *per cur.* Cro. Eliz. 543. like point adjudged, 889. like point, *per cur.* Hob. 88. like point adjudged. 2 Mod. 33. like point adjudged. Thorpe v. Thorpe, Comyns, 98. pl. 67. Ld. Raym. 235. 662. S. C. Salk. 171. pl. 3. S. C. 12 Mod. 452. S. C.

Leon. 192. adjudged. Cro. Eliz. 163. S.C. adjudged.

If the father of *A.* and *B.* lying sick, declares his intention to devise a rent of 4*l. per ann.* to his younger son during his life, and thereupon *A.* the eldest son, in consideration that the father will not charge his lands therewith, assumes and promises to *B.* to pay the said rent; whereupon the father forbears to charge the land, and dies, and the land descends to *A.* discharged of the said rent, this is a good consideration.

Roll. Abr. 19. Moor, 857. S. C. adjudged by three against one. Brownl. 18. S.C. adjudged. Hob. 10. S. C. adjudged by

If *B.* the daughter of *A.* be heir apparent to *C.*, and *D.* promises to *A.* the mother, in consideration that she would (*a*) consent and agree that the said *B.* her daughter should marry his son, that he would give to the said *A.* 100*l.*, upon which *A.* consents, and the marriage takes effect; this is a good consideration, for nature has given the power of disposing to parents, and in nature their children are bound to obey them.

three against one. Hut. 39. S. C. cited. (*a*) In consideration the plaintiff would give his good-will and furtherance to a marriage. Moor, 595. pl. 808.——Where marriage brokage bonds and other considerations to procure marriage are made void in equity; *vide* Abr. Eq. 89, 90. and tit. *Marriage.*—— In consideration the plaintiff would procure the consent of her master for the defendant to have a shop in his house, &c. a good consideration. Godb. 216. —In consideration the plaintiff would procure the consent of the lessor, that the lessee might assign his term, &c. Hut. 39. adjudged a good consideration.——In consideration that the mother of *A.* would permit her son to serve him for such a time. Roll. Abr. 20. adjudged.

Roll. Abr. 21, 22. adjudged. ‖*Quære?*‖

If *A.*, being on a treaty with *B.* for the purchase of certain lands from *B.*, comes to *B.*'s wife, and promises her in consideration that she would not hinder the bargain, that he would give her 10*l.* or a riding-suit; this is a good consideration, and the husband and wife may have an *assumpsit* on this promise.

Roll. Abr. 22. (*b*) 2 Roll. R. 435 like point adjudged. Vent. 211, 212. like point adjudged. Hardr. 366. S. P. *dubitatur.* 4 Leon. 2. like point adjudged. *Vide* 2 Keb. 182.

If *B.* in consideration that *A.*, at the special instance and request of *B.*, would permit *B.* to have and hold a messuage and land, then in the occupation of *B. una cum proficuis et commoditatibus inde provenientibus* to his own use, promises to pay him 13*s.* at *Michaelmas* after, for rent for the premises, and also at the said feast to deliver the possession of the premises to *A.* in as good repair as they were at the time of the demise; this is a good consideration to maintain an action, though it does not appear that *A.* had (*b*) any estate therein at the time of the promise, and though it appears that *B.* was then in possession thereof.

Sid. 323. Lev. 204. like point adjudged. But upon evidence it must be proved what estate the plaintiff had, so that it may appear that there was a consideration. 2 Roll. R. 435. [But *Qu.* for the action is founded merely upon the contract, and the lessor's title cannot be controverted in it. 2 Wils. 218.] ‖If *B.* had *come in* under *A.* then he could not dispute *A.*'s title; but it appears that *B.* was already in possession at the time of his promise, and therefore he might show that *A.* was a mere stranger; in which case *B.* would not occupy by his permission, and would not be bound to pay the money. See Williams v. Bartholomew, 1 Bos. & Pull. 326. Rogers v. Pitcher, 6 Taunt. 202.‖ But after a verdict for the plaintiff, the court will intend it was proved what estate the plaintiff had. Vent. 211. Lev. 179.

Bates v. Cort, 2 Barn. & C. 474.

‖Where the plaintiff agreed with *A. B.* to sell and deliver to him a lace machine for 220*l.* to be paid thus; 40*l.* on delivery, and the residue by weekly payments of 1*l.*, which were to be paid to the defendant as the trustee for the plaintiff; and in case of any default plaintiff was to have back the machine, and in consideration of the plaintiff, at defendant's request, appointing him to receive the weekly instalments, defendant promised

plaintiff

plaintiff to take the machine and pay the balance, should there be any default in *A. B.* in the weekly instalments; it was held that this promise was *nudum pactum*, there being no consideration for it.‖

If *A.* in consideration that *E.* will make an estate at will to him, such as counsel shall devise, promises, *&c.* this is no good consideration, for that he may presently after the estate made determine it. (*a*)

Roll. Abr. 23. Poph. 183. S. C. cited. ‖(*a*) But if there be any doubt or dispute whether the party is tenant at will or for years, the granting such estate as he hath will be a good consideration. 1 Vin. Abr. 309.; and see Richard on v. Mellish, 2 Bing. 229. 3 Bing. 334.‖

If *A.*, having several young children, lies sick, and *B.* in consideration that *A.* after his death will commit the education of his children, and the disposition of his goods during their minority, to him, assumes and promises to *A.* to procure certain customary lands to be assured to one of the children; whereupon *A.* appoints *B.* overseer of his will, and that his goods should be under the disposition of *B.* *A.* dies, and *B.* by virtue thereof, takes possession of the several goods of *A.*; if *B.* does not procure such lands to be assured accordingly, yet shall the executor of *A.* have no action against *B.*, for here is no consideration, inasmuch as the power which *B.* had given him was only *pro educatione liberorum*, and no profit to himself (*b*); and though such overseers too often make their advantage, yet that is contrary to their trust, and such a fraud as the law will not presume.

3 Leon. 88. adjudged between Smith and Smith. *Vide* 3 Leon. 129. (*b*) But if one executor, in consideration the other will relinquish the executorship, assumes, &c. this is good. Bulst. 185.

If there be certain controversies between *A.* and *B.* and they submit to the award of *J. S.*, who among other things is about to award that *B.* shall deliver up to *A.* two several obligations, wherein *A.* was bound to *B.*, whereupon *B.* in consideration that upon the request of *A.* the clause in relation to the delivery up of the obligations shall be left out of the award, assumes and promises to *A.* to deliver them up to *A. gratis*, *&c.* this is a good consideration, the clause being omitted *ad specialem instantiam ipsius A.*

3 Leon. 105. adjudged.

If *A.* pawns goods to *B.*, upon condition of redemption at a day certain, and after the day the goods being not redeemed, *B.* says he will sell them, upon which *D.* says, if he will stay the sale of them but for three days, he will pay the money and have the goods; if *B.* does stay the sale accordingly, *B.* may have an action against *D.* upon this agreement, for this was in nature of a sale (*c*); and if *D.* had paid the money, he might have brought *detinue* for the goods.

Roll. Rep. 215. adjudged. Capper and Dickenson. (*c*) So where *A.* in consideration that he had paid and delivered to the defendant twenty pieces of hammered money, being twenty old shillings, at his request, he the defendant promised to pay him twenty shillings new money; and it was objected that the property was not altered, *sed non allocat.*; for a delivery, in consideration of being paid the value, is a sale. Salk. 25. pl. 11. 2 Ld. Raym. 895.

If *A.* and *B.* are both solicitors for the office of under-sheriff, and *A.*, in consideration that *B.* will desist, assumes and promises to *B.* that if he the said *A.* obtains the said office, that he the said *A.* will pay unto *B.* 20*l.* for a horse, *&c.* this is a good consideration.

Cro. Jac. 612. Parker and Brown, adjudged.

Winch. 80. (a) It seems a strange reason; must not the *planting* imply the *growing*?

A. has lands in *D.*, of which parish *B.* is rector, and *B.* in consideration that *A.* will plant his lands with hops, and so better the tythes, assumes and promises to allow him 40*s.* for every acre so planted; and whether this is a good consideration, because the tythes cannot be bettered by the planting of the hops, but by the growing of them, *dubitatur.* (*a*)

Sid. 89. adjudged between Scott and Stevens. Lev. 71. S.C. Roll. Rep. 27.

If *A.* together with *B.* is bound to *C.* for the proper debt of *B. &c.* and *A.* pays the money, and *B.* dies and makes *D.* his executor, and *D.*, in consideration that *A.* will forbear to sue him till such a time, assumes and promises to repay him; this consideration is good (*b*), though *D.* was liable in equity only. (*c*)

S.P. *per Croke.* (*b*) So if the consideration be, that the plaintiff shall release an equitable interest only. Wells and Wells, Vent. 40. 1 Lev. 272. Thorpe v. Thorpe, Ld. Raym. 662. In consideration the plaintiff would forbear to sue for a legacy. 2 Lev. 3. Vent. 120. (*c*) *Qu.* Was not *D.* liable in an action of *assumpsit* for money laid out and paid by *A.* for testator in his lifetime?

Britten v. Webb, 2 Barn. & C. 485. 3 Dow. & Ry. 650.

‖Where *A.* drew a bill upon *B.* his debtor, which *B.* accepted, and *A.* indorsed the bill to *C.*, and *C.* reindorsed to *A.*, it having been agreed that *C.* should indorse the bill to give *A. C.*'s security for the acceptor paying it, the court held that *A.* could not recover on the bill; for treating it as a bill, *A.* by his indorsement was liable on it to pay the amount to *C.*, and *A.* could not recover on the ground of the special agreement, since there was no consideration for *C.*'s indorsement.

Mouldsdale v. Birchall, 2 Black. R. 827.

If *A.* assign to *B.* a debt due from *C.*, although the amount be uncertain, still this is a good consideration to support a promise by *B.* to deliver goods to *A.* in payment for it.

Thorpe v. Thorpe, 1 Ld. Raym. 662.

And so also the assignment of an equity of redemption by a mortgagor is a good consideration to support an *assumpsit.*

Price v. Seaman, 4 Barn. & C. 525. 7 Dow. & Ry. 14. 1 Ry. & Moo. 195.

And so also the assignment of a bargain for the purchase of an estate by the plaintiff to the defendant at his request, is a sufficient consideration to support a promise by the defendant to pay the plaintiff a certain price for the bargain; and as writing is necessary to the validity of such a bargain, it may after verdict be presumed that the bargain was in writing, though not so alleged in the declaration.‖

Lev. 257. Bolton and Fenner, adjudged. Sid. 392. S. C. adjudged.

If the plaintiff declares that he was possessed of several seamen's tickets for wages due to them, and had solicited the treasurer of the navy to pay them, who had ordered the defendant his clerk to pay them, and the defendant, in consideration the plaintiff would not give his said master any further trouble about the payment thereof, assumes to pay them; this is a good consideration: for though it does not appear the plaintiff had any interest in the money, or authority to receive it; and it was objected, though he might not trouble the master further, yet the owners might; yet after verdict for the plaintiff, it was adjudged for him; for it cannot be intended but that the plaintiff had an interest in the tickets, or authority to receive the money, else the treasurer would not have ordered the payment thereof.

Mod. 25. adjudged be-

If *A.* in consideration that *B.* an infant, hath promised to permit *A.* to carry away so much of his grass, *&c.* assumes and promises

promises to pay *B.* 6*l.* the consideration is good, and *B.* may maintain an action against *A.* upon this promise, notwithstanding *B.* may avoid his promise. tween Smith and Bowen. 2 Stra. 939. S. C. cited and agreed. Vent. 51. S. C. adjudged. 2 Keb. 581. S. C. Yelv. 134. like point *per cur.* Sid. 41. Keb. 1. S. P. *Vide* head of *Infants.*

If *A.* and *B.* are churchwardens of *D.*, and *C.* at the prosecution of *A.* and *B.* is excommunicated for not paying a tax for the reparation of the church of *D.*, and *C.* in consideration that the bishop, at the request of *A.* and *B.*, would absolve him, assumes and promises to pay unto *A.* and *B.* so much; if *C.* is accordingly absolved, *A.* and *B.* may have an action upon this promise against *C.*, for it cannot be intended but the absolution was at the instance of *A.* and *B.*, and by reason of the promise to pay them the money. Vent. 297. adjudged between Curtis and Cullingwood. 2 Lev. 119. S. C. adjudged, the consideration being that the bishop would absolve the mother of the defendant at the request of the defendant, which the bishop would not have done if the plaintiffs had not accepted the promise of payment.

If *B.* is indebted to *A.* in 20*l.* and *C.* is indebted to *B.* in the like sum, and *C.* promises *A.* in consideration that he is content to accept the said sum by the hands of *C.*, and to stay for this for four days, that he will pay him the said sum; this is a good consideration for *A.* to maintain an action upon the case against *C.* Roll. Abr. 29.

If *A.* is indebted 20*l.* to *B.*, and dies, and his executor, in consideration that *B.* will forbear him for a reasonable time, promises to pay him the debt; this is a good consideration to have an action, with an averment that he forbore him for a certain time. Roll. Abr. 26. But where a promise by an executor or administrator, or an heir, to pay on forbearance, makes a good consideration. *Vide* the several titles. ‖Such promise must be in writing, and the consideration must appear on the face of it, according to the statute of frauds, 29 Car. 2. c. 3. § 4.‖

‖So, also, if the executor promise to pay a legacy in consideration of the legatee forbearing to sue for it, this is a good consideration to support the promise. And although it is now decided that an action of *assumpsit* will not lie against the executor on an implied undertaking to pay the legacy arising from the sufficiency of assets (*a*), yet it is not decided that an action will not lie on an *express* promise by the executor (*b*), or on an admission by him of having money to pay it (*c*); and therefore, on forbearance in either of these cases, and certainly in case of forbearance to sue for the legacy in the spiritual court, or in equity, a promise founded on such forbearance would be still binding. Davis v. Rayner, 2 Lev. 3. 1 Vent. 120. 2 Keb. 758. (*a*) Deeks v. Strutt, 5 Term R. 690. (*b*) Atkins v. Hill, Cowp. 284.; *sed vide* 7 Barn. & C. 542. (*c*) Gorton v. Dyson, 1 Bro. & B. 219. See 2 Will. Saund. 137. (5th edit.)

As forbearance to sue implies a right of suit, unless the party forbearing has a good cause of action at the time of the promise to pay the debt, the promise is without consideration, and not binding. Thus where a married woman had given a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay the money, *Pratt* C. J. held that an action would not lie against her, since the note being absolutely void, there was no right of action against her at the time of her promise. Loyd v. Lee, 1 Stra. 94.; and see Cockshott v. Bennett, 2 Term R. 763., that a security absolutely void, cannot be revived by a subsequent promise. In Lee v. Muggeridge, 5 Taunt. 45. *Mansfield* C. J.

C. J. and *Gibbs* J. alluding to Loyd v. Lee, said, "The consideration averred (forbearance) did not exist; but it did not follow that no other consideration could have been stated that would have supported the promise."

Jones v. Ashburnham, 4 East, 455.; but see Marshall v. Birkenshaw, 1 New R. 172.

So also where the declaration stated that *A. B.*, deceased, was indebted to the plaintiff in a certain sum of money, and that in consideration that plaintiff would forbear and give time of payment of the debt (without stating to whom, or shewing any liability in any one to pay it), the defendant undertook to pay it, it was held on demurrer that no consideration for the promise appeared; since unless some person were liable to be sued for the debt, the plaintiff did not forbear to sue.

Barber v. Fox, 2 Saund. 135.

And, on the same principle, forbearance to sue the heir on a bond of his ancestor, in which he is not named, is no consideration to support a promise by the heir to pay the bond; for unless the heir is named, he is not liable on the obligation, though it is otherwise as to the executor.

Longridge v. Dorville, 2 Barn. & Ald. 117.

The abandonment of a suit by the plaintiff where the question of law is doubtful, and not clear in favour of the plaintiff, has been decided to be a good consideration for a promise by the defendant to pay a specific sum of money.

Phillips v. Bateman, 16 East, 356.

Where the defendant, on occasion of a run on a banking house, came forward and told the holders of notes waiting for payment, that he had determined to support the bank to the extent of 30,000*l.*, whereupon the holders kept back some of their notes, and the defendant afterwards signed a written paper to the same effect; it was held, that he was not liable to an action by an individual holder on this promise, since admitting that the promise amounted to an engagement to each individual holder, which the court thought it did not, still it was without consideration; for no forbearance was agreed on, and each holder might have immediately sued for his claim.‖

2 Black. Com. 445. Hawkes v. Saunders, Cowp. 290. Trueman v. Fenton, Cowp. 544. ‖See 1 Stark. 370. 4 Taunt. 613. If the bankrupt only promises to pay *when able*, the promise is conditional, and the plaintiff must prove his ability. 2 H. Black. 110. *Loughborough* C. J. *diss.*‖

[If a debt be due in conscience, though the remedy at law for recovering it may be gone, it is a good consideration for a promise. Thus a promise to pay a debt barred by the statute of limitations; a promise by a man when he comes of age to pay a meritorious debt contracted during his minority, though not for necessaries; and a promise by a certificated bankrupt to pay the whole of his debts; all these shall bind, for the obligation in conscience is not extinguished.]

Lee v. Muggeridge, 5 Taunt. 35.

‖And on the same principle of a moral and conscientious obligation, where a married woman having an estate for her separate use during coverture, with an absolute power of disposing of it by will, gave a bond to the plaintiff for securing money lent by him at her request to her son-in-law, and after her husband's death promised that her executors should settle the bond, an action of *assumpsit* was held to lie by the plaintiff against the woman's executors on this promise; not on the ground of forbearance to sue, since she was not legally liable; but on the ground of her moral obligation to pay the money advanced

advanced at her request, which operated as a sufficient consideration to support her promise when discovert.

And where *A.* paid to *B.* the whole of a demand claimed by *B.*, but part of which was due to *C.*, and *B. after* the payment engaged to indemnify *A.* against any demand of *C.*, Lord *Ellenborough* held that the receipt of the whole money formed a sufficient moral consideration for the promise of *B.* Lord Suffield v. Bruce, 2 Stark. Ca. 175.

But though a moral obligation is in some cases sufficient consideration to support an express promise, it is never held to have the effect of raising an implied promise.‖ Atkins v. Banwell, 2 East, 505.; and see Wennall v. Adney, 3 Bos. & Pull. 247., and the note of the learned reporters. Watson v. Turner, Bull. N. P. 129. Wing v. Mill, 1 Barn. & Ald. 104.

[Mutual promises must be both binding as well on the one side as on the other, else they will be *nuda pacta*. Where an action was brought on a bet of fourteen guineas to eight guineas on a horse-race, it was holden, that as the plaintiff might have refused under the statutes of 16 Car. 2. c. 7. and 2 Ann. c. 14. to pay the fourteen guineas, if he had lost, there was no mutuality in the wager, and therefore he could not recover the eight guineas. Harrison v. Cage, Salk. 24. Blaxton v. Pye, 2 Wils. 309. ‖But under the 17th section of the statute of frauds, a contract for the sale of goods is binding on the party signing, though it would not be binding on the other party for want of his signature. Egerton v. Matthews, 6 East, 307.‖

So where *A.*, having proposed to sell goods to *B.*, gave him a certain time at his request to determine whether he would buy them or not, within which time *B.* determined to buy them, and gave notice thereof to *A.*; *A.* is not liable to an action for not delivering them; for *B.* not being bound by the original contract, there was no consideration to bind *A.*] Cooke v. Oxley, 3 Term R. 653.

‖But where there is an actual sale by a broker, and a sale note delivered to the buyer, but with an option to him to renounce the contract by a day named, and he does not do so, the sale becomes absolute, and the seller cannot disaffirm it after the time is elapsed.‖ Humphries v. Carvalho, 16 East, 45.; and see Adams v. Lindsell, 1 Barn. & A. 681.

(D) Where the Consideration shall be said to be executed or continuing.

A CONSIDERATION altogether executed and past is not good to maintain an *assumpsit*; but if it were moved by a precedent request, it is good, and amounts to a promise; for it is not reasonable that one man should do another a kindness, and then charge him with a recompence (*a*); for this would be obliging him whether he would or no, and bringing him under an obligation without his own concurrence. (*b*) Roll Abr. 11, 12. Several cases to this purpose. Bull. Ni. Pri. 145. (4th edit.) Stokes v. Lewis, 1 Term R. 21. ‖An affidavit to hold to bail is bad, unless it state the goods sold, money lent, &c. to be at the defendant's request. 5 Maule & S. 446.‖ [(*a*) If a man work for another merely with a view to a legacy, he cannot afterwards resort to an action upon an implied *assumpsit*. Osborn v. Governors of Guy's Hospital, 2 Stra. 728. (*b*) If a person pay money which another was under a *legal* or *moral* obligation to pay, *though without his knowledge or request*, the law raises an *assumpsit*: as in the case of goods distrained by the commissioners of the land-tax, if a neighbour should redeem the goods, and pay the tax, he may maintain an action against the owner for

for the money so paid: so if a person bury the wife or child of another, he may recover back the expenses incurred by it from the father or husband. Jenkins v. Tucker, 1 H. Black. R. 90. Church v. Church, *B. R.* 1656, cited in Sir T. Raym. 260. Nor is it any bar to such an action against the husband, that the wife lived apart from him, and had a separate maintenance, for at her death the separate maintenance is at an end. Anon. *B. R.* M. 31 G. 3. reported in Vaillant's edition of Dyer, 272. b. note b.]

Exall v. Partridge, 8 Term R. 308. (a) Otherwise in case of an under-tenant. 11 East, 52.

‖If a *stranger* has goods on a tenant's premises, which are distrained for rent in arrear from the tenant, and the stranger pay the rent to redeem his goods, he may recover the amount from the tenant as money paid to his use; for the compulsion is tantamount to a request. (*a*)

Crafts v. Tritton, 2 Moo. 411.

But where the plaintiff became surety for his brother in a mortgage bond for the repayment of 300*l.*, for which the brother mortgaged his estate to *A.* for a term of years, and the brother afterwards by indenture, to which the plaintiff was no party, sold and conveyed the estate to the defendant, who engaged to pay off the mortgage money on the mortgagee's assigning over the mortgage term; and the defendant also covenanted with the brother to indemnify him and the plaintiff against the mortgage money, and the defendant afterwards failed in paying the mortgage money when demanded by the mortgagee, whereupon the plaintiff paid it to the mortgagee; it was held, that the plaintiff could not recover such money from the defendant as money paid to his use, since there was no privity between the plaintiff and defendant in the transaction, the defendant was never substituted as principal, and the plaintiff never became surety for him in lieu of his brother, and therefore the plaintiff paid the money in discharge of his liability as surety for his brother.

Toussaint v. Martinnant, 2 Term R. 100. Cowell v. Edwards, 2 Bos. & Pull. 288.

A surety compelled to pay the whole debt, may recover it as money paid from the principal debtor; and a co-surety compelled to pay the whole may recover against his co-sureties their respective proportions on the implied request by them to pay what they were liable for.

Deering v. Lord Winchelsea, *Ibid.* 270.; *sed vide* 2 Espin. 278.

Merryweather v. Nixon, 8 Term R. 186.

So also if a plaintiff recover in an action of contract against two defendants, and levy the whole damages against one, that one may recover a moiety against the other in an action for money paid to his use; but it is otherwise if a party recover against two in an action of *tort*.

Burnell v. Minot, 4 Moo. R. 540.

And if one of the two parties, jointly liable to a third, on application to pay the demand submit the matter to arbitration, and then pay the sum awarded, though without the privity of the other party, he may recover a moiety from such other party as money paid to his use.

Hutton v. Eyre, 1 Marsh. 603.

And one joint contractor paying money merely due in equity from both, may recover in *assumpsit* a moiety from the other as money paid to his use.

Taylor v. Higgins, 3 East, 169. Maxwell v. Jameson, 2 Barn. & Ald. 51., which over-rule Barclay v. Gouch, 2 Espin. R. 57.

But the plaintiff can sue for money paid, *&c.* only when he has actually paid money, and not where he has merely been compelled to give security for another.

If

If an officer, at the request of a prisoner, permit him to go at large on his promise to pay the creditor the debt, and the prisoner absconding, the officer is compelled to pay the debt himself, he cannot recover the money as paid to the use of such prisoner; since, although for the prisoner's benefit, it was not paid under any implied request from him, but in consequence of the officer's breach of duty. Pitcher v. Bailey, 8 East R. 171.

If a carrier, by mistake, deliver goods to the wrong person, who appropriates them, and the carrier is compelled to pay the price to the real consignee, he may recover the amount from the person to whom they are delivered as money paid to his use. Brown v. Hodgson, 4 Taunt. 189.; but Lord *Ellenborough* held, in a similar case, that the declaration should be special; and certainly the carrier's liability to pay is not incurred at the request or on behalf of the defendant; but in consequence of his own mistake. Sells v. Laing, 4 Camp. 81.; and see Longchamp v. Kenny, Dougl. 137.

But where the plaintiff, as churchwarden, and a number of parishioners signed an order authorizing the churchwardens to put a new roof to the tower of the church, and the plaintiff and the other churchwarden accordingly ordered the repairs, and made a rate on the inhabitants to reimburse themselves, the rate being quashed on appeal, the plaintiff sought to recover a proportion of the expenses paid from the defendant as one of the parties signing the order; it was held, the action would not lie, since there was neither any express or implied *assumpsit* on the part of the defendant to pay the money, and the churchwardens would have been repaid if they had made a proper rate. ‖ Lanchester v. Frewer, 2 Bing. R. 361.

If the servant of *A.* be arrested in *London* for a trespass, and *J. S.*, who knows *A.*, bails him, and after *A.* for his friendship, promises to save him harmless, and *J. S.* comes to be charged; yet this is no consideration to ground an *assumpsit* on, because the bailing, which was the consideration, was past and executed before. (*a*) Dyer, 272. Roll. Abr. 11. 2 Leon. 225. Owen, 144. Yelv. 41. 2 Stra. 933. 2 Barnard. K. B. 55.

5 Burr. 1665. ‖(*a*) But see Lord Suffield v. Bruce, 2 Stark. 175.‖

But it had been otherwise if the master had before requested him to become bail for his servant, and the bailing had been after. (*b*) Dyer, 272. Roll. Abr. 11. (*b*) Hob. 106. S. C. and S. P. cited and agreed, because the promise is not naked, but couples itself with the precedent request, and the act of the party procured by that request. 2 Leon. 225. S. C. cited and agreed. Cro. Car. 409. S. C. cited *arguendo*, and S. P. agreed to *per curiam*.

So, if a man requests another to labour for his pardon, *&c.*, and after he has done his endeavour, if the other says, in consideration that he has laboured for his pardon at his own charge, he promises to pay him so much, *&c.*, this is a good consideration. Roll. Abr. 11. Moor, 866. S. C. Brownl. 8. S. C. Hob. 105. S. C. Stile, 465. S.P.

If *A.* serves *B.* for a year, but has nothing for his service (*c*), and afterwards at the end of the year, *B.*, for his good and faithful services, assumes to pay him 10*l.*, *A.* may have an action upon the case upon this promise against *B.*, for the consideration is good. 2 Leon. 225. Godb. 32. S.C. Cro. Eliz. 42. S. C. (*c*) But if a servant has wages given him, and after his service ended, his master *ex abundantiâ* promises to pay him 10*l.* more, he

he shall not have an action on this promise, because there is no precedent consideration. 2 Leon. 225. Hutt. 84.

Taylor v. Brewer, 1 Maule & S. 290. Jewry v. Busk, 5 Taunt. 302.

‖In the last case there was an express promise to pay a certain sum; but if *A.* work for a committee, under a resolution that any service rendered by him shall be taken into consideration, and such remuneration made as shall be deemed right, in this case he cannot sue for his recompense, for the resolution imports that the committee are to consider whether any remuneration is due; but if a party do work under promise of a handsome present he may sue for compensation.‖

Leon. 102. Pearl and Edwards adjudged. Cro. Eliz. 94. S. C. adjudged, and said the consideration that he was in possession, and

If *A.* leases lands to *B.* for a certain term of years, rendering rent, and after some of the years expired, and the rent paid, *A.*, in consideration that *B.* had occupied the land and paid his rent, assumes to save him harmless against all persons for his occupation past and to come; if afterwards the cattle of *B.* are distrained *damage-feasant*, he may have an action upon this promise against *A.*; for the occupation, which is the consideration, continues.

had paid, and was to pay his rent, was a sufficient cause for *A.* to defend his possession for the time to come. ‖But where the declaration stated, that in consideration *B.* had become and was tenant to the plaintiff, he undertook to cultivate the farm in a certain manner, the declaration was held bad on demurrer, as the consideration was executed, and did not necessarily raise any such obligation as was stated. Brown v. Crump, 1 Marsh. R. 567. 6 Taunt. 300.‖

2 Leon. 111. adjudged between March and Rainsford. Leon. 102. S.P. (*a*) A good consideration to raise an use, but not an *assumpsit*. Cro. Eliz. 756. agreed *per cur.* Carth. 141.

If there be a communication between *A.* and *B.* concerning a marriage to be had between *A.* and the daughter of *B.*, upon which *B.* offers him 200*l.* with his daughter in marriage; but they cannot agree upon the day of payment, and afterwards *A.* steals away the daughter of *B.*, and marries her without the consent or knowledge of *B.*, and after *B.* agrees thereto, and in consideration of this marriage assumes to pay 100*l.* to *A.*; this is a good promise, upon which *A.* may have an action against *B.* for the natural affection of the father (*a*), and the advancement of the daughter (*b*), make this a consideration continuing. (*c*)

arguendo. (*b*) Marriage is always a continuing consideration. 2 Leon. 224. *per Anderson.* Godb. 51. Cro. Car. 409. Hut. 84. Cro. Eliz. 741. (*c*) A serjeant at law gives counsel to *A.* who afterwards, in consideration thereof, assumes to pay him 20*l.*, an action lies thereupon. 2 Leon. 111. *per Popham.* Cro. Eliz. 59. said. [*Qu.* of this?]

2 Keb. 99.

In consideration that he had paid money for the defendant, and obtained a release of his debt, was held a continuing consideration, because the benefit of it was continuing to the party.

Warren v. Morse, Cro. Eliz. 138.

[Where the plaintiff declared, that in consideration he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance; the consideration was adjudged not to be absolutely past, for the assurance was the substance of the sale.]

(E) Where the Promise shall be void, the Consideration being against Law.

AS all considerations are deemed insignificant and void, that are not of some benefit to the promiser, or loss to the promisee;

misee; so if they are wicked and ill in themselves, or unlawful by being prohibited by some act of parliament, they are void; therefore,

If an officer, who by the duty of his office is obliged to execute writs, promises, in consideration of money paid him, to serve a certain process, an *assumpsit* will not lie on this promise (*a*); for the receipt of the money was extortion, and the consideration unlawful.

Roll. Abr. 16. Roll. Rep. 313. S. P. adjudged. the consideration being, that he would serve a *ne exeat regno*.

[(*a*) The like law on a promise of a bribe to a bailiff for taking bail. Stotesbury v. Smith, 2 Burr. 924. 1 Black. R. 204. S. C.] ‖On the same principle a promise by the captain of a ship to pay a sailor extra wages in consideration of his doing more than the ordinary duty in navigating the ship, is void, and the sailor cannot sue on it. Harris v. Watson, Peake's Ca. 72. So, also, where in the course of a voyage some of the seamen deserted, and the captain not being able to find others to supply their places, promised to divide the wages which would have become due to them among the remainder of the crew, the promise was held void for want of consideration. Stilk v. Myrick, 2 Camp. 317.‖

So if an executor sues execution by *elegit*, and *B.* a stranger, as a friend to the executor, in consideration that the sheriff would forthwith execute the said *elegit*, and of 6*d.* to him by the sheriff paid, promises to pay him 60*l.*, upon which the sheriff executes the writ; yet no action lies, because the consideration is against law (*b*); for the sheriff ought to do his duty without reward, and this 60*l.* is no discharge of the fees due to the sheriff, being given by a stranger (*c*), and not expressed for them.

Roll. Abr. 16. Cro. Jac. 105. S.C. adjudged. (*b*) So if a sheriff suffer one that he has arrested to escape, on the promise of a stranger, to be paid so much money, yet no action lies on this promise. Salk. 28. pl. 17. *Vide* head of *Sheriff*. (*c*) Otherwise where given by the plaintiff himself. Roll. Abr. 26. [But the case in Rolle does not warrant this; it is as follows: — "If *A.* delivers an execution to the sheriff at his suit against *B.*, and in consideration that the sheriff without any fee will execute it, promises the sheriff to pay to him a certain sum, which is as much as the sheriff is allowed to take by the statute of 28 Eliz.; though it be admitted that the sheriff cannot have any remedy for his fees, yet because it was lawful for the sheriff to take his fees, and he made the execution at the plaintiff's request, and this is for his benefit, this is a good consideration." By the reports of this case in Moor and Croke it appears, that the sheriff declared for the money, as for his lawful fees of office under the statute: in the other case in the text, he declared for a gross sum for executing the writ; thence the difference between the cases as to the *legality* of the consideration, the present subject of enquiry; for it would not affect the consideration in that respect, whether the promise were made, or the money were to be paid by the plaintiff himself, or a stranger. Cro. Eliz. 654. Moo. 468. p. 669. 699. p. 972.] ‖And if the sheriff take a larger fee than is due on a warrant issued by him in execution of his office, it may be recovered back as money had and received to the use of the party paying it. Dew v. Parsons, 2 Barn. & A. 562.; and see Morgan v. Palmer, 2 Barn. & C. 729.‖

But if a man brings a *capias* that he has against *A.* to the sheriff, and prays him that he will make *J. S.* his special bailiff, and promises him, if he will make him his special bailiff, that if *A.* escapes from the bailiff, he will bring no action for the escape against him; this is an *assumpsit* upon which an action lies, if he brings any action against the sheriff for the escape.

Roll. Abr. 16. Leon. 132. 3 Leon. 227. Cro. Eliz. 178. Owen. 97. S.C. adjudged. 4 Term R. 119.

So where the sheriff takes goods in execution upon a *fieri facias*, and a stranger promises the officer to pay him the debt, in case he will restore them; this is a lawful consideration, for by the *fieri facias* he may sell the goods, and this in effect is doing no more.

Salk. 28. pl. 17. adjudged on demurrer. Love's case.

If *A.*, in consideration of some benefit, promises not to set up or follow the same trade with the plaintiff in such a town, this is a good promise; but if the promise were not to set up or follow

Vide Roll. Abr. 16, 17. Cro. Jac. 326. 596. 2 Bulstr. 136.

Jones, 13. Fortesc. 297. follow the same trade in any part of the kingdom, it would be void.

March, 77. 2 Roll. R. 201. 2 Ld. Raym. 1456. 2 Stra. 739. 3 Bro. P. C. 349. ‖Bunn v. Guy, 4 East, 190. So a bond given by a surgeon not to practise within twenty miles, was held not to be illegal. Hayward v. Young, 2 Chit. R. 407.‖

Roll. Abr. 18. Cro. Car. 337. 353. 361. S. C. 1 Jon. 341. S. C. If *A.*, being a clerk, promises *B.*, in consideration that *B.* will procure him to be rector of a donative church, with cure of souls, to pay 10*l.* to *B.*; this is no good consideration to maintain an action, for this is simony, and an offence against the laws of God and man.

Parsons v. Thompson, 1 H. Bl. 322. [Where *A.* was in possession of an office in a dock-yard, and *B.*, in order to induce him to procure himself to be superannuated, and retire on the usual pension, agreed (without the knowledge of the navy-board to whom the appointment belonged) in case he (*B.*) should succeed him to allow him his extra pay from the yard-books; and *B.* was afterwards appointed to the office; it was holden, that an *assumpsit* would not lie upon this agreement, the consideration being illegal, as a fraud upon the public, and an injury to the service.

Garforth v. Fearon, M. 27 G. 3. 1 H. Black. R. 327. So where *A.*, who was appointed by the interest and on the application of *B.* to be customer of a port, had previously signed an agreement declaring that his name was used on the application in trust for *B.*, that he would appoint such deputies as *B.* should nominate, and would empower *B.* to receive the profits of the office to his own use; it was holden, that the consideration in this case would not support an *assumpsit*, being equally against the principles of the common law, and the statute of the 12 R. 2. c. 2. and 5 & 6 E. 6. c. 16.

Stackpole v. Earl, 2 Wils. 133. So a promise to pay 2*l.* per cent. to procure a purchaser of defendant's place in the customs is bad, and will not raise an *assumpsit.*]

Blachford v. Preston, 8 Term R. 89.; and see Card v. Hope, 2 Barn. & C. 661. Richardson v. Mellish, 2 Bing. R. 229. ‖So also a promise to pay to the plaintiff a sum of money on a person being appointed to succeed him in the command of an East India ship, in consideration of the plaintiff paying 5000*l.* to the owner for the appointment, without the knowledge of the East India Company, was held bad, the consideration being illegal.‖ 3 *Id.* 334. Hughes v. Statham, 4 Barn. & C. 187. It seems that an agreement to introduce a man to a partnership with a medical practitioner, in consideration of a per centage on the premium to be paid is not illegal. Edgar v. Blick, 1 Stark. Ca. 464. But an agreement to allow poundage to a person upon the amount of bills of all customers recommended by such person has been held a fraud on the customers, and illegal. Wyburd v. Stanton, 4 Esp. Ca. 179.; and see 1 Carr. & Pa. 149. A contract between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced by the brewer, unless he shew that he supplied the publican with good beer. Holcombe v. Hewson, 2 Camp. 391.; and see Thornton v. Sherratt, 8 Taunt. 529.

Cro. Eliz. 230. Mead and Bigot adjudged. 3 Leon. 236. S. C. adjudged. *A.* levies a plaint in the court of *Stepney* against *B.*, upon which a precept is directed to *C.* the bailiff there, to attach the goods of *B.*, and thereupon *C.* attaches certain of the goods of *B.*, and *A.*, in consideration that *C.* will deliver those goods to him to deliver at the next court, assumes and promises to save *C.* harmless,

harmless, *&c.* the consideration is void, being against law; for the bailiff ought not to deliver them to the plaintiff.

If *A.*, being seised of lands in fee, enters into a recognizance to *B.*, and after makes a feoffment of those lands to *C.*, who, in consideration that *B.* will assign to him the recognizance, assumes and promises to pay him 80*l.*; this is a good promise, for the consideration being to assign to the terre-tenant, it operates by way of discharge, and is clearly lawful; otherwise of an assignment to a stranger. (*a*)

Cro. Eliz. 551. Barrow and Gray.

(*a*) *Qu.* As to what is alleged respecting a stranger?

If *A.* brings *B.* to a common inn, of which *C.* is host, and affirms to *C.* that he hath arrested *B.* by virtue of a commission of rebellion, and in consideration that *C.* will keep *B.* as a prisoner by the space of one night, assumes and promises to save *C.* harmless, *&c.* if *B.* recovers against *C.* in an action of false imprisonment, *C.* may have an action against *A.* upon this promise; for though the consideration, *viz.* the keeping of *B.* was unlawful, yet because it did not appear to *C.* to be so, the promise to save him harmless was good.

Hut. 55. adjudged between Fletcher and Harcourt. Winch. 48. S.C. adjudged; but *Hobart* said, perhaps there may be a diversity where a public officer, and where a private man (as in a principal case) makes the arrest; but because the defendant had pleaded *non assumpsit*, which implied that the imprisonment was lawful, he agreed judgment should be given for the plaintiff.

But if it appears that the act which is to be done is unlawful, as if *A.*, in consideration that *B.* will beat *C.*, promises to save *B.* harmless, the consideration is void.

Hut. 56. Winch. 49. S.C. and S.P. *per Hutton.* 2 Lev. 174. like point adjudged, where the defendant, in consideration of 20*s.*, assumed to pay 40*s.* if he did not beat *J. S.* out of such a close. [So where two boxed for a wager of five guineas; on *assumpsit* for that sum brought by the winner, it was holden that the action would not lie, the act being a breach of the peace. Webb v. Bishop, Gloster Ass. 1731. Bull. Ni. Pri. 16.] ‖And an action will not lie on a wager whether an unmarried woman has had a child, Ditchburn v. Goldsmith, 4 Camp. 152.; nor on a wager as to the sex of a third person, De Costa v. Jones, Cowp. 729.; nor on a wager on an abstract question of law, or judicial practice, not arising out of circumstances really existing, and in which the parties have an interest, Henkin v. Guerss, 12 East, 247. 2 Camp. 408.; nor on a wager as to the amount of any branch of the public revenue, Atherfold v. Beard, 2 Term R. 610. Shirley v. Sankey, 2 Bos. & Pull. 130.; nor on a wager that plaintiff would not marry within six years, since this is in restraint of marriage, and void, Hartley v. Rice, 10 East, 22.; nor on a wager between two voters on the event of an election of members of parliament, Allen v. Hearn, 1 Term R. 56.; nor on a wager on a cock fight, Squires v. Whisken, 3 Camp. 140., or a dog fight, Egerton v. Furzeman, 1 Ry. & Moo. 213.; nor on a wager on a horse race, if the sum betted by either party be above 10*l.*, Goodburn v. Morley, 2 Stra. 1159. Blaxton v. Pye, 2 Wils. 309. Clayton v. Jennings, 2 Black. R. 706.; or if the horse race is run for less than 50*l.*, though the sums betted be under 10*l.*, Johnson v. Bann, 4 Term R. 1.; nor although the sum run for is above 50*l.* unless the race is a *bonâ fide* horse race on the turf, Ximenes v. Jaques, 6 Term R. 499. Whaley v. Pajot, 2 Bos. & Pull. 51. But if neither of the sums betted on a horse race amounts to 10*l.* and the race is run for 50*l.* or upwards, an action lies on the wager. M'Callester v. Haden, 2 Camp. 438. It seems that a wager between two proprietors of carriages for conveying passengers, that a given person shall go by one particular carriage and no other is illegal. Eltham v. Kingsman, 1 Barn. & A. 683. An action will lie on a wager, whether the defendant be older than the plaintiff, Hussey v. Crickett, 3 Camp. 168.; and a wager as to the identity of a third person is not illegal. Bland v. Collett, 4 Camp. 157. A wager on the length of life of *Buonaparte* (then First Consul of *France*) arising out of a conversation as to the probability of his coming to a violent end, was held void on the grounds of immorality and impolicy. Gilbert v. Sykes, 16 East R. 150.‖

[If *A.* promise *B.* money in consideration that he will not give evidence in a cause, such promise cannot be enforced, for it is unlawful and iniquitous so to suppress testimony.]

1 Leon. 180. 3 Term R. 17. S.P.

If

Yelv. 197. adjudged between Marten and Blithman. 2 Bulstr. 213. and Godb. 250. S. C. adjudged, the promise being to pay the gaoler money. Het. 175. S. P. 10 Co. 102. S. P. agreed *per Wray* C. J. and that if such promise was not void by the common law, it is made void by the statute 23 H. 6. c. 9. Cro. Eliz. 199. adjudged. 3 Leon. 208. adjudged. [It could not be void by the statute, for that does not extend to parties in execution, but speaks only of persons arrested on mesne process. 1 Term R. 421.] (*a*) But such promise to the plaintiff is good, for he may lawfully discharge him. Cro. Eliz. 190. adjudged. ‖And it does not require writing, since the debt is discharged by setting at liberty, and consequently the debtor is no longer liable.‖

If *A.* is in execution at the suit of *B.*, and *C.*, in consideration that the gaoler will permit *A.* to go at large, assumes and promises to him (*a*) that *A.* shall pay the debt at a certain day, and that he, the said *C.*, will save the gaoler harmless, the promise is void, because the consideration is against law.

Sid. 132. Keb. 483. S. C. Lev. 98. S. C. adjudged, *nisi*, the promise being to deliver him or pay 10*l.* and the action being brought by the plaintiff himself, who declared upon a promise to the bailiff *ex parte queren.*; so that if he was out of custody, it must be intended by the assent of the plaintiff, because the promise was made to the bailiff *ex parte querentis*; and by bringing the action he hath affirmed his assent. [The reason is, that the promise being made to the plaintiff, or to one on his behalf, is not within the statute of 23 H. 6. c. 9., for the illegality of the consideration in this case arises merely upon that statute. *Therefore* it is, that undertakings by attorneys for the appearance of a defendant are enforced by the courts, for they are given to the plaintiffs in the action. But where any engagement is entered into for this purpose with the sheriff, it must be in the particular form chalked out by the statute, otherwise it is void. Accordingly it was holden, that an agreement in writing to put in good bail for a person arrested on mesne process at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of a sheriff, in consideration of his discharging the party arrested, was void by the statute of H. 6.; for, since the passing of that statute, the usage has been to take the security by bond; and that bond, by the words of the statute, must be entered into to the sheriff, or to such officer as has the return of process; whereas here was no bond, but a mere simple contract, and that with the sheriff's officer; and farther, the bond must be given only for the appearance of the party, and for no other purpose. Rogers v. Reeves, 1 Term R. 418.] ‖See 4 East, 568. 4 Maul. & S. 333., and *post.* tit. *Bail.*‖

If *A.* is arrested, and *C.*, in consideration that the bailiff will suffer *A.* to continue in the house of *C.* till the next morning, assumes and promises them to deliver him in safe custody to the bailiff; the consideration is lawful, for it shall not be intended that the bailiff was ever absent from *B.*, so that it could be no escape.

Mod. 166. Gilb. Evid. 68. Cro. Eliz. 469, 470. *bis.* Like point, where the consideration was to take such oath before the mayor of *London.* Brett and Pretiman, like point, Sid. 283. adjudged. Raym. 153. adjudged. Keb. 26. 44. adjudged; where the consideration was to take such oath before a master in chancery, 2 Sid. 123. like point adjudged; where the oath was to be taken before a master in chancery; and a like point there cited to have been adjudged, where the oath was to be taken before a judge of assise.

If the father of *A.* was indebted to *B.*, and *A.* promises *B.* that if he will bring two witnesses before a justice of peace, who upon their oaths shall depose that the father of *A.* was so indebted to *B.*, that then he will pay it; if *B.* does produce his witnesses, *&c.* he may have an action upon this promise against *A.*, for the consideration is not unlawful, nor the oath profane; adjudged by two judges against *Vaughan*, who held that such an oath, illegally administered and taken, was within the statute of profane swearing.

Sid. 212. Keb. 744.

If *A.* obtains a judgment against *B.* in the marshal's court, and afterwards, in consideration of money in hand paid, assumes and promises to assign this judgment to *C.*; this is a good promise, for it is lawful so to do, and the intent must be that it shall be assigned according to common usage, *viz.* by letter of attorney,

so

so that *C.* may take out execution in the name of *A.* which may be done without any maintenance.

If *A.* obtains a judgment against *B.*, and thereupon takes out an *elegit*, and delivers it to the under-sheriff, who by virtue thereof seizes certain goods of *B.*, and afterwards the under-sheriff, in consideration that *A.* will take out a new *elegit*, and deliver it to him, promises to cause and procure the said goods to be found by inquisition, and to deliver the same to such person as *A.* shall appoint, *&c.*; this promise is against law, being to do a thing against the duty of his place, by which he is bound to return an indifferent jury; and though part of the promise was to do a lawful act, yet since that depended upon the other part, which was illegal, the whole is naught. 2 Jones, 29. adjudged between Morris and Chapman. Carter, 223. S.C. adjudged.

[If a performer engage to dance at the King's Theatre in the *Hay Market*, yet no action will lie against him for a breach of the agreement, if it appear that the theatre was not licensed pursuant to the 10 G. 2. c. 28. But in such case the performer may recover from the manager the salary which he had stipulated to pay for him; for being engaged and ready to execute the agreement on his part, he ought not to suffer for the want of a licence, which it was the manager's business to have procured. Gallini v. Laborie, *5* Term R. 242.

Money lent for the purpose of paying a gambling debt may be recovered back, for the statute of 9 Ann. c. 14. only annuls the *security*, and not the *contract*. Barjeau v. Walmsley, 2 Stra. 1249. Robinson v. Bland, 2 Burr. 1080. Alcinbrook v. Hall, 2 Wils. 309. ‖See 3 Barn. & A. 179. and *post*, 373.‖

Where the plaintiffs, who were merchants living at *Dunkirk*, sold tea to the defendant *there*, and delivered it to him *there*, though this tea was so sold for the purpose of being smuggled into *England*, and that purpose was known to the plaintiffs at the time; yet they not being concerned in the smuggling, and it being a fair sale as to them, and good by the laws of the country where they lived, they were allowed to recover the price of the tea in *England*. Holman v. Johnson, Cowp. 341.

But where the plaintiffs were four partners, three of whom lived in *England*, and the fourth in *Guernsey*, and this last sold brandy at *Guernsey*, packed up in a particular manner for the purpose of smuggling, but without the privity or personal participation of the others; in an action brought for the price of this brandy, they were nonsuited: for in this case the parties were natives of *England*, and the contract was made in contravention of the laws of *England*; whereas in the case of *Holman* v. *Johnson* the contract was made abroad by foreigners, who are not bound to take notice of the revenue laws of this country. Biggs v. Lawrence, *3* Term R. 454. ‖Waymell v. Reade, *5* Term R. 599.‖

So where the plaintiff, an inhabitant of *Guernsey*, sold goods to the defendant in *Guernsey*, which it appeared were to have been smuggled into *England*, and the defendant gave bills, on which an action was brought for the price; it was adjudged, that the plaintiff could not recover, for the bills were given on an illegal contract, and to a subject of this country.] Clugas v. Penaluna, 4 Term R. 466

Lightfoot v. Tennant, 1 Bos. & Pull. 551.

‖So also if the plaintiff agrees to sell to the defendant goods for the express purpose of being shipped, with the plaintiff's knowledge, to a foreign port, and from thence reshipped to the *East Indies*, and there trafficked with clandestinely, contrary to 7 G. 1. c. 21., and a bond is given by the defendant to the plaintiff for securing the price; a plea stating this illegal agreement, is a good bar to an action on the bond.

Langton v. Hughes, 1 Maule & S. 593.; and see Law v. Hodson, 11 East, 300.

So also a druggist selling drugs to a brewer, knowing that they are to be used in the brewery, cannot recover the price, the 42 G. 3. c. 38. prohibiting brewers from using any articles but malt and hops in brewing.

Hodgson v. Temple, 5 Taunt. 181. But this case is inconsistent with the principle of the above cases, and the case of Holman v. Johnson, which was quoted by one of the judges as supporting the principal case is clearly distinguishable from it, since that was decided on the ground that the contract and delivery of the goods were complete in *France*, and that though the vendor knew they were to be smuggled into *England*, still he was not bound to notice a mere revenue law of another country. See Brown v. Duncan, 10 Barn. & C. 98., and *infrà*, 371.

It has, indeed, in one case been held, that the mere knowledge of the seller that the goods are to be illegally employed will not prevent his recovering the price, unless he is a sharer in the illegal transaction. And a vendor of spirituous liquors to the defendant a rectifying distiller, who also kept a retail spirit shop, was suffered to recover the price of the liquors, though he had knowledge of the defendant's illegally exercising both trades, contrary to the 26 G. 3. c. 73. § 54.

Ribbans v. Crickitt, 1 Bos. & Pull. 264.; and see Lofhouse v. Wharton, 1 Camp. 550., where the same doctrine was held as to non-resident voters, by *Wood* Baron.

So also an innkeeper furnishing provisions at the desire of a candidate to resident voters after the *teste* of the writ, cannot recover the amount from the candidate, such provisions being contrary to the Treating Act, 7 & 8. W. 3. c. 4.

Marchant v. Evans, 2 B. Moo. 14.

So also a printer cannot recover the price of printing a weekly periodical work, unless he has complied with the injunctions of the 38 G. 3. c. 78. § 1. and 10., by lodging an affidavit at the Stamp Office stating the name and abode of the printer and publisher, and by printing such name, *&c.* on some part of the paper.

Bensley v. Bignold, 5 Barn. & A. 335.

Nor can a printer recover for printing a book, unless he prints his name on the first and last leaves, according to the 39 G. 3. c. 79. § 27. And it matters not whether the statute prohibits the thing negatively, or enjoins it affirmatively; if the subject-matter of the plaintiff's action is in violation of it, the plaintiff cannot recover in a court of justice.

Ibid. 340.

And it would seem that it makes no difference whether the thing is prohibited absolutely, or only under a penalty.

Johnson v. Hudson, 11 East, 180.; and see Gremaire v. Le Clerc Bois Valon, 2 Camp. 144.

In one case, indeed, it was held that a factor who sold a parcel of tobacco might recover the price, though he had not taken out a licence as a tobacco dealer, according to the 29 G. 3. c. 68. § 70., which enacts that every person who shall deal in tobacco shall take out a licence, which by § 72. is to be renewed yearly, under penalty of 50*l.* The court held that as this was a breach

breach of a mere revenue regulation, protected by a sufficient penalty, the plaintiff might recover. But it is to be observed they also doubted whether the plaintiff was a dealer in tobacco within the meaning of the act.

And this case has been confirmed by a very recent decision, where five persons carried on trade in partnership as distillers, and one of them alone carried on the business of retail spirit dealer within two miles of the distillery, contrary to the 4 G. 4. c. 94. §§ 132, 133., and his name was not entered at the Excise Office or in the licence as a partner in the distillery, as required by 6 G. 4. c. 8. § 7.; it was held that these being mere revenue regulations, the breach of them by one of the partners, with the knowledge of the others, did not render the trade carried on by the five illegal, so as to deprive them of the right to recover the price of spirits sold by the partnership. Brown v. Duncan, 10 Barn. & C. 93.

A person cannot recover a sum for commission and money laid out and expended in buying for the defendant shares in an illegal company, contrary to the 6 G. 1. c. 18. Josephs v. Pebrer, 3 Barn. & C. 639. See *id.* 814.

So also where two persons engage in an illegal partnership, carried on in the name of one of them, for insuring ships, contrary to the 6 G. 1. c. 18. § 12., (which prohibits societies and partnerships for underwriting and assuring, except the two chartered companies,) and one partner pays sums for losses, he cannot recover any part of such sums in *assumpsit* from the other partner, since the partnership being illegal cannot be the foundation of an action. And if an arbitrator award a sum due from one partner to the other for such losses, the court will set aside the award *pro tanto.* Mitchell v. Cockburne, 2 H. Black. 379.; and see Lees v. Smith, 7 Term, 338. Clayton v. Dilly, 4 Taunt. 165. Aubert v. Maze, 2 Bos. & Pull. 371.

And if one of such partners receive the premiums on such illegal insurances, the other partner cannot recover any portion of them as money had and received to his use, for in such case the rule applies *in pari delicto potior est conditio possidentis ;* nor if a proportion of the losses is paid by one partner to a broker for the use of the other partner, can such other partner recover the money from the broker. (*a*) Booth v. Hodgson, 6 Term R. 405. Sullivan v. Greaves, Park. Insur. 8.; and see Davis v. Edgar, 4 Taunt. 63.

(*a*) But the case of Sullivan v. Greaves is in principle overruled by the subsequent decisions of Tenant v. Elliot, 1 Bos. & Pull. 3., Farmer v. Russell, *ibid.* 296., in which it was held that a party receiving money for another as a mere agent, and not being implicated in the illegal transaction, cannot resist paying the money over on the ground that the consideration on which the money was paid to such agent was illegal. And the case of Sullivan v. Greaves certainly goes beyond the doctrine of Mitchell v. Cockburne, Aubert v. Maze, *Ex parte* Bell, and the other cases, where one partner paying money on the illegal transaction is held not entitled to recover a proportion as money paid to the use of the other; since in these cases it is necessary for the plaintiff to prove the illegal transaction, and his case rests on the foundation of it; but in the case of an agent receiving money for the plaintiff, it is not necessary to go into the illegal transaction, but the plaintiff can recover on merely proving the receipt of the money by the defendant on the plaintiff's account. The money in such case becomes the plaintiff's money in the defendant's hands, and "the distinction is, that whether the consideration be good or bad, a man may recover *his own money*, but not that of another person." *per Heath* J., 1 Bos. & Pull. 299. Where, however, notice was given by the payer to the agent not to pay the money over, and no money in fact passed, but the agent merely credited the party to whose use it was to be received, it was held that such party could not recover it. Edgar v. Fowler, 3 East R. 222.

Ex parte Bell, 1 Maule & S. 751.

And if money is advanced by *A.*, one partner of a firm, to *B.* for payments to be made on policies illegally subscribed on the joint account of such partner and *B.*, although such money is advanced out of the partnership funds without the privity of the other partners, who are not at all concerned in the illegal insurances, still after *A.*'s death his surviving partners cannot claim this money against the estate of *B.*, who has become bankrupt; for it must be considered as if the claim were made for the benefit of *A.* the delinquent partner as well as the rest, and the claim is founded on the illegal agreement to insure.

Branton v. Taddy, 1 Taunt. 6.

And if *A.* underwrite policies in his own name, but for the benefit of himself jointly with a partner, when the fact of the partnership is shown *A.* cannot recover premiums on such policies against third parties for whom they were underwritten.

Faikney v. Reynous, 4 Burr. 2069.

It was indeed formerly held that where the plaintiff and a third person had been illegally concerned in stock-jobbing transactions, contrary to the 7 G. 2. c. 8., and the plaintiff paid differences, and the defendant gave a bond to the plaintiff for securing the repayment of such third person's share, the plaintiff might recover on such bond; since stock-jobbing was not *malum in se*, and the statute only prohibited paying or receiving differences, but did not avoid all securities relating thereto.

Petrie v. Hannay, 3 Term R. 418.

And on the authority of this decision it was afterwards held, where a broker had been employed by two parties, jointly concerned in such illegal transactions, to settle their differences, and one of the parties paid the whole amount to the broker with the assent of the other, the party paying might recover a moiety from such other party in *assumpsit* for money paid to his use; for in this case the payment was not strictly within the statute, as it was made to the broker who had previously advanced the money to pay the losses. Lord *Kenyon* in this case differed from the rest of the court, and the other judges only held the action maintainable, because they could not distinguish the case from that of *Faikney* v. *Reynous*. But both these decisions have been repeatedly called in question, and are overruled in principle by the cases of *Mitchell* v. *Cockburn*, *Aubert* v. *Maze*, and *Booth* v. *Hodgson*, *suprà*, and by the case of *Cannan* v. *Bryce*, *infrà*; and the distinction between *malum prohibitum* and *malum in se*, on which the former case partly rested, is now exploded.

See 2 Bos. & Pull. 571. 5 Barn. & Ald. 185.

Steers v. Lashley, 6 Term R. 61. Brown v. Turner, 7 Term R. 630. Amory v. Meryweather, 2 Barn. & C. 573.

And consistently with the last-named cases, it is held if a broker draw a bill on his principal for the amount of differences paid for his principal in illegal stock-jobbing transactions, and an indorsee take the bill knowing the nature of the consideration, or take it after it is due, he cannot recover on the bill; for the drawer himself could not recover, and the indorsee with notice is in the same situation. Nor if he afterwards take a bond in lieu of such bill can he recover on such bond.

Webb v. Brooke,

And if two parties join in illegally procuring the ransom of a ship, contrary to the 45 G. 3. c. 72., and one lend to the other money

money for their joint purpose, and a bill is given, the party lending the money cannot recover on the bill. 3 Taunt. 6.

And so even if an innocent party lend to another money for the purpose of paying losses on illegal stock-jobbing transactions, he cannot recover back such money, for the statute making it unlawful to pay such losses, it must be unlawful for one party to provide another with the means of payment (*a*); and this case rests on the same footing as the cases of selling goods knowingly for an unlawful purpose, in which case the vendor cannot recover the price. (See *Langton* v. *Hughes*, *supra*, p. 370.) Cannan v. Bryce, 3 Barn. & Ald. 179. (*a*) This case is distinguishable from Barjeau v. Walmesley, 2 Stra. 1249. and the other cases where it is held that money lent to pay a gaming debt may be recovered back, since the gaming act 9 Ann. c. 14. does not expressly prohibit the payment of such debt, but only avoids securities; whereas the 7 G. 2. c. 8. § 5. expressly prohibits paying or receiving differences for not transferring public stock. See 3 Barn. & Ald. 184.

And where the plaintiff and defendant joined in laying an illegal wager with *D.*, and *D.* lost the bet, and the plaintiff expecting *D.* to pay it, for the defendant's accommodation advanced to the defendant his share, and *D.* became insolvent and never paid the bet; it was held, that the plaintiff could not recover back the money paid to the defendant, since it was necessary to ground his claim on the illegal transaction. Simpson v. Bloss, 7 Taunt. 246.

And on the same principle that the plaintiff cannot recover where his case is founded on an illegal transaction, where the plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon* in the name of the defendant, a *Portuguese*, shipped a cargo from *Lisbon* to a *French* port, and the cargo was captured by a *British* cruiser, and condemned in the Admiralty Court as *French*, and enemy's property; and the defendant, with the plaintiff's privity and consent, claimed it as his property, and thereby procured it to be restored to him: and the plaintiffs afterwards brought an action for money had and received against the defendant, to recover the proceeds, it was held, that they could not recover; since having colluded with the defendant to procure a judgment in the Admiralty Court, by proving the cargo the defendant's, they could not now claim it in another court as their own. De Metton v. De Mello, 12 East, 234.

If two parties enter into an agreement which *primâ facie* imports to be illegal, it lies on the party seeking to enforce it to show that the intention was legal. Holland v. Hall, 1 Barn. & A. 56.

And if the consideration is immoral, it is against law, and no action can be founded on it. Thus an action will not lie for use and occupation of premises let for the purpose of prostitution, nor for board and lodging of women where the plaintiff is to partake of the profits of their prostitution, nor for dresses furnished to women for such purpose: but it must be shewn that the lodging was let or the dresses furnished expressly for such object; for it is no defence merely to prove that the defendant was a prostitute, although the plaintiff knew of it. Girardy v. Richardson, 1 Espin. 13. Howard v. Hodges, Selw. N. P. 60. Bowry v. Bennet, 1 Camp. 348. Lloyd v. Johnson, 1 Bos. & Pull. 340.; and see Gibson v. Dickie, 3 Maule & S. 465.

However if the plaintiff suffer the defendant to remain his tenant after he has knowledge that she uses his premises for Jennings v. Throgmorton,

1 Ryan & M. 251. See 2 Carr. & Pa. 47.

prostitution, he cannot recover the rent accruing after such knowledge.‖

(F) Where the Consideration and Promise shall be said to be sufficiently set forth and averred.

But for this, *vide* head of *Pleas* and *Pleadings*. [Where there is a special contract or agreement,

THE plaintiff must set forth every thing essential to the gist of the action, with such certainty that it may appear to the court that there were sufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court, whether the damages given by the jury were in proportion to the demand, or whether the party was at all entitled to a verdict.

the plaintiff ought to declare upon it, for the defendant should have notice that he is sued on it; but if the plaintiff fails of proving the case stated in the special count, after an attempt for that purpose, it is now the course to permit him to go into evidence on the general counts, if he have given notice that he means to rely on them as well as the other special ground, the necessity of which notice is in order to prevent a surprise on the defendant. Dougl. 651. 24. 1 Term R. 134. Bull. Ni. Pri. 153.] ‖If the plaintiff is legally entitled to recover on any of the general counts, he may do so without any notice to the defendant. The surprise on the defendant is obviated by the particulars of demand, which the defendant is entitled to call for.‖

10 Co. 77. For this point, *vide* Hob. 5. Godb. 186. Cro. Jac. 207. 213. 642. Hob. 18. Moor, 854. pl. 1167. Hetl. 106. Roll. Rep. 391. Bulstr. 67. 3 Bulstr. 207. Cro. Jac. 397. Hard. 132.; but Palmer, 171. *per Croke* and *Chamberlain*, there is a diversity where the promise is to pay at a day to come, and where not; for the promise to pay at a day to come, implies a forbearance in the mean time; and *vide* Roll. Rep. 396. (*a*) Such a declaration is not made good by verdict. Cro. Car. 6. 31. Sid. 182. and *vide* Brownl. 14. Poph. 31. Jenk. 293. (*b*) The plaintiff declared that the defendant was indebted to the testator of the plaintiff in 20*l*., *quas ei solvisse debuit secundum agreament. inter eos habit.* 2 Lev. 152. Judgment was stayed after verdict, for the agreement might be by deed. *Vide* Carth. 276.

Therefore in an action upon the case, the plaintiff (*a*) cannot declare *quod cum* the defendant was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, *super se assumpsit* to pay, *&c.* without (*b*) shewing the cause of the debt.

Sid. 246. adjudged: Lev. 164. S. C. adjudged *nisi* Raym. S. C. 123. adjudged *nisi*. Keb. 878.

So if in an *assumpsit* the plaintiff declares that, in consideration *quod procuravit J. S.* to surrender a messuage, *&c.* the defendant *solveret* to the plaintiff 10*l*., the declaration is not good, for there is no promise laid, *super se assumpsit*, or *agreavit* being omitted; and nothing here that imports a promise or contract. [See Lee v. Welsh, 2 Stra. 795. 2 Ld. Raym. 1516. S. P.] ‖But where it was stated that it was agreed between the plaintiff and the defendant, and the mutual promises were omitted, the count was held good after verdict; for the agreement imported a promise. Mountford v. Horton, 2 New R. 62.‖

2 Keb. 97. Sid. 306. (*a*) 6 Mod. 131. S. P. *per Holt*. *Vide* head of *Pleas* and *Pleadings*.

Super se assumpsit on an *insimul computasset* was left out, and a difference was endeavoured to be taken where the law raises the promise, and where it is a special promise; and that in the first it should not be needful; but the court held it necessary in both, for the law does not (*c*) create a promise in any case in pleading, but gives sufficient evidence to a jury to find a promise.

But in this action the law requires no greater certainty in the allegations than the nature of the thing requires; therefore if a contract be made in general terms, the declaration may likewise be

be general. Hence a *quantum meruit* for *diversa vestimenta et omnia alia materialia adinde spectantia*, is good.

So if in an *assumpsit* the plaintiff declares that, in consideration the plaintiff would find and provide for a sick man all such necessaries as he should want, the defendant assumed and promised to pay, *&c.*, and avers that he had found him necessaries amounting to such a sum, *&c.*; this is a good declaration, without shewing in particular what those necessaries were, for that would make the record too prolix.

5 Bulstr. 31. adjudged between Crips and Bainton. Roll. R. 173. S.C. adjudged; and that rather because it was after verdict.

Vide tit. *Error*. This manner of declaring is certainly good, and every day's practice.

If in an *indebitatus assumpsit* the plaintiff declares that the defendant was indebted to the plaintiff in 10*l.* for the (*a*) feeding and agistment of beasts, and for wheat *et aliis* (*b*) *mercimoniis per prædict.* the defendant *habit. et recept.*; this is a good declaration; for though it be not sufficient to say that he was indebted generally, because that may be for rent upon leases, or debts upon specialties, yet this is certain enough, for as well the wares and merchandizes, as the pasturing and wheat, are personal things, for which an *assumpsit* may be brought.

Hob. 5. adjudged and affirmed upon a writ of error in *Cam. Scacc.* Roll. R. 24. S. C. adjudged and affirmed. (*a*) *Indebitatus* for tythes, Wright and Beale, Lev. 141. Sid. 223. after verdict adjudged good, and intended severed upon a special contract. (*b*) So an *indebitatus* lies *pro opere per antea facto*. Sid. 425. Vent. 44. 2 Keb. 552. Mod. 8. adjudged. *Pro præmio*, on a policy of insurance. 2 Lev. 153. [In an *assumpsit* on the judgment of a foreign court, it is not necessary to state in the declaration the grounds and cause of action upon which the judgment was founded. Crawford v. Whittal, Dougl. 4.]

So in an *assumpsit* the plaintiff declared *pro opere et labore* generally, without setting forth what sort or manner of work or labour it was; and though it was objected that it should be set forth particularly, so that it may appear to the court to be lawful work, yet the court held it well enough; and that the only reason why the plaintiff is obliged to shew wherein the defendant is indebted, is, that it may appear to the court that it is not a debt on record or specialty (*c*), but only upon simple contract; and any general words, by which that may be made to appear, are sufficient.

Carth. 276. adjudged. Pasch. 5 W. & M. in *B. R* between Hibbert and Courthope. Vent. 44. S.P. Sid. 425. S.P. 2 Keb. 552. Mod. 8. S.P. 10 Mod. 81. 295. 12 Mod. 16. 250. 508. 324. Fitzgib. 302. (*c*) For damages recovered in an *assumpsit*, will be no bar to an action of debt grounded on a record or specialty. Cro. Car. 6. Leon. 155. Cro. Eliz. 242.

If in an *assumpsit* the plaintiff declares, that whereas the defendant had received 24*l.* of several persons, to the use of the plaintiff (*d*), in consideration thereof the defendant did assume and promise to pay, *&c.*; this is a good declaration, without shewing of what persons in particular he received the money (*e*), because the consideration is executed (*g*), and not traversable. (*h*)

Moor, 854. adjudged. Roll. R. 391. S.C. adjudged. (*d*) So an *indebitatus* for money received by the hands of *J. S.* to the use of the defendant, Mod. 42. adjudged good after verdict; and said, they would intend it money lent. 2 Keb. 615. adjudged, and *vide* Roll. R. 391. Cro. Jac. 690. (*e*) So an *indebitatus* lies for 40*l. pro diversis denar. summis ei præstitis ac pro diversis denariorum summis de ead.* the plaintiff *recept. et habit. ac pro quodam pecuniæ summa*, by the plaintiff, at the request of the defendant, to *J. S. solut.*, without shewing in particular how much he was indebted for each cause, for that is not material, he being indebted so much *in toto*. Cro. Jac. 245. Yelv. 517. Brownl. Ent. 71. (*g*) Where the consideration is executed

cuted, it is only inducement, and needs not precisely be alleged as to time or place. Cro. Eliz. 715. (*k*) The common method now used is to declare for money had and received by the defendant to the use of the plaintiff, without mentioning of whom, or by whose hands received; and this is the best method of declaring, as the plaintiff may give in evidence all money received, which, under a particular declaration could not be done, if any of the payers were omitted. This general form of action is, in many cases, equivalent to a bill in equity, for an account, &c.

Cro. Car. 116. Holmes and Savil adjudged. Hetl. 106. 113. S. C. adjudged. Poph. 177. Latch. 141. Palm. 442. Yelv. 70. Roll. R. 396. S. P.

If in an *assumpsit* the plaintiff declares *quod cum* there were several reckonings and accounts between the plaintiff and defendant, and at such a day, *&c. insimul computaverunt* for all debts, reckonings, and demands, and the defendant upon the said account was found to be in arrear the sum of 20*l.* in consideration whereof the defendant promised to pay, *&c.*; this is a good declaration, without shewing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in pede compoti* are reduced to a sum certain, and thereupon being indebted to the plaintiff, it is sufficient to ground an action.

3 Mod. 190. adjudged. 3 Keb. 469. S. P. adjudged.

If in a *quantum meruit* for meat, *&c.* the plaintiff declares upon a promise, to pay so much *quantum rationabiliter valerent*; this is a good declaration, though general; and though objected that it ought to have been *valebant*.

All. 5. adjudged. *Vide* March, 100.

If in an *assumpsit* the plaintiff declares, that the defendant, in consideration of, *&c. inter alia*, did assume to pay, *&c.* this is no good declaration, because he ought to set forth the whole promise, which is entire.

Cotterill v. Cuff, 4 Taunt. 285.; and see Tempest v. Rawling, 13 East R. 18. Squier v. Hunt, 5 Price, 68. Clarke v. Gray, 6 East, 564.

‖But it is now settled to be sufficient if the plaintiff states in his declaration so much of the contract as shews the particular promise, for the breach of which he complains. Thus, where the plaintiff declared that the defendant warranted bacon sold to the plaintiff to be prime bacon, and of good quality, this was held sufficient, although it was also part of the warranty that the bacon was singed, and of *Strangeway*'s manufacture: for the plaintiff complained only of the inferiority of the quality. But the whole of the consideration moving to the defendant must be stated, for the consideration is entire, and it must be shewn that it is entirely performed.‖

Leneret v. Rivet, Cro. Jac. 503.

[Where the plaintiff declared upon two considerations, and failed in a proper averment of the performance of the one, the judgment was arrested, for the *assumpsit* of the defendant must be presumed to be founded on the two considerations taken together.

Collins v. Gibbs, 2 Burr. 899.

If a defendant undertake to pay money in consideration of the plaintiff's executing a release; here the release is a condition precedent, and the plaintiff must aver that he has executed a release, or was ready to do it, else the declaration will be bad on demurrer, and in arrest of judgment, if the judgment be by default; though it would be helped by a verdict.

Courtney v. Strong, 2 Ld. Raym. 1217.

Where the plaintiff declared in consideration of a promise that the defendant should hold an estate clear of a rent-charge granted to *J. S.*, without molestation of the plaintiff; but did not shew any

any title in himself to the rent-charge, the declaration was holden ill after verdict; for the promise, as it stood, was a promise not to do a thing which the promiser could not do, and was therefore merely *nudum pactum.* 1 Salk. 364. S. C.

Where the declaration stated that the defendant became, and was tenant to the plaintiff of a certain farm, in consideration whereof he undertook to manage it in a husbandlike manner; it was objected that there was no consideration, because it was not alleged that the defendant had become tenant on the terms of cultivating the farm in a good and husbandlike manner; *sed non allocatur*, for the bare relation of landlord and tenant is a sufficient consideration for such a promise.] Powlet v. Walker, 5 Term R. 373.

‖But a declaration stating that in consideration the defendant *had* become tenant to the plaintiff, he undertook to cultivate in a particular mode, and to repair, is bad for want of consideration; for these obligations do not arise from the mere relation of landlord and tenant.‖ Brown v. Crump, 1 Marsh. R. 567. See 2 Barn. & C. 273.

If in an *assumpsit* the plaintiff declares, that in consideration the plaintiff had promised to deliver a cow to the use of the defendant, the defendant did assume and promise, *&c.* this is a good declaration, without (*a*) any averment of the delivery of the cow (*b*), because there is promise for promise. (*c*) Hob. 88.

(*a*) And if in such case the plaintiff doth aver a performance, the defendant can take no issue thereupon. Cro. Eliz. 545. And an ill averment will not hurt. Lev. 88. 293. (*b*) Where there are mutual promises the plaintiff need not aver a performance of his part. Yelv. 134. Roll. R. 336. Vent. 41. Hardr. 102, 103. March, 75. Cro. Eliz. 703. Lev. 20. 293. Cro. Eliz. 137. Leon. 186. Salk. 29. pl. 30. (*c*) Both these promises ought to be made at the same time, else they will be *nuda pacta*. Hob. 88. Cro. Eliz. 137. Leon. 186.

[So also the *assumpsit* laid was, that the plaintiff had agreed to deliver so much cloth to the defendant, and the defendant agreed on a certain contingency happening to pay £*l.* for it; but, if the contingency did not happen, it was agreed that he was to pay nothing: the contingency did happen, and on action brought the plaintiff had a verdict; when it was moved in arrest of judgment that the plaintiff had not averred the delivery of the cloth; but it was resolved that this being promise for promise, no such averment was necessary; but if the defendant had undertaken to pay if plaintiff *would deliver* so much cloth, in that case an averment would have been necessary.] Martindale v. Fisher, 1 Wils. 88. ‖But as the courts now construe covenants to be dependent or independent according to the intention and meaning of the parties, and the good sense of the case, this distinction would probably now be rejected. See 1 Saund. 320. note 4.

‖The rules of law respecting conditions precedent and averments of performance are clear and indisputable, *viz.* that where the agreements on each side are distinct and independent each party may bring an action against the other for breach of the agreement on his part, without averring performance of the agreement on his, the plaintiff's, part. But where the agreements are mutually dependent, it is necessary for the plaintiff to aver the performance of the agreement on his part, in order to entitle him to an action for breach of the agreement of the defendant. The difficulty lies solely in the application of these rules

rules to each particular case. As the dependency or independency of the agreements depends entirely on the spirit and sense of the instrument and the intention of the parties, which vary in every particular case, it is obvious that technical rules can hardly be laid down on the subject; some general rules have, however, been extracted from the cases.

Callonel v. Briggs, 1 Salk. 112. Thorpe v. Thorpe, *Ibid.* 171. Lancashire v. Kenilworth, 2 Salk. 623. Kingston v. Preston, Dougl. 691. Jones v. Barkley, *Ibid.* 684. Gooddison v. Nunn, 4 Term R. 761. Porter v. Sheppard, 6 Term R. 665. Morton v.

1st. Where two acts are to be done at the same time, as where *A.* covenants to convey an estate to *B.* on such a day, and in consideration thereof *B.* covenants to pay *A.* a sum of money on the same day (or on the conveyance), neither can maintain an action without shewing performance of or an offer to perform the agreement on his part, though it is not ascertained which is to do the first act. — *Note.* In contracts of sale and other cases where the thing to be done and the payment of the money are concurrent, the party suing for the money must shew *performance* of the thing for which the money is to be paid, or a *tender and refusal*, or other matter equivalent to performance. But the party suing for nonperformance of the other act or matter need only aver a *readiness* to pay the money on the thing being done; for the doing of a thing for which money is the price virtually precedes payment.

Lamb, 7 Term R. 125. Glazebrook v. Woodrow, 8 Term R. 366. Peters v. Opie, 2 Saund. 352. note 5. French v. Campbell, 2 H. Black. 178. Phillips v. Fielding, *Ibid.* 123. Holdipp v. Otway, 2 Saund. 106. Rawson v. Johnson, 1 East, 203. Heard v. Wadham, *Ibid.* 619. Hall v. Cazenove, 4 East, 477. Martin v. Smith, 6 East, 555. Cook v. Jennings, 7 Term R. 381. Ferry v. Williams, 1 Moo. 498. 1 Saund. 320. note.

Dyer 76. a. in marg. Thorpe v. Thorpe, 1 Salk. 171. 1 Ld. Raym. 665. 1 Lutw. 250. 12 Mod. 461. 1 Vent. 177. Terry v. Duntze, 2 H.

2d. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or not doing such other act, without any averment of performance by the plaintiff, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent.

Black. 389. Smith v. Woodhouse, 2 New R. 235.

1 Salk. 171. 1 Ld. Raym. 665. Smith v. Wilson, 8 East, 473. Gibbon v. Mendez, 2 Barn. & A. 17.

3d. But when a day is appointed for the payment of money, *&c.*, and the day is to happen after the thing which is the consideration of the money, *&c.* is to be performed, no action can be maintained for the money, *&c.* before performance by the plaintiff.

1 Saund. 320. b.

Boone v. Eyre, 1 H. Black. 273. note (*a*). Duke of St. Albans v. Shore, *Ibid.* 279. Campbell v. Jones, 6 Term R. 570. Ritchie v. Atkinson, 10 East, 295. Havelock v.

4th. Where an agreement goes only to part of the consideration on both sides, and a breach of such agreement may be paid for in damages, it is an independent agreement, and an action may be maintained for a breach of the agreement on the defendant's part, without averring a performance by the plaintiff; in other words, if the substantial part of the consideration has been performed by the plaintiff, he shall not be barred from suing for his recompence on account of his nonperformance of any subordinate stipulation, but such nonperformance may be compensated in damages to the defendant in a cross action.

Geddes, 10 East, 555. Davidson v. Gwynne, 12 East, 389. Storer v. Gordon, 3 Maule & S. 308. Fothergill v. Walton, 2 Moo. 630.

5th. But

5th. But where mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred; in other words, if the plaintiff does not shew performance of that which is the substantial and essential part of the consideration, he cannot recover his recompence.‖ *Ibid.*, and Large v. Cheshire, 1 Vent. 147. See also *Pleas and Pleadings*, (B) Vol. VI. as to dependent and independent covenants; and 1 Will. Saund. 320. *notis.*

Assumpsit on an agreement to forfeit a deposit of five guineas, and to pay a further sum of 10*l.*, if the defendant did not accept the possession of certain premises from the plaintiff, and also pay for certain fixtures therein at a fair appraisement by two appraisers. In an action on this agreement, it was adjudged on a special demurrer, that the declaration was ill, because the plaintiff had not shewn his right to the premises, so that he could have delivered possession according to his agreement, and as each was to name an appraiser, that he had named one. Luxton v. Robinson, Dougl. 620.

‖So also where conditions of sale stipulated that the purchaser should pay down a deposit, and pay the remainder of the purchase-money at a certain time on having a good title, and that he should have a proper surrender of the estate (being copyhold), on payment of the remainder of the purchase-money, in an action by the vendor for nonfulfilment of the conditions by a purchaser, the declaration merely alleging that the plaintiff had been always ready and willing, and frequently offered to make a good title, and to make a proper surrender, on payment of the purchase-money, was held insufficient on demurrer; for it should have alleged that the plaintiff actually made a good title, and made a surrender of the estate, or a tender and refusal of such surrender; and it should also have shewn what title the seller had. Phillips v. Fielding, 2 H. Black. 123.; and see Duke of St. Alban's v. Shore, 1 H. Black. 270.

But where the vendor averred that he was seised in fee, and that the title to the land was made good, perfect, and satisfactory to the defendant, and that he had always been ready and willing, and offered to convey to the defendant, this was, on demurrer, held a sufficient averment of performance on the part of the plaintiff to entitle him to recover against the vendee for not completing the purchase; for the allegations that the plaintiff was seised in fee, and that the title was made good and satisfactory to the defendant, distinguished this from the last case; and the court seemed of opinion, that a vendor need not set out his title on the record, and it is not the practice to do so.‖ Martin v. Smith, 6 East, 555.; and see Ferry v. Williams, 1 Moo. 498. Sug. Vend. & P. 216. 2 Chitt. on Plead. 164.

In *assumpsit* on an agreement to pay 30*l.*, in consideration of the plaintiff's relinquishing a rent-charge to the defendant, the plaintiff averred that he did relinquish the rent, and did not claim it; but the judgment was arrested, because he did not shew *how* he had relinquished the rent, for it might be by words, which was no discharge. Gregory v. Nevill, Cro. Eliz. 292.

The defendant promised to deliver a horse to the plaintiff, on the plaintiff's becoming bound to him by writing obligatory in 11*l.*; the plaintiff in his declaration only averred *his offer* to become bound, upon which, judgment was arrested; for he should have averred a tender of the bond ready sealed to the defendant, and Austin v. Jervoise, Hob. 69 77.

and also the sum he was bound in, that the court might judge of the performance.

Marriot v. Lister, 2 Wils. 141. Butcher v. Andrews, 1 Salk. 23. But a declaration for money *lent to the defendant's wife*, at his request, is good; for a loan to the wife, at the husband's request, is a loan to the husband himself. Stevenson v. Hardy, 5 Wils. 388. 2 Black. R. 872. S. C.

Where the plaintiff declared for money *lent* by him to one *J. S.*, at the request of the defendant, the judgment was arrested, for the word *lent* is a technical term, and imports a loan to *J. S.*; if so, *he* was the debtor, and therefore the *defendant* could not also be the debtor; for there cannot be a double debt on a single loan. But it had been otherwise if the plaintiff had declared for money *delivered* to such a person at the defendant's request; for then the loan would have been to the defendant himself.]

‖(G) Where *Indebitatus Assumpsit* lies, and where the Declaration must be special.

WHEREVER the consideration on the part of the plaintiff is executed, and the thing to be done on the defendant's part is mere payment of a sum of money due immediately, or where money is paid on a contract which is rescinded, so that defendant has no right to retain it, this constitutes a debt for which the plaintiff may declare in the general count, on an *indebitatus assumpsit*. Anciently, (see Cro. Jac. 690. 245. Cro. Car. 6.) the count in such case was special, (like the forms, 1 Saund. R. 267. 2 Saund. 350.) stating the consideration as executory, the promise, the plaintiff's performance, and the defendant's breach; but since that period the *indebitatus* count has grown by degrees into use, though at first regarded with jealousy by Lord *Holt* and other eminent judges. (See 2 Stra. 933. 12 Mod. 324.)

1 Chitt. on Plead. 338.; but see 2 *Ibid.* 37. note (*f*). 8 Term R. 327. 4 Taunt. 45.

Thus where real property has been sold, and conveyed without any contract under seal for payment of the price, or where it has been enjoyed by the defendant as tenant without a lease, or by his under-tenant; the price in the former case, and the rent in the latter, may be recovered in *indebitatus assumpsit*.

Poulter v. Killingbeck, 1 Bos. & Pull. 397.; and see Leeds v. Burrows, 12 East, 1.

So also if goods are sold and actually delivered to the defendant the price, if due, in money, may be recovered on this count; and this, though the price is settled by third parties. Thus where the plaintiff let to the defendant land rent free, on condition that the plaintiff should have a moiety of the crops, and while the crop of the second year was on the ground, it was appraised for both parties and taken by defendant; it was held, that the plaintiff might recover his moiety of the value in *indebitatus assumpsit* for crops, *&c.* sold; for by the appraisement the special agreement was executed, and a price fixed at which the defendant bought the plaintiff's moiety.

Neal v. Viney, 1 Camp. 471.; *sed vide* 9 Moo. 28. 6 Moo. 114.

But if a party by one agreement engage to accept an assignment of a lease of a farm, and also to take the fixtures, crops, *&c.* at a valuation, and he is let into the possession of the fixtures, and the crops are valued to him, but the lease is not assigned by the vendor, the vendor cannot recover the price of the crops and

and fixtures in *indebitatus assumpsit*, but must declare specially on the agreement, which is entire and cannot be divided.

If goods are sold on credit, as where sold to be paid for in three months by a bill at two months, the vendor cannot bring *indebitatus assumpsit* before the five months expire; his remedy before that period, if the vendee does not give the bill, is by a special *assumpsit* for not paying by a bill. Mussen v. Price, 4 East, 147. Dutton v. Solomonson, 3 Bos. & Pull. 582. Hoskins v. Duperoy, 9 East, 498. Lee v. Risdon, 2 Marsh. 495. 7 Taunt. 188.; but see Hickling v. Hardy, 1 Moo. 61. Brooke v. White, 1 New R. 330. Marshall v. Poole, 15 East, 98.

And though the goods may have been purchased fraudulently, and with intent not to pay for them, still the vendor cannot maintain *indebitatus assumpsit* if the credit has not expired. Ferguson v. Carrington, 9 Barn. & C. 59.

But at the expiration of the period of credit, the debt being due in money, *indebitatus assumpsit* may be maintained for it.

And so if the goods are sold to be paid for at the end of three months, the vendor agreeing, if the vendee wish for further time, to take his bill at three months more, here if the bill is not given, the vendor may bring *indebitatus assumpsit* at the end of the first three months; for the extension of time is expressly conditional on the vendee giving a bill. Nickson v. Jepson, 2 Stark. 227. 3 Camp. 352.

So also, if the goods sold are to be paid for, partly in money, and partly in goods, the declaration must be on the special agreement; but if the goods to be given in exchange are delivered to the vendor, and the money only remain unpaid, this may be recovered in *assumpsit* for goods sold and delivered. 1 Holt's R. 179. Sheldon v. Cox, 3 Barn. & C. 420.

And where the goods sold were to be paid for at a fixed price, but it was agreed that the vendor should take other goods at a *stipulated sum* in part of such price, on failure of the vendee to deliver such goods, Lord *Ellenborough* held that a contract resulted to pay the whole in money. Forsyth v. Jervis, 1 Stark. R. 437.

And if two tradesmen agree to supply each other on the footing of goods for goods, and a balance is struck between them, this balance may be recovered in money. Ingram v. Shirley, 1 Stark. 185.

Where the sale is complete, but there has been no actual delivery, the price may still be recovered in *indebitatus assumpsit* for goods bargained and sold, if the vendor was ready to deliver, unless the contract stipulated that the delivery was to precede payment. But the property must have *vested* in the defendant, or the vendor cannot maintain this action. Hankey v. Smith, Peake's Ca. 42. Kymer v. Suwercropp, 1 Camp. 109. 5 Barn. & C. 857. 6 *Id.* 388. 8 *Id.* 283.

And this was so held by *Ellenborough* C. J. even after a resale of the goods by the vendor, who brought his action merely to recover the loss on the resale; and when it was objected that the vendor in order to recover, ought to have the goods ready to deliver to the defendant, his lordship said the defendant might maintain trover for them against the vendor. Mertens v. Adcock, 4 Espin. 250.

However, the Court of Common Pleas subsequently departed from this doctrine, and in such cases it is always usual to have a special Hagedorn v. Laing, 6 Taunt. 166.

Hopkins v. Vaughan, 12 East R. 398.

a special count for not accepting and paying for the goods. And it is decided that a vendee cannot be held to bail for goods bargained and sold.

Lightfoot v. Creed, 2 Moo. R. 250.

And so if a defendant fail to perform a contract to transfer stock on a certain day, the plaintiff must declare specially for nonperformance of the contract, and cannot, by purchasing the stock in the market, recover the difference in price, as money paid to the defendant's use.

Hill v. Perrott, 3 Taunt. 274.; see Ferguson v. Carrington, 9 Barn. & C. 59.

Where the defendant fraudulently procured the plaintiff to sell goods to a third person for a bill to be given by the defendant, and indorsed by the vendee, and the defendant immediately got the goods into his own hands, it was held that the plaintiff might bring *indebitatus assumpsit* against him for the price; for the goods being in his possession unaccounted for, the law raised an *assumpsit* to pay for them; and the defendant could not set up the contract, since that would be taking advantage of his own fraud.

Read v. Hutchinson, 3 Camp. 351.

But Lord *Ellenborough* in a similar case, held that *indebitatus assumpsit* would not lie; but in this case it was expressly provided that no recourse was to be had to the buyer if the bill was not paid.

1 Term R. 133.

Where the plaintiff has a power of rescinding the contract, and does so, or where it is rescinded by mutual agreement of the parties, the plaintiff may recover back, in *indebitatus assumpsit*, any money which he has paid on the contract; but if the contract is still open, the plaintiff cannot recover the money as money had and received, but must declare specially for the damage sustained.

Towers v. Barret, 1 Term R. 133.

Thus where the plaintiff paid ten guineas to the defendant for a chaise and harness, on condition to be returned if the plaintiff's wife did not approve of it, and the wife not approving it was returned to the defendant, who refused to receive it; it was held, that the plaintiff might recover the money back as money had and received, the contract being at an end, according to the original terms of it.

Giles v. Edwards, 7 Term R. 181.; and see Cooke v. Munstone, 1 New R. 351.

So if the defendant by his own act prevent the complete performance of an agreement made with the plaintiff, the latter may recover back any money paid, as money had and received to his use.

Weston v. Downes, Dougl. R. 24.

In cases of warranty of horses or goods, if the vendee accept them back, on their being returned by the vendor, the latter may recover back the price paid, as money had and received to his use.

Power v. Wells, *Ibid.*

But if they are not returned, or the vendee refuses to accept them, then the vendor's claim is for damages for breach of the warranty, and in that case his declaration must be special.

Fortune v. Lingham,

And this last is the case, although the vendor after the sale said, if the horse was unsound he would take it back, and return

return the money; for this is no abandonment of the original contract. 2 Camp. 416. Payne v. Whale, 7 East R. 274.; and see Ellis v. Mortimer, 1 New R. 257.

In order to the rescinding of a contract, it is necessary that both parties should be put in *statu quo;* and therefore a party can not recover back his money, as money had and received, where he has derived a partial benefit from the contract, but in such cases he can only recover damages on a special count.

Thus, where the plaintiff agreed to take a lease from defendant of certain premises, to be executed in ten days, and the premises to be put in repair by the defendant before that time, and the plaintiff paid 10*l.* on the agreement, and took immediate possession, but the defendant did not repair the premises according to the agreement; it was held, that the plaintiff could not, by quitting the premises, rescind the contract so as to recover back his money as money had and received, since he had received benefit from his occupation of the house. Hunt v. Silk, 5 East R. 449.

So, where the plaintiff had paid money to the defendant, for permission solely to enjoy a patent of the defendant, for an invention which turned out not to be new, the plaintiff was not allowed to recover back his payments as money had and received, since he had had a beneficial enjoyment of the patent. Taylor v. Hare, 1 New R. 260.

In cases of special contracts for building and performing work and labour, if the work and labour is executed according to the agreement, and the payment is to be made in money, the plaintiff may recover on the *indebitatus* counts; but if the payment is to be made in a particular manner, as by bills, and the time of credit has not expired, the declaration must be special: and if the work, *&c.* is not done according to the contract, (that is, being different in nature, and not merely of inferior quality,) the plaintiff cannot recover either on a special count or on the *indebitatus assumpsit;* unless, indeed, the defendant has acquiesced in the deviation, either by using the work or seeing it go on and not objecting. Bull. N. P. 139. 1 Wils. 117. Ellis v. Hamlen, 3 Taunt. 51. Burn v. Miller, 4 Taunt. 745. Basten v. Butler, 7 East, 479. Cook v. Munstone, 1 New R. 354. Robson v. Godfrey, 1 Stark. R. 275. Holt N. P. C. 236.; and see 1 Barn. & C. 704.

And where a party engages to work on a continuing contract, and it is specially provided that no wages are to be paid till completion of the service, although he is prevented completing the service by the wrongful act of the defendant, he cannot recover wages *pro rata* in *indebitatus assumpsit;* but his remedy is either on the special agreement, or for the tort of the defendant. Hulle v. Heightman, 2 East R. 145.; see 4 Carr & P. 208. 9 Barn. & C. 92.

So also where the plaintiff, a mariner, agrees by articles under seal, executed by the captain of a ship, to serve faithfully on board the ship for a certain voyage, in consideration of which, the plaintiff and the other mariners are to receive a certain share of the proceeds of the cargo when sold on the ship's return, and the defendant, as owner, is appointed agent to sell the cargo on behalf of all parties, the plaintiff cannot, on proving a sale by the defendant, and that the proceeds are in his hands, Evans v. Bennett, 1 Camp. R. 500.

hands, recover his share in *assumpsit* for money had and received, unless there has been an acknowledgment of the plaintiff's faithfully serving according to the contract; but his remedy is on the special contract.

Prouting v. Hamond, 8 Taunt. 688.; and see Teale v. Auty, 4 Moo. R. 542.

But where the defendant acknowledges to the plaintiff the receipt of a sum of money on his account, and promises to account for it, there the plaintiff can recover either on the count for money had and received, or on the account stated, without going into the transactions out of which the receipt of the money arose.

Gandell v. Pontigny, 4 Camp. 375. 1 Stark. Ca. 198.; and see Collins v. Price, 5 Bing. 132.

However, a servant at a yearly salary, payable quarterly, if discharged in the middle of the quarter, and paid up to his discharge, may recover wages for the remainder of the quarter in *indebitatus assumpsit*, having tendered his services for such time.

Eardley v. Price, 2 New R. 333.

And if a schoolmaster stipulate on receiving a boy, that if he is removed without a quarter's notice a quarter's salary extra is to be paid, he may recover such extra quarter's salary on the *indebitatus* counts for board, lodging, and tuition; for the extra sum may be considered an addition to the salary for the last quarter the boy remains, payable on the event of notice not being given.

Wells v. Girling, 3 Moo. 79.; and see Gibson v. Minet, 1 H. Black. 569.

Where the defendant signs a joint and several note, merely as surety for another, the payee's only remedy is by a count on the note; and he cannot recover on the *indebitatus* count on an account stated, since the *debt* is due from the other party, and not from the defendant.

Mines v. Sculthorpe, 2 Camp. 214.

And so also in case of a written guarantee to be answerable for goods sold to a third party, the declaration must be special. See 4 Dow. & Ry. 243.

Knowles v. Michell, 13 East, 249. Highmore v. Primrose, 5 Maule & S. 65.

An acknowledgment of a single item of debt due from defendant to plaintiff is sufficient to support a count on an account stated.‖

(H) What may be pleaded as a good Discharge and Performance of the Promise.

Vide head of *Pleas and Pleadings.* Where infancy, coverture, a release, the statute of limitations, or more money lost at gaming than the statute allows, are good bars. *Vide* the several titles; and where they must be pleaded, or may be given in evidence, title *Evidence.* [The general issue to this action is, "that the defendant did not undertake and promise in manner and form alleged." But as the action is an action of *trespass* upon the case, the plea of "not guilty" was formerly used as the general issue. Elrington v. Doshant, 1 Lev. 142., and it is still effectual after verdict, though it will not be allowed on demurrer. Marsham v. Gibbs, Ca. temp. Hardw. 173. 2 Stra. 1082. S. C.]

AN *assumpsit* is an action founded on a contract, the nonperformance of which is a fraud and injury to the plaintiff; and therefore the defendant must shew that there was no contract, or that the contract was void and without consideration, or that he hath performed it, and is therefore discharged.

If

If in a *quantum meruit* for medicines, the defendant pleads that he had paid the plaintiff (*a*), *tot. et tantos denariorum summas*, as the said medicines were worth, without shewing what sum in certain he hath paid (*b*); this is no good plea.

March, 77.

(*a*) In an *assumpsit* for fees and money laid out, the plaintiff avers that he laid out 27*s.*; and the defendant pleads that he had paid all fees and money laid out, without shewing what he had paid. Rob. Ent. 56. (*b*) Where the defendant may plead generally, that the plaintiff *exoneravit eum* of the said promise. Cro. Car. 583. 2 Roll. Abr. 408. pl. 1. (*c*) Qu. If on special demurrer such plea is not bad, as amounting to the general issue?

If in an *assumpsit* the plaintiff declares that the defendant did assume and promise to pay to the plaintiff so much money, and also to carry away certain wood before such a day; the defendant as to the money cannot plead that he paid it, and as to the carriage of the wood *non assumpsit* (*d*); for the promise being (*e*) entire cannot be apportioned. (*g*)

March, 100. adjudged, and after a verdict for the plaintiff upon *non assumpsit*, a repleader was awarded.

(*d*) Brownl. Ent. 58, 59. In an *assumpsit* to pay 24*s. per* hogshead for ale, &c. the plaintiff shews, *licet*, 48*s.* was due to him *secundum ratam prædict.*, &c. and the defendant *quoad* 24*s.*, *de*, &c. pleads *non assumpsit*, and as to the residue a tender, and thereupon issue is joined, and *vide* Thomp. Ent. 66. Rob. Ent. 40. (*e*) * The defendant pleads the promise was conditional, and traverses that it was absolute as the plaintiff had declared. Thomp. Ent. 74. Rob. Ent. 97.† (*g*) *Qu.* Therefore, if he should not have pleaded *non assumpsit* to the whole? ‖On the general issue the defendant might shew payment of the money, and also object to the variance in case the plaintiff did not prove a promise both to pay the money and carry the wood, as laid in the declaration.‖

* *Non assumpsit* to part, and tender to the residue, is good.

† *Qu.* If such plea is good, if it does not amount to the general issue, and if the general issue would not have been the proper plea?

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30*l.*; and thereupon, in consideration that the defendant promised to pay the said 30*l.*, the plaintiff likewise promised to release and acquit the defendant of all demands; this is a good plea, for by the account the first contract is merged.

2 Mod. 43, 44. adjudged. Milward and Ingram. 1 Mod. 205. S.C. adjudged. But *North* C. J. there said, that if there had been but one debt between them, the entry into an account for that would not determine the contract. *Vide* Ld. Raym. 680. [A stated account is no plea to a debt on simple contract; for both being equal, the latter is not merged in the former. Roads v. Barnes, 1 Burr. 9. 1 Black. R. 65. But a plea that the defendant indorsed a promissory note, of which he was the payee, to the plaintiff "for and on account of the debt," is good. Kearslake v. Morgan, 5 Term R. 513. So is a plea that the plaintiff and defendant accounted together; and that the defendant drew a bill of exchange upon himself in favour of the plaintiff for the sum he was found in arrear, and delivered it to the plaintiff. Richardson v. Rickman, *B. R.* M. 16 G. 3. cited in 5 Term R. 517.] ‖See tit. *Accord and Satisfaction.*‖

The defendant cannot plead that he revoked his promise; as if *A.* is in execution at the suit of *B.*, and *J. S.* desires *B.* to let him go at large, and that he will satisfy him; to which *B.* agrees, though *J. S.*, before any thing is done in pursuance of this promise and agreement, comes to *B.* and tells him, that he revokes his promise, and that he will not stand to it; yet such revocation cannot be pleaded in bar to the action.

Roll. Abr. 32. 2 Roll. Rep. 39. S. P. adjudged. Cro. Jac. 483. S.C. adjudged.

So if in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would solicit a business for the defendant, which he had

3 Lev. 244. adjudged between How

and Beech, upon a writ of error in *Cam. Scacc.*, and the first judgment affirmed accordingly.

had with *J. S. et finem adinde poneret*, the defendant did assume, *&c.* and that he had solicited and employed much care and pains, *&c.* but before he could *finem adinde ponere*, the defendant countermanded him, the action lies; though it was objected, that such employment is always countermandable; and if the plaintiff had bestowed pains, and in part done the thing before the countermand, he might have had a *quantum meruit* for what he had done, but not an *assumpsit* for the whole; yet it was resolved by the court, that if after part done the defendant countermands it, the plaintiff shall have an action for the whole, and upon the trial the jury ought to give as much in damages as the business done deserves.

Yelv. 22. Shelbur and Scotford adjudged. 2 Roll. R. Like point point *dubitatur.* (*a*) So the horse d

If *A.*, being possessed of a horse, lends him to *B.*, and *B.* assumes and promises to re-deliver the horse to *A.* by a day, before which day the true owner of the horse, *contra voluntatem B.*, takes him from *B.* (*a*); this matter, by reason of the precedent property, is *quasi* an eviction of the horse from the possession of *B.*, and shall discharge *B.* of his promise. (*b*)

Jones, 179. (*b*) If one assumes to purchase lands at the best price he can, the promise to purchase is absolute; but the price must be as reasonable as he can. Lev. 3. *per Twisden.* But *per Foster* C. J. — he is not bound to purchase unless the owner will sell.

ATTACHMENT.

Lamb. Eiren. lib. 1. c. 16. [(*c*) If for a contempt in the face of the court, the commitment is by rule of court, unless the party escape out of court before he is secured. Jac. Law Dict. tit. Attachment.]

AN *attachment* is a process that issues at the discretion of the judges of a court of record, against a person for some contempt (*c*), for which he is to be committed; and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information; for though by the statute of *magna charta*, none are to be imprisoned *sine judicio parium, vel per legem terræ*, yet this summary method of proceeding being absolutely necessary to the furtherance and execution of justice, seems to have been long practised, and is certainly now established as part of the law of the land.

Vide 2 *Westm.* c. 3.

As several matters relating to this head fall more properly under others, I shall only in this place consider,

(A) In what Cases an Attachment is to be granted:

(B) How the Person against whom it is granted is to be proceeded against, and how to be discharged.

(A) In

(A) In what Cases an Attachment is to be granted.

ALL courts of record have a discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other officer be guilty of a corrupt practice in not serving a writ; as if he refuse to do it unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences, in such manner as shall seem proper, by attachment. Dyer, 218. 2 Hawk. P. C. 215. *Vide* head of *Sheriff*.

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obstinacy, the judgment whereof is to be left to the discretion of the court, it seems not usual to proceed in this manner, but to leave the party to his ordinary remedy against the sheriff, either by action, or by rules to return the writ, or by an *alias* and *pluries*, which if he have no excuse for not executing, an attachment goes of course. Hob. 62. 264. Noy, 101. F. N. B. 38. Finch, 237. 1 Black. R. 6. [In contempts to inferior jurisdictions, the court of *B. R.*, it seems, never interposes. Rex v. Burchett, 1 Stra. 567. But it will, for disobeying an order of sessions, confirmed in *B. R.* Rex. v. Holland, Ca. temp. Hardw. 160.]

Sheriffs and other officers are liable to an attachment for an oppressive or illegal practice in the execution of a writ; as using needless force, violence, or terror, treating persons under an arrest basely and inhumanly, extorting money from them, *&c.*, or making an arrest without due authority; as, by colour of a blank warrant (*a*), filled up without the privity or subsequent agreement of the sheriff. 11 H. 6. 42. (*a*) Noy, 101. Moor, 770. 2 Roll. Abr. 278. But there may be some special circumstances which may induce the court to excuse it, as that the practice was so, and that it was done to prevent the party's having notice of the arrest. 2 Hawk. P. C. 215.

An attachment is grantable for a corrupt practice, in not executing a writ effectually; as if a sheriff, having levied a debt on an execution, embezzles the money. 2 Hawk. P. C. 215.

‖But if the plaintiff's attorney receives the money on a *fieri facias*, without the writ being delivered to the sheriff, it is no contempt to attach the money in the attorney's hands by a foreign attachment.‖ Gwinness v. Brown, 4 Taunt. 472.

Also an attachment is grantable in discretion for a false return to a writ (*b*); but this is not usually done without some visible corruption, or extraordinary circumstances of malice, hardship, or oppression. (*c*) Hawk. P. C. 215. [(*b*) An attachment was granted against a mayor for making a return to a *mandamus* in the name of the town-clerk and burgesses without their knowledge or consent. Rex v. Hoskins, Ca. temp. Hardw. 188. If coroners do not return an attachment of contempt against the sheriff, an attachment will be granted against them in the first instance directed to elisors. Andrews v. Sharp, 2 Black. R. 911. The King v. Peckham, *id.* 1218.] (*c*) For an action on the case lies against the sheriff; *vide* tit. *Sheriff*. [For the same reason an attachment will not be granted against him for neglecting to take a replevin-bond. The King v. Lewis, 2 Term R. 617.]

Attorneys are liable to an attachment, and have been punished in this manner in numberless instances; as for prosecuting or defending a suit without directions from the party, for base and unfair *Vide* tit. *Attorneys*, and 2 Hawk. P. C. 217.

copy of the rule, and that the original rule was shewn to him at the same time. The King v. Smithies, 3 Term R. 351. But where a *mandamus* was granted for the election of a mayor, under 11 G. 1. c. 4. § 2., and a rule made that public notice should be affixed in the market-place, which was done accordingly, an attachment was granted for disobedience of the *mandamus* against a member of the corporation who was served with a copy of the rule, notwithstanding neither the original *mandamus*, nor rule was shewn him at the time; for the public notice by the act is *primâ facie* sufficient. But the application for an attachment might be well answered, if the party could shew that he had no notice of the *mandamus*. The King v. Edyvean, 3 Term R. 352. ‖Chitt. R. 503. 1 Dowl. & Ry. 529.; *sed vide* 2 Price, 2. Service on a sunday is bad, 8 Term R. 86., and a copy of the order must be served, shewing the original alone is not sufficient. 1 Price, 401. The C. B. will not open the rule for attachment for nonpayment of costs on mere affidavit that the party has not been served, unless he shew mistake, 1 New R. 256.‖ Motions for attachments in civil suits are proceedings on the civil side of the court of K. B. till the attachments issue, and therefore the affidavits on which they are grounded are to be entitled with the names of the parties; but when the attachments issue, the king is to be named as prosecutor, for the proceedings are then on the crown side. 3 Term R. 253. Wood v. Webb.] ‖Whitehead v. Firth, 12 East, 165. The King v. Sheriff of Middlesex, 7 Term R. 439.‖

Brandon v. Brandon, 1 Bos. & Pull. 394. Dodington v. Hudson, 1 Bing. R. 410.

‖And where the order of the court is, to perform a certain act, a demand of performance is necessary before an attachment can be granted.

8 Moo. 610. 1 Bing. 464.

But where the order was forthwith to reinstate certain premises, an attachment was granted for not having *commenced* within four days from the service of the order.‖

2 Hawk. P.C. 231. Fortes. 267. [Granted against the plaintiff in an action, and his attorney, for entering up judgment on a bond and warrant of attorney executed whilst the defendant was under arrest, and without calling in his attorney. Woodin v. Colledge, Ca. temp. Hardwicke, 177. The instituting a suit, though there be a real demand, either for the purpose of injuring a third person, or of getting the opinion of the court, is a contempt punishable by attachment. Coxe v. Phillips, Ca. temp. Hardw. 237. Da Costa v. Jones, Cowp. 729. Hoskins v. Lord Berkley, 4 Term R. 402. So is putting in bail by feigned names, no such persons being in existence. Stra. 384. Or assigning for error the death of the plaintiff in ejectment. Moor v. Goodright, 2 Stra. 899. Or arresting a plaintiff whilst attending arbitrators under a rule of court in order to injure his cause. Rex v. Hall, 2 Black. R. 1110. Or the mere serving of process on a party attending his cause in a court of justice. Cole v. Hawkins, 2 Stra. 1094. Andr. 275. S. C. Or bringing a writ of error, after having obtained an injunction on the terms of giving a release of errors. 3 Atk. 297. Where the court will punish for contempts in the challenging of juries, see 1 Stra. 593. 2 Lord Raym. 1364. 8 Mod. 245. 2 Stra. 1001. An attachment was granted against a person for threatening the life of the prosecutor, who had indicted another for perjury, in an affidavit on which an information had issued against him. Rex v. Carroll, 1 Wils. 75.

An attachment is proper for abuses of the process of the court; as for suing out execution where there is no judgment; bringing an appeal for the death of one known to be alive; making use of a process of a superior court, as a stale to bring a defendant within the jurisdiction of an inferior one, and then dropping it; using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it.

2 Atk. 469. 2 Ves. 520.

[It is a high contempt of a court, punishable by attachment, either to scandalize the court itself, or to abuse parties who are concerned in causes in it, or to publish any thing in order to prejudice mankind against the parties before the court.]

Ex parte Jones, 13 Ves. 237. and see Mr. Just. *Wilmot's* elaborate

‖And accordingly Lord Chancellor *Erskine* committed to the Fleet the committee of a lunatic and his wife, and the printer, for publication of a pamphlet having an obvious tendency to obstruct the petitioner, acting under orders of the court, in the management

ment of the estate, and to bring into contempt the court's orders.

judgment prepared to be delivered in the King v. Almon, Mr. Wilmot's notes, 243.

And a court of general gaol delivery has jurisdiction to make an order in a trial likely to last several successive days, prohibiting the publication of the proceedings until the trial is terminated; and in case of disobedience they may punish the contempt by fine.

The King v. Clement, 4 Barn. & Ald. 218. 11 Price R. 68. Such an order appears to have been first made in the trial of Lord *Melville* in 1806, and afterwards in the King v. Watson, and the King v. Brandreth.

And a judge at *nisi prius* has not only the power of committing but of fining a defendant for a contempt committed by him in insulting the judge, blaspheming the Christian religion, and slandering individuals not present.‖

The King v. Davison, 4 Barn. & Ald. 329.; and see tit. *Courts*.

[If a defendant in a penal action obtain a rule to stay proceedings, on paying a sum agreed upon between him and the plaintiff, the court will grant an attachment against him, if he refuse to pay such sum.]

King v. Clifton, 5 Term R. 257. ‖Hart v. Draper, 7 Taunt. 43.‖

(B) How the Person against whom an Attachment is granted is to be proceeded against, and how discharged.

ATTACHMENTS are usually granted on a rule to shew cause, unless the offence complained of be of a flagrant nature, and positively sworn to; in which last case the party is ordered to attend, which he must do in person; as must every one against whom an attachment is granted; and if the party attending the court upon such a rule to answer it, or appearing upon an attachment, be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him (*a*), concerning the comtempt complained of, or will suffer him to enter into a recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance discharged; otherwise he must answer them, though exhibited after the four days; but in all cases, if he fully answer them, he shall be discharged as to the attachment, and the prosecutor shall be left to proceed against him for the perjury (*b*), if he thinks fit; but if he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted, as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it.

2 Hawk. P.C. 141. Salk. 84. pl. 3. 2 Jones, 178. [The court will never grant an attachment for one party at the suit of another, where the affidavits on which it is moved for are sworn before the prosecutor's agents. Rex v. Wallace, 3 Term R. 403. (*a*) But he cannot come in and confess the contempt till after the interrogatories are filed, unless in the case of a rescue, or a contempt in the face of the court. Rex v. Edwards, 4 Burr. 2105. 1 Black. R. 637. S.C. Rex v. Elkins, 1 Black. R. 640. In the case of a rescue, however, it has been since adjudged, that he must answer interrogatories, if the prosecutor insist upon it, R. v. Jane Horsley, 5 Term R. 362. In the King's Bench the interrogatories must be signed by counsel. Reg. gen. Mich. 1793, 5 Term

5 Term R. 474., and are referred to the master of the Crown Office to examine the party upon them; and he is to report to the court whether in contempt or not. Ca. temp. Hardw. 239. But the party may demur to improper interrogatories, such as may tend to convict him of any other offence, R. v. Barber, 1 Stra. 444., or subject him to a penalty. Ca. temp. Hardw. 239. If reported in contempt, he immediately receives sentence, unless the court, by consent, wave giving judgment, and order the recognizance to be discharged, Rex v. James Wheeler, 3 Burr. 1256.; or the Attorney-general consent that he may be continued on his recognizance. R. v. Beardmore, 2 Burr. 797. — ‖The master's report that he is in contempt is conclusive; and when he is brought up for judgment, the contempt cannot be denied, but only mitigated. Coulson v. Graham, 2 Chitt. R. 57. But in the Common Pleas the prothonotary's report is not conclusive against parties who have been put to answer interrogatories before him; but they may except to the report on any material point. 1 Bing. 272. 8 Moo. 214. S. C. and *Id.* 322.‖ It is not usual to allow costs to a party who purges himself of a contempt which he is charged with: but where the charge has appeared quite groundless and vexatious, the court has given them. R. v. Plunket, 3 Burr. 1329. (*b*) R. v. Vaughan, Dougl. 516. It is a rule of Court of K. B., that the master's report cannot be moved for on the last day of term, without previous leave of the court, except in extraordinary cases; and there must be always a personal service of notice. R. v. Wheeler, 1 Black. R. 311. But attachments for non-payment of costs, and not returning the writ, are expressly excepted out of this rule. 1 Burr. 651.]

[By a rule of the Court of K. B., *Easter*, 34 G. 3., it is ordered, "That in future, whenever any writ of attachment shall issue "in order to compel any person to answer upon interrogatories, "and on which judgment shall not be given in the course of the "term, the name of the cause shall be inserted in the list of "motions appointed to come on peremptorily in the ensuing "term, in order that the court may be informed what shall have "been done in prosecution of such writ."

Rex v. Dr. Windham, Cowp, 377. London v. Lynn, 1 H. Black. R. 208. Bishop of Chichester v. Harward, 1 Term R. 652. ‖See tit. *Mandamus*, Vol. V.‖

In Chancery, if a corporation is in contempt, there is no remedy by way of proceeding for a contempt personally, against the real parties who offend; but the mode of compulsion is by sequestration. At law a corporation cannot be attached for contempt in their corporate character for not returning a writ directed to them, but an attachment in the nature of a *pone* is the proper way to compel an appearance. But where a *mandamus* goes to a corporate body to compel an election, the Court of *B. R.* it seems will attach the individuals who refuse to proceed to it.]

ATTORNEY.

Co. Lit. 52. 8 Co. 58. Hob. 9. Roll. R. 5. Of a *responsalis* and his power, and how disused since the se-

AN attorney is one set in the place of another, and is either public, as an attorney at law, whose warrant is *talis ponit loco suo talem attornatum*; or private, who has authority given him to act in the place and stead of him by whom he is delegated, in private contracts and agreements; which authority must be by deed, that it may appear that the attorney has pursued his commission. Of this all persons are capable, and therefore

fore may be executed by monks, infants, feme coverts, persons attainted, outlawed, excommunicated, villains, aliens, *&c.*; for this being only a naked authority, the execution of it can be attended with no manner of prejudice to the persons under such incapacities or disabilities, or to any other person, who by law may claim any interest of such disabled persons after their death.

veral statutes that have given power to make attorneys. *Vide* Co. Lit. 128. a.

But the person (*a*) here treated of is an attorney at law, who is appointed to prosecute and defend for his client, and is considered as an officer belonging to the courts of justice; concerning whom there are several statutes and resolutions.

(*a*) For private attorneys, *vide* tit. *Authority and Power.*

(A) Of admitting Persons to act as Attorneys, and the Qualifications necessary for such Persons.

(B) Who may appear by Attorney, and in what Cases.

(C) Of retaining an Attorney, what shall be an Appearance; and therein of the Warrant of Attorney.

(D) Of the Power of an Attorney, when appointed; and the Regularity of his Proceedings.

(E) Of the Determination of his Power; and herein of dismissing or changing him.

(F) Of his Fees and Disbursements, and the Remedy for the Recovery of them.

(G) Of the Privileges which an Attorney has.

(H) Of Offences and Misbehaviour for which he is punishable; and herein of the Form of the Proceedings against him.

(A) Of admitting Persons to act as Attorneys, and the Qualifications necessary for such Persons.

BEFORE the statute *Westm.* 2. c. 10. all attorneys were made by letters patent under the great seal, commanding the justices to admit the person to be attorney to such an one; since which there have been several (*b*) statutes and rules made for the better regulation of attorneys.

Vide 2 Inst. 249. 377. Co. Lit. 128. 8 Co. 58. 2 Mod. 83. When first of record, *vide*

statute. 4 H. 4. c. 18. and Roll. R. 3. (*b*) 3 E. 1. c. 42., which see explained 2 Inst. 249. 6 Ed. 1. c. 8. explained 2 Inst. 311. 13 Ed. 1. c. 10. explained 2 Inst. 377. 27 Ed. 1. 7 R. 2. 14. 3 H. 7. 1. 23 H. 8. c. 3. 29 Eliz. c. 5. 31 Eliz. c. 10. relating to cases in which persons may prosecute or defend by attorney. By the 4 H. 4. c. 18. are to be inrolled, and sworn to execute their office truly. By the 1 H. 5. c. 4. no under-sheriff to practise as an attorney. 33 H. 6. c. 7. For restraining the number of attorneys in *Norfolk*, *Suffolk*, and *Norwich*, *vide* 2 Inst. 250. 32 H. 8. c. 30. 18 Eliz. c. 14. 4 Ann. c. 16. relating to the filing of warrants of attorney. By the 3 Jac. 1. c. 7. are to sign bills of fees, and produce tickets of money given to counsel; *vide postea*, letter (F), 190. By the 13 W. 3. c. 6. must take the oaths. By the 12 G. 1. c. 29., made perpetual by 21 G. 2. c. 5., acting as an attorney after a conviction for forgery or perjury, to be transported.

By

Vide the statute, and the same clauses with respect to solicitors practising in courts of equity; and 23 G. 2. c. 26. § 15., whereby solicitors may be admitted attorneys without stamp or fee. [But attorney of *B. R.* cannot be admitted of C.B. without a new stamp. Barnes, 38.] ‖(a) But see 2 Black. R. 734. 957., where attorneys were admitted by the C. B., under special circumstances, though they had not regularly served the whole term of five years under the original articles; and see 1 Chitt. R. 566. 1 Dow. & Ry. 14. An articled clerk, who had served two years and a half, and then been prevented by illness from attending to business, but who had attended as much as his health allowed, was admitted. *Ex parte* Matthews, 1 Barn. & Adolph. 160.‖

By the 2 G. 2. c. 23., made perpetual by 30 G. 2. c. 19. § 75., it is enacted, "That no person from and after the first "day of *December* 1730, who was not duly admitted as an "attorney pursuant to the directions of the statute, shall be "permitted to act as an attorney, or to sue out any writ or "process, or to commence, carry on, or defend any action or "actions, or any proceedings, either before or after judgment "obtained, in the name or names of any other person or persons, "in any of his majesty's courts of record, unless such person "shall have been bound, by contract in writing, to serve as a "clerk, for and during the space of five years, to an attorney "duly and legally sworn and admitted; and unless such person "shall have continued in such service during the said term of "five years (*a*); and unless such person shall be allowed of, ad-"mitted, and enrolled by a judge of the said courts, and shall "have taken the following oath: *I*, A. B., *do swear, that I will "truly and honestly demean myself in the practice of an attorney, "according to the best of my knowledge and ability.* And in case "any person shall in his own name, or in the name of any other "person, sue out any writ or process, or commence, prosecute, "or defend any action or suit, or any proceedings in any of the "courts of law or equity, as an attorney or solicitor, for or in "expectation of any gain, fee, or reward, without being admit-"ted and enrolled (*b*); every such person for every such offence "shall forfeit and pay 50*l.* to the use of such person as shall "prosecute him for the said offence, and is hereby incapable to "maintain any action or suit in any court in law or equity, for "any fee, reward, or disbursements, on account of prosecuting, "carrying on, or defending any such action, suit, or proceed-"ing (*c*); and that no attorney or solicitor shall have more than "two clerks at a time, except the prothonotaries and secondary of "the King's Bench, who may have three clerks. Also a sworn "attorney, suffering any to act in his name, shall himself be "disabled to act in any court, and his admitttance in any court "shall from thenceforth cease and be void: Provided (*d*), that "an attorney or solicitor sworn in any one court may, by the "consent of an attorney or solicitor sworn in any other court, "which consent must appear in writing, signed by the attorney "or solicitor, in the name of such attorney sue any writ, pro-"cess, or commence, carry on, prosecute, or defend any action "or actions, or any other proceedings in such court, notwith-"standing such person is not sworn or admitted to be an attor-"ney of such court."

Taking a turnkey for an articled clerk disallowed, and the articles cancelled. Burr. Rep. 291. Fraser's case. ‖An articled clerk had held the office of surveyor of taxes during the term of his clerkship; and on affidavit it appeared that out of the five years of nominal service with the attorney, three (on a computation) had been spent in actual service with him. He afterwards bound himself to a second attorney, and served him for two years. But it was held, that his service under the first articles could not be coupled with his service under the second. *Ex parte* Peter Taylor, 4 Barn. & C. 341. 6 Dow. & Ry. 423.; and see 5 Barn. & A. 538.‖ (*b*) A solicitor in chancery may practise in the equity side of the Exchequer without being admitted a solicitor in that court. Meadowcroft v. Holbrooke, 1 H. Black. R. 30. ‖But a solicitor in the equity side of the Court of Exchequer is not entitled

entitled to practise in the Court of Chancery; and if he does, cannot maintain an action for the amount of his bill. And *semble*, that a solicitor of the Court of Chancery cannot, by writing, authorize a solicitor of the Exchequer to practise there in his name. Vincent v. Holt, 4 Taunt. 452. But an attorney of the K. B., though he should not be at the time a solicitor in Chancery, may recover for business done in the suing out a commission of bankrupt; for this issues out of the common law side of the Court of Chancery, and the petition does not require any attorney's name. Wilkinson v. Diggell, 1 Barn. & C. 158. 2 Dow. & Ry. 302. (*c*) 2 G. 2. c. 23. § 24.; and see 7 Moo. 54. 3 Bro. & Bing. 241. S. C.‖ (*d*) Attorney who gives another leave to practise in his name, is answerable for what he does in his name. 12 Mod. 666.

[By 12 G. 2. c. 13. § 7. none but regular attorneys shall act in the county courts, under a penalty of 20*l*. 12 G. 3. c. 13. § 7.

By the same, § 8., Quakers may be admitted upon their affirmation. § 8.

By 22 G. 2. c. 46. § 34. An affidavit of the actual execution of the articles of clerkship shall be made and filed within three months by the master and clerk, and none shall be admitted before such affidavit shall be produced and read in open court. § 10. Affidavit shall be made by the clerk or master of actual service to such master or his agent for the term of five years. (*a*) § 7. None shall take or retain any clerk after discontinuing business. 22 G. 2. c. 46. § 34. ‖(*a*) By this statute it is necessary that a clerk should actually serve five years under articles. Therefore where a clerk had served part of his time with a master who left the country, and before his articles were assigned to another master an interval of ten months had elapsed, during which he was not serving under articles, but under the assignment he served the remainder of the time specified, the court would not allow him to be admitted till he had served out the ten months under new articles. *Ex parte* Rowle, 2 Chitt. R. 61. And it has been holden, that the statute is not complied with by the clerk's serving part of the time with another attorney, though with his master's consent, and the rest of the time with his master. 7 Term R. 456.; but see 2 Black. R. 764. And where a clerk to an attorney held, during the whole time for which he was bound, the office of surveyor of taxes under the crown, it was held that he could not be considered as serving his whole time and term in the business of an attorney within the act; and on this ground he was struck off the roll after he had been admitted. *In re* Taylor, 5 Barn. & A. 538. In this case the clerk afterwards bound himself to another attorney, and served him for two years, at the expiration of which time he was again admitted an attorney upon an affidavit, stating that for more than three of the five years for which he was originally bound his service had been given to the attorney to whom he was articled; and on moving to strike him off the roll, it was held that his service under the first articles could not be coupled with his service under the second, so as to entitle him to be admitted. *In re* Taylor, 4 Barn. & C. 341. 6 Dow. & Ry. 428. But the C. B., refused to strike an attorney off the roll on affidavit, stating that he had not served a regular clerkship, as he had been opposed on the same ground at the time he was admitted, and no misconduct or malpractice had been imputed to him subsequently to his admission. *In re* Page, 1 Bing. R. 160. 7 Moo. 572.‖

§ 10. A clerk, in case of his master dying, or discontinuing business, or of his being discharged, if he serves the residue of his time in the manner prescribed by the act to another, and makes the proper affidavits, may be admitted. § 10. ‖As to the stamp-duty on subsequent articles where the master dies, see 34 G. 3. c. 14. § 5. 48 G. 3. c. 149. § 10. 55 G. 3. c. 184. sched. part 1.‖

‖An articled clerk having served part of his clerkship with an attorney who died before the expiration of his term, is, it seems, at liberty, even after an interval of six years, to serve the remainder of his clerkship with another attorney, with a view to admittance. And the Court of King's Bench granted a rule to discharge an articled clerk, where the attorney to whom he was bound had become bankrupt and absconded; and directed the rule 1 Dow. & Ry. 14. 1 Chitt. R. 558. *in notis.* 2 *Id.* 62. S. C.

rule to be served at the last place of abode of the attorney, and on the clerk to the commission of bankruptcy, and to be stuck up in the King's Bench office.

3 Barn. & A. 257. 1 Chitt. R. 694.

This court has also a summary jurisdiction over matters in difference between attorneys and their clerks; and therefore where a clerk had misconducted himself, and left the service of the attorney to whom he was articled at the end of a year and a half, and the latter refused to take him back, in consequence of his previous misconduct, the court referred it to the master, who decided that a portion of the premium should be returned; and this decision was confirmed by the court, though the point in question had been decided otherwise in a suit in the Exchequer. But the court refused to compel an attorney to execute an assignment of articles of clerkship where the clerk had been guilty of criminal conversation with the attorney's wife, even though the attorney had promised to assign him over.‖

Tidd, 68. (9th ed.)

22 G. 2. c. 46. § 16, 17.

By 22 G. 2. c. 46. § 16, 17. Sworn clerks in Chancery, or their clerks bound and actually serving for five years, or being admitted and serving as a waiting clerk the two last years, may be admitted solicitors; and so if their masters die, and they serve under articles with others.

§ 18.

§ 18. No sworn clerk to have more than two clerks.

§ 19.

§ 19. This act not to extend to the officers in the king's remembrancers, treasurer's remembrancers, pipe office, or office of pleas in the Exchequer.

§ 11.

§ 11. Attorneys acting as agents for unqualified persons, or permitting them to use their names, to be struck off the roll, and committed to prison for any time not exceeding one year. (*a*)

‖(*a*) Where an attorney had permitted a certificated conveyancer to conduct his business in the joint names of the two, this was held to be within the meaning of this section; and the attorney was consequently struck off the rolls, and the clerk committed to prison for a month. 1 Barn. & C. 270.‖

§ 12.

§ 12. None shall act as attorneys at the sessions who have not been admitted according to 2 G. 2. c. 23., under a penalty of 50*l*., with treble costs; and attorneys suffering such persons to practise in their names shall incur the like penalty.

§ 13.

§ 13. The attorneys of the duchy court of *Lancaster*, or of the great sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, and *Durham*, acting within their respective jurisdictions, are exempted.

§ 14.

§ 14. No clerk of the peace or his deputy, or under-sheriff or his deputy, shall act as attorneys at the sessions for the county, *&c.* where they shall execute such offices, under the like penalty of 50*l*.

49 G. 3. c. 28. § 1.

‖By 49 G. 3. c. 28. § 1. a service of five years as clerk to one of the regularly appointed clerks of the king's coroner and attorney in the Court of King's Bench, entitles the person so having served to be admitted and practise as an attorney.

1 & 2 G. 4. c. 48. § 1.

Also, by 1 & 2 G. 4. c. 48. § 1. (as amended by 3 G. 4. c. 16.), persons who at the time of being articled have taken the degree of bachelor of arts or bachelor of law in the universities of *Oxford*,

ford, Cambridge, or *Dublin*, may be admitted to practise as attorneys, after three years' *bonâ fide* service as clerks; provided the degree of bachelor of arts have been taken within six years, and that of bachelor of law within eight years, after matriculation, and provided also that four years have not elapsed between the time of taking the degree and that of entering into articles.

And, by § 2., if any person bound by contract in writing to serve as clerk for five years shall, *bonâ fide*, be a pupil to a barrister or certificated special pleader in *England* or *Ireland* for one year, he may be admitted an attorney or solicitor in like manner as now done where the clerk has served part of the term of his clerkship with the agent of the person to whom he is bound. § 2.

The statute 34 G. 3. c. 14. § 2. requires that the indentures of an attorney's clerkship shall be enrolled or registered with the proper officer of the court, together with an affidavit of the time of executing the same, before the clerk shall be admitted to practise as an attorney; and enacts, that unless the indentures are enrolled or registered within six months next after execution, together with the affidavit of the time of execution, the service shall be deemed to commence from the time of enrolment or registry only.

34 G. 3. c. 14. § 2. Where the original articles of clerkship were lost, the Court of K. B., on motion, ordered that the master should be at liberty to enrol a copy of them. *Ex parte* Clarke, 3 Barn. & A. 610. But where the indentures had been sent from the country to be enrolled, and after the clerkship had been served no trace of the indentures could be discovered in the master's office, the court refused to admit the clerk, or suffer the counterpart of the articles to be enrolled *nunc pro tunc*; though evidence was offered that, at the time of the supposed enrolment, the fees for the enrolment were actually paid at the proper office. *Ex parte* Pilgrim, 1 Barn. & C. 264.

The certificates of attorneys were first introduced by the 25 G. 3. c. 80.; and now, by 37 G. 3. c. 90., every person admitted, sworn, and enrolled a solicitor or attorney, *&c.* in any of his majesty's courts at *Westminster*, *&c.*, or in any other court in *England* holding pleas, where the debt or damage shall amount to 40*s.* or more, shall annually, between the first day of *November* and the end of *Michaelmas* term then next following, [altered by 54 G. 3. c. 144. § 13. to "between the 15th "day of *November* and the 16th day of *December* in each year,"] during such time as he shall continue so to practise in any of the said courts, or before such person shall commence, carry on, or defend any action or suit, or any proceedings whatsoever, in any of the said courts, deliver in to the commissioners of the stamp duties, or to their officer appointed for that purpose, at the head office of stamps in *Middlesex*, a paper or note in writing, containing the name and usual place of residence of such person; and thereupon and upon payment of the duties, according to the place of his residence, every such person shall be entitled to a certificate, duly stamped, to denote the payment of the said duties; which certificate the said commissioners shall cause to be immediately issued, under the hand and name of the proper officer, in such form as they shall devise.

These duties, as fixed by the last stamp act (*a*), are, where the attorney (*a*) 55 G. 3.

c. 184. sched. part 1.; and for the former duties, see 44 G. 3. c. 98. sched. (A). attorney resides in *London*, or within the limits of the twopenny post, 12*l.* if he have been admitted three years, and 6*l.* if not admitted so long: if he reside elsewhere 8*l.*, if he have been admitted three years, and 4*l.* if not so long. 48 G. 3. c. 149. sched. part 1.

§ 27. By § 27. of the above cited 37 G. 3. c. 90. every certificate shall be entered in one of the courts in which the person described therein shall be admitted, and enrolled with the respective officer (a) See 2 G. 2. c. 23. § 18. or officers (*a*) of the said courts appointed by the 25 G. 3. c. 80. to grant certificates of enrolment or admission, within the time therein before prescribed, or before such person shall be permitted to practise as aforesaid; and the said respective officers shall from time to time, upon payment of the sum of 1*s.*, enter in alphabetical order the names of the persons described in such respective certificates, together with the places of such their residence as aforesaid, and the respective dates of such certificates, in books or rolls to be prepared for that purpose; to which books or rolls in the said courts respectively all persons shall and may, at seasonable times, have free access, without fee or reward.

§ 30. By § 30. any person practising as an attorney without obtaining a certificate, or delivering in a false place of residence, to evade the payment of the higher duties, shall forfeit 50*l.*, and be made incapable of maintaining an action for business done.

§ 90. And by § 90. any attorney neglecting to take out his certificate for the space of one whole year, shall be thenceforth incapable of practising either in his own name or that of any other person; and his admission shall be void. He may, however, be re-admitted on payment of the arrears, and such penalty as the court shall think proper to impose.

7 G. 4. c. 44. § 3. Acts of indemnity are occasionally passed to relieve attorneys who have neglected to take out their certificate in due time.

Davis v. Edmonson, 3 Bos. & P. 382.; and see 1 New R. 245.; A common informer may recover the penalties for non-observance of the provisions of this statute, though no such power is expressly given to him. *sed vide* 2 East, 569. *contrà*.

4 Esp. Ca. 14. And if an attorney be in partnership with another, and they carry on their business together, and their joint names are put on papers on causes in their office, either of them is liable to the penalties of the last-mentioned act for practising as an attorney without entering his certificate, though it do not appear that one of them had any profit or advantage from the suit for which the *qui tam* action is brought; the consequence is that two attorneys or proctors cannot be sued together as for one offence in practising, without having obtained and entered their certificate.

1 New R. 245.; *sed vide* 2 East, 569.

6 Term R. 663. It has likewise been determined that the certificate act does not extend to the county court, though an attorney prosecute a suit there by writ of *justicies* for more than forty shillings.

As a further inducement for attorneys to take out their certificates,

cates, it is enacted by the statute above cited 37 G. 3. c. 90. (*a*) that "every person admitted, sworn, and enrolled in any of the courts "therein mentioned, who shall neglect to obtain his certificate "thereof, in the manner before directed, for the space of one whole "year shall from thenceforth be incapable of practising in his own "name, or in the name of any other person, in any of the said "courts by virtue of such admission, entry, and enrolment; and "the admission, entry, and enrolment of such person in any of "the said courts shall from thenceforth be null and void. Pro- "vided always, that nothing therein before contained shall be "construed to prevent any of the said courts from readmitting "such person, on payment to the commissioners of the duty "accrued since the expiration of the last certificate obtained by "such person, and such further sum of money by way of penalty "as the said court shall think fit to order and direct." (*b*) On the above statute it has been holden, in the Common Pleas, that where a person is admitted an attorney, and omits to take out his certificate within the year, he must be re-admitted before he can practise, though he should never have practised on his former admission. (*c*) And, in the King's Bench, where an attorney has discontinued to practise after the expiration of his certificate, though in consequence of pecuniary difficulties and illness (*d*), or absence abroad (*e*), a term's notice must be stuck up and entered at the judge's chambers for the purpose of re-admitting him, in like manner as upon an original admission. (*g*) But where an attorney continued to practise after the expiration of his certificate through the inadvertence or misconduct of his agent or clerk, in neglecting to get it renewed, the court, on an affidavit of the circumstances, will readmit him without giving a term's notice. (*h*) And where the certificate of an attorney of the Common Pleas had been, through the mistake of his agent, filed in the King's Bench, where he was not admitted for four successive years, such certificate was allowed to be entered and filed in the Common Pleas, on notice of the application being given to the stamp office. (*i*) Where a term's notice was necessary, and the party intending to apply to be re-admitted on the roll affixed his notice outside the Court of King's Bench in the morning before the sitting of the court, on the first day of the term, of which the notice was intended to be given, this was holden to be a sufficient compliance with the rule. (*k*)

In the Court of King's Bench it is a rule, that where an agent employed to take out an attorney's annual certificate has neglected to do so, and the attorney has, from ignorance of the fact, continued to practise, the court will only allow him to be re-admitted upon payment of a fine, with the arrears of duty. (*l*) But attorneys have been readmitted in that court without paying any fine or arrears, on making it appear that they never practised (*m*), or had discontinued practice after their last certificate expired (*n*), or that they were prevented practising by illness (*o*), or by being reduced to the situation of a clerk (*p*); and the

(*a*) § 31.

(*b*) For the evidence, in an action by an attorney for his fees, as to his not having been re-admitted, after neglecting to take out his certificate, see 5 Barn. & C. 38. 7 Dow. & Ry. 512. S. C.

(*c*) 6 Taunt. 408. 2 Marsh. 123. S.C.; and see 1 Chitt. R. 729.

(*d*) 1 Chitt. R. 207.

(*e*) *Ibid.* 208.

(*g*) *Ex parte* Vaughan, E. 45 G. 3. K. B. Tidd. 79.

(*h*) 1 Barn. & Ald. 189. 190. 8 Taunt. 129. 3 Moore, 578. 1 Chitt. R. 163 673. 692.

(*i*) 4 Moore, 317.

(*k*) 4 Dow. & Ry. 646.

(*l*) 4 Barn. & Ald. 90. For the form of an affidavit of admission on the above ground, and the rule of court thereon, see Tidd, Append. ch. 5. § 15, 16.

(*m*) 1 Chitt. R. 729.

the distinction is said to be this,—that where the party has been practising in the interval, he must pay the arrears of duty; but not so where he has not practised. (q) So, in the Common Pleas, an attorney who had ceased to practise after the passing of the 25 G. 3. c. 80. and before the operation of the 37 G. 3. c. 90. § 31. had commenced was readmitted, without paying any penalties or arrears of duty. (r) And, in a late case (s), an attorney who had ceased to practise six years was readmitted in that court on payment of a nominal fine, without the arrears of duty; on an affidavit, stating that he had discontinued to practise, on account of his affairs having become embarrassed, that he had not practised in the interval, and that no misconduct could be imputed to him in his character of an attorney. ‖

(n) 2 Bow. & Ry. 58.
(o) 1 Chitt. R. 101. 692.
(p) 2 Barn. & Ald. 314.
1 Chitt. R. 102.
S. C.; and see *Ibid.* 692.
1 Lee's Prac. Dict. (2d edit.) 333, 334. n.
2 Marsh. 125.
(q) 2 Dow. & R. 239. *per Abbott* C. J.
(r) 2 Taunt. 398. (s) 7 Moore, 410. 1 Bing. 91. S. C.; and see 7 Moore, 493. 495.

By a rule of the Court of King's Bench, Tr. 31 G. 3. (in aid and furtherance of the dispositions of the legislature manifested in the above acts,) it is ordered, "That, from and after the "last day of *Michaelmas* term then next ensuing, no attorney, "who shall be retained or employed as a writer or clerk by any "other attorney, shall, during the time of such employ, take or "have any clerk under articles; and that no service to any such "attorney under articles during the time that such attorney shall "be so employed by any other attorney shall be deemed good "service. And it is further ordered, that, from and after the "same last day of *Michaelmas* term, no person who shall enter "into articles with an attorney or attorneys shall be at liberty to "serve the agent or agents of such attorney or attorneys, under "such articles, for a longer time than one year of his clerkship, "and that any such service to an agent or agents beyond that "time shall not be deemed good service. And to the intent that "better information may be obtained touching the fitness and "qualifications of persons applying to be admitted attorneys, it "is further ordered, that, from and after the same, *&c.* every "person who shall apply for admission as an attorney in that "court, and who shall not have been admitted an attorney or "solicitor of any other court, shall, for the space of one full "term, previous to the term in which such person shall apply "to be admitted, cause his name and place of abode, and also "the name or names and place or places of abode of the at-"torney or attorneys to whom he shall have been articled, writ-"ten in legible characters, to be affixed on the outside of the "Court of King's Bench, in such place as public notices are "usually affixed, and also in some conspicuous place in the "chambers (a) of each of the judges of that court, and in the "King's Bench office; and that no person who shall not have "regularly complied with this order shall in future be admitted "an attorney of that court."

This rule has been since adopted by the Court of C. P. (a) But instead of fixing up his name and place of abode in the judge's chambers, it is ordered by a subsequent rule, Tr. 33 G. 3. that he shall enter, or cause to be entered, in a book to be kept for that purpose at each of the judge's chambers of that court, his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articled; and that no person who shall not have complied with this rule shall in future be admitted an attorney.

As a further means of reducing the number of this body of men, by stat. 34 G. 3. c. 14. the legislature have imposed a duty

34 G. 3. c. 14.

duty of 100*l.* ‖by 55 G. 3. c. 184. raised to 120*l.*‖ upon every contract in writing, to serve as a clerk, in order to admission as a solicitor or attorney in any court at *Westminster*, and a duty of 50*l.* ‖by 55 G. 3. c. 104. 60*l.*‖ upon every such contract, in order to admission into any court of great sessions in *Wales*, *Chester*, *Lancaster*, or *Durham*, or in any Court of Record in *England* holding pleas, where the debt shall amount to forty shillings. And § 2. no clerk can be admitted unless the indenture or writing containing the contract be enrolled, together with an affidavit of the due execution thereof, in the court in which such clerk proposes to be admitted, within six months next after the execution thereof; and in default of enrolment within that time the service shall be deemed to commence from the time of the enrolment, and not from the execution of the indentures. And by § 3. every person shall, previous to his being permitted to practise, make an affidavit of the payment of the duty, and specify in it the sum paid, and the name and place of abode of the person or persons with whom the contract of service was entered into, the time of the execution thereof, and of the enrolling of it; and, in case he shall have been previously admitted a solicitor or attorney in some other court, shall specify in such affidavit the court in which he has been so admitted, and time of his admission, and cause the same to be filed in the court in which he proposes to be admitted; which affidavit shall be produced and openly read in the court in which he proposes to be admitted before he shall be enrolled therein.

§ 2.

§ 3.

The § 4. imposes a penalty of 100*l.* upon any person, other than such as shall have been admitted in one of the courts of great sessions in *Wales*, *&c.* by virtue of a contract made before the 5th and 10th days of *February* 1794, and a service in pursuance thereof, who shall in his own name, or that of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any of the courts at *Westminster*, without being admitted in one of them according to the directions of the several acts now in force for the better regulation of attorneys; and further incapacitates him from maintaining any action for the recovery of his fees, *&c.* on account of such proceedings.

§ 4.

But by § 5. persons admitted in any court at *Westminster*, who shall have paid the 100*l.* duty, may be admitted in any other court mentioned in the act without paying any further duty; and by § 6. a similar provision is made for the admission of those who have paid the 50*l.* duty into any other court but those at *Westminster*. And by § 7. any person admitted in any of the above courts, by virtue of a contract and service thereunder, before the said 5th and 10th days of *February*, may be admitted to any of the other courts without the payment of the duties imposed by this act. And § 8. protects articled clerks who shall have paid the duty from the payment of it again, upon any new contract with other masters.]

§ 5.

§ 6.

§ 7.

§ 8.

‖By 44 G. 3. c. 98. § 14. any person who shall for a fee, *&c.* draw

44 G. 3. c. 98. § 14.

draw or prepare any conveyance, deed, or other proceedings in law or equity (except wills, agreements not under seal, and letters of attorney), not being a serjeant at law, barrister, or solicitor, *&c.* duly certificated, or a special pleader, equity draftsman, or conveyancer of one of the four inns of court, and certificated, shall forfeit for each offence 50*l.*‖

Vent. 11. Sid. 410. Mod. 23.

An attorney sworn and admitted in any of the courts at *Westminster* may practise in any inferior court, unless such court by charter or prescription is restrained to a certain number of attorneys, and has a power to exclude all others.

Lev. 75. Sid. 94. Keb. 349. Raym. 14. *Vide* tit. *Mandamus.*

Also if an attorney of any inferior court is refused the privilege of acting, or turned out by the judge or steward, a *mandamus* will lie to restore him.

Barnes, 59.

[An apprentice to a man as a scrivener, though he be also an attorney, cannot be admitted.

Ex parte Cole, Dougl. 115.

A barrister cannot be admitted an attorney: if he is desirous of being so, he must first apply to his society to be disbarred.

Moody's case, Barnes, 42.

An attorney who had at his own instance been struck off the roll, and had been put into the commission of the peace, and made a commissioner of the land-tax, moved to be restored; and on an affidavit setting forth his reasons, the motion was granted, he consenting to take no advantage of any action pending, if there should be any.]

(B) Who may appear by Attorney, and in what Cases.

2 Inst. 924. Co. Lit. 128. 8 Co. 58. 2 Mod. 83. Of infants appearing in person by guardian or attorney, *vide* head of *Infants*.

THE statute of *Westm.* 2. cap. 10. gives to all persons a liberty of appearing by attorney without any letters patent, which it seems they were formerly obliged to take out, otherwise they were to appear each day in court in their proper person (*a*); for the command of the writ being to appear, was always intended to be in proper person.

[(*a*) By reason whereof, Lord *Coke* observeth, there were but few suits. Co. Lit. 128. a.]

(*b*) 2 Hawk. P. C. 387. *Vide* Roll. R. 190. 2 Bulst. 299. (*c*) 3 Inst. 212. That the appellant and appellee must both appear in person. 3 Mod. 268. 4 Mod. 99. 2 Jones, 210. (*d*) 2 Hawk. P. C. 213.; and *vide* title *Appeal.*

But in a capital case (*b*) the party must always appear in person, and cannot plead by attorney: also in criminal offences, where an act of parliament requires that the party should appear in person; so in appeal (*c*), or on an attachment. (*d*)

Lev. 146. Kelw. 165. Dyer, 346. Cro. Jac. 462. 3 Inst. 125. 2 Hawk. P. C. 273. A clerk in court may confess an indictment for his client. 6 Mod. R. 16.

On an indictment, information, or action for any crime whatsoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceedings after, till conviction.

18 Eliz. c. 5. par. 1.

By the 18 Eliz. cap. 5. par. 1. it is enacted, "that every "informer upon any penal statute shall exhibit his suit in proper "person, and pursue the same only by himself, or by his at-

"torney

" torney in court, and that he shall not use any deputy or " deputies at all."

By the 29 Eliz. cap. 5. par. 21. it is recited, " that divers " of her majesty's subjects dwelling in the remote parts of the " realm, had been many times maliciously troubled upon inform- " ations and suits exhibited in the Courts of the King's Bench, " Common Pleas, and Exchequer, upon penal statutes, and had " been drawn up upon process out of the countries where they " dwell, and driven to attend and put in bail, to their great " trouble and undoing; for reformation thereof it is enacted, " That if any person or persons shall be sued or informed against " upon any penal law, in any of the said courts where such person " or persons are bailable by law, or where by the leave or favour " of the court such person or persons may appear by attorney; " in every such case the person or persons so to be empleaded " or sued, shall and may, at the day and time contained in the " first process served for his appearance, appear by attorney of " the same court where the process is returnable, to answer and " defend the same, and not be urged to personal appearance, or " to put in bail for the answering of such suits." 29 Eliz. c. 5. par. 21.

If one be outlawed upon an indictment for not repairing a bridge, and thereupon admitted to bring a writ of error, he must appear, and in person assign his error (*a*); so adjudged and agreed by all the clerks of the crown-office in Sir *William Read*'s case; and though the court greatly pitied Sir *William*, because he was ninety years of age, and very infirm, and had kept his chamber for a year and more, yet they held that it could not be done by attorney, being against the course of the court, and doubted whether the king's privy seal would help him; and he was thereupon brought from his house ten miles from *London*, in an horse-litter, upon men's shoulders to the bar, and came into court and assigned his error, and put in bail to prosecute. Cro. Jac. 616. Sir William Read's case. (*a*) But if an administrator brings error upon an outlawry of his intestate for murder, he may appear by attorney; for though the party himself must have appeared in person, that he might have stood *rectus in curia*, and answer the matter of fact; yet in this *case* that reason fails. March, 113. *Vide* the statute 7 H. 4. c. 13., by which a judge may examine into the inability of a person outlawed to appear, and the court dispense with a personal appearance; and Cro. Jac. 462. where on affidavit of sickness the court allowed of an appearance by attorney. *Vide* the 4 & 5 W. & M. c. 18., that persons outlawed may appear by attorney, except for treason or felony, and reverse the same without bail. 2 Salk. 496. *acc.* *Vide* tit. *Outlawry.*

If husband and wife are sued, the husband is to make an attorney for her. (*b*) 2 Sand. 213. Bridg. 73.

See title *Baron and Feme.* *Vide* 6 Mod. 86. ‖(*b*) For feme covert cannot make an attorney. 3 Taunt. 261.‖

If an idiot sue or defend, he cannot appear by guardian, *prochein amy*, or attorney, but must appear in proper person; but otherwise of him who becomes *non compos mentis*, for he shall appear by guardian if within age, or by attorney if of full age. Co. Lit. 135. b. 2 Inst. 390. 4 Co. 124. Palm. 520. 2 Sand. 535. *Vide* tit. *Idiot and Lunatics.*

In an attachment of privilege by the marshal, he shall have no attorney because present in court. 6 Mod. 16.

(C) Of retaining an Attorney, what shall be an Appearance; and herein of the Warrant of Attorney.

Salk 87. pl. 4. [Where an attorney of either bench has accepted a warrant, or subscribed a process, declaration, or warrant to appear, the rule is, "that he shall be compelled to cause an appearance, or be liable to an attachment, or put out "of the roll, as the case requires; and the party is not to be received to countermand such "appearance after his retainer." Tidd's Prac. 124. The usual mode of proceeding upon this rule is by attachment. 6 Mod. 42. 86.; and if an attorney expressly undertake to appear, the court will oblige him to do it in a proper manner; as, if for an *infant*, he must appear by *guardian*. Goodright v. Wright, 1 Stra. 25. Stratton v. Burgiss, *Ibid.* 114. Power v. Jones, *Ibid.* 445. And though he may have been imposed upon by a sheriff's officer, yet the court will oblige him to fulfil his undertaking. Lorymer v. Hollister, 1 Stra. 696.] ‖But a general undertaking by an attorney to appear to process does not oblige him to put in bail to bailable process. 2 Chitt. 415.; and see 3 Bing. 70. And an attachment will not be granted against an attorney for neglecting to enter an appearance according to his undertaking. Mould v. Roberts, 4 Dow. & Ry. 719.‖

AN attorney is not compellable to appear for any one, unless he take his fee, or back the warrant; after which the court will compel him to appear.

6 Mod. 42. *per Holt* C. J. *Vide* Comb. 299.

If before a writ be taken out an attorney promise to appear to it, and after it is taken out it is shewed to him, he ought to appear, but that is no actual appearance; but if such undertaking be after the writ is actually taken out, it is an appearance.

Salk. 86. pl. 3. *per Holt* said to be the practice of the court. 1 Keb. 89.

Where an attorney takes upon him to appear, the court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party his action against him. (*a*)

[(*a*) But *Qu.* Whether an appearance under a forged warrant of attorney be good? and see the case of Robson v. Eaton, 1 Term R. 62., where it was adjudged, that if *A.* pay a debt which he owes to *B.* to the attorney of a person suing him in *B.*'s name, but without his authority, he shall be obliged to pay it over again.]

1 Sid. 51. (*b*) Mordecai v. Solomon, Say. R. 173. Menzies v. Rodriguez, 1 Price, 92.‖

[For where he once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself; and it is said to be his duty to proceed in the suit, though his client neglect to bring him money. (*b*)]

14 Ves. 272. A similar practice prevails in Chancery; and in that court a solicitor having proceeded to a certain length in the cause, and then declined to act further, has no lien for the costs upon a fund in court. 14 Ves. 196. 271.; and see 1 Swanst. 1. 3 Swanst. 93.

‖And it is said to have been determined in C. P. that an attorney having quitted his client before trial could not bring an action for his bill.

Johnston v. Alston, 1 Camp. 176.

An attorney retained to defend an action is not bound, in following the instructions of his client, to do what is meant merely for delay.‖

Salk. 88. pl. 7. 6 Mod. 16. S. P. That an action will lie against an attorney for appearing with-

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, though the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default: but if the attorney be not responsible or suspicious, the judgment will be set aside, for otherwise the defendant

defendant has no remedy, and any one may be undone by that means. out a warrant. 5 Mod. 205. And for that reason an attachment denied. Comb. 2., *vide infrà*, letter (H), 422. ‖Where an authority was given to an attorney to protect a defendant from arrests, and before that authority was countermanded the attorney gave an undertaking to put in bail for the defendant, the court would not set aside the proceedings on behalf of the defendant, though he disclaimed the authority of the attorney. 1 Chitt. 193.‖

[Attorneys were anciently appointed in court, when actually present; but they are now usually appointed out of court by warrant, which should regularly be in writing; but an authority by parol is said to be sufficient to support a judgment.] 1 Wils. 39. 2 Keb. 199. 1 Lill. Pr. Reg. 134. 137.

A warrant of attorney may be entered at any time before judgment (*a*), or before a writ of error brought. Roll. Abr. 290. For this *vide* 18 Eliz. c. 14. That after verdict in any court of record judgment shall not be stayed or reversed for want of a warrant of attorney; and *vide* 32 H. 8. 30. and 4 Ann. c. 16. § 3. that the plaintiff's attorney shall file his warrant the same term he declares, and the defendant's attorney the same term he appears, on pain of forfeiting ten pounds; and also suffering such imprisonment as by the discretion of the justices of the court, where any such default shall happen to be, shall be thought convenient. *Vide* Roll. R. 186. March, 122. Golds. 91. Brownl. 46. Hetley, 59. Bulst. 21. Cro. Jac. 277. *Vide* title *Error*. [(*a*) At any time *pendente lite*. 1 Stra, 526. Noke v. Caldecot, 2 Stra. 807. Henriques v. The Dutch East India Company, 2 Ld. Raym. 1532. S. C. Brooke v. Manning, Fitzg. 191.]

[It was formerly the course of the Court of King's Bench to enter the warrants of attorney on a particular roll kept for that purpose; but this course was altered by *Wright* C. J. who caused them to be entered on the top of the plea-roll, as the practice is at this day. 1 Salk. 88. R. E. 4 J. 2.

It is to be observed with respect to the warrant of attorney, that by 25 G. 3. c. 86. above-mentioned, § 13, 14, 15., "no "attorney shall sue out any writ or process, or commence, pro- "secute, or defend any action, unless he shall have delivered to "the officer or his deputy, appointed to sign or issue the first "process for the plaintiff, or to enter, file, or record the bail or "appearance for the defendant, a *memorandum* or minute of his "warrant duly stamped, containing the names of the parties, "the court, and the attorney; and where a *præcipe* is required "(except for an original), the nature and denomination of the "process, and the return of it; which *memorandum* or minute "the said officer or his deputy shall receive, and forthwith enter "or file on record, and shall sign thereon the day of delivering "it." A similar memorandum is required by § 19. previous to entering up judgment on a *cognovit actionem*, or warrant of attorney.] But by § 17. no action shall be stayed, or judgment set aside on account of the omitting to enter a *memorandum*.

No man, though by consent of parties, can be attorney on both sides, for the consent of parties cannot change the law. Faresl. 47. *per curiam.*

If the attorney in the original action acts as attorney in the proceedings against the bail without any new warrant (*b*), this is error; for though any person may take out a *scire facias*, yet upon the return a plea commences, and a new warrant of attorney ought to have been entered, because this is a new cause and different record. Salk. 89. pl. 11. 402. pl. 10. 2 Salk. 603. *Ibid.* 369. 2 Ld. Raym. 821. 1252. 7 Mod. 3. 5 Mod. 397. Carth. 447. Burr and Atwood. (*b*) If the tenant makes an attorney *in banco*, and after conusance of this plea is demanded by a franchise and granted, the attorney shall continue attorney

attorney for him in the franchise also, without other making, and he is his attorney there *ipso facto*, without other removal; for the conusance is granted to hold plea as the justices ought, if this had not been granted. 21 E. 3. 45. b. 61. 21 Ass. pl. 17. Fitz. tit. Receipt, 133. Roll. Abr. 290. S. C. So if after conusance granted, a re-summons be sued for the failure of right there in the court where this was granted, he continues attorney for him there also upon the first retainer. Roll. Abr. 290. If judgment be given *in banco* against the defendant, and this be reversed in *B. R.* for error in the process, the attorney whom the tenant had in the first plea, shall continue his attorney now in *B. R.* to answer to the original. Roll. Abr. 290.

2 Show. R. 161. pl. 147. Keb. 593. (*a*) *Qu.* If the courts would now set aside the judgments against the bail, if they were regularly served with process, unless they had a good defence?

In debt on a bail-bond, the principal gave a warrant of attorney to appear for himself, and likewise ordered the same attorney to appear for the bail, who were his neighbours; the attorney appeared accordingly, and for want of a plea, judgment was had against the principal and bail; but upon motion set aside as to the bail, the principal's order not being a warrant to appear for more than himself, and it being by ignorance of the law, and not a wilful act, the judges discharged the attorney as to any contempt. (*a*)

Moor, 711. [*Vide supra*, tit. *Amendment* (D), 3. the case of Richards v. Brown, Dougl. 114., where the very reverse to this was done, the name in the warrant of attorney altered to that in the declaration.]

If there be a mistake in the attorney's name, it may be amended by the warrant of attorney, for the warrant of attorney being precedent, will amend the roll, and the court will take notice that it is the same that appeared. But if the right name be no where entered, the court cannot amend. 3 Bulst. 202. [In Phillips v. Smith, which was a penal action, a mistake in the addition of the defendant in the warrant of attorney was amended after error brought. 1 Stra. 136.] *Vide* Salk. 88.

(*b*) 18 Eliz. c. 14. (*c*) 4 & 5 Ann. c. 16.

[The want of a warrant of attorney is aided after verdict (*b*) or judgment by *nil dicit* (*c*), *&c.* by the statutes of jeofails.]

(D) Of the Power of an Attorney, when appointed; and the Regularity of his Proceedings.

Comb. 40. Roll. R. 366. Stile, 426. (*d*) And then a new authority is necessary. Salk. 86.

THE authority of an attorney, when appointed, continues until judgment, and for a year and a day afterwards to sue out execution, and for a longer time if they continue execution; but if not, the judgment is supposed to be satisfied and to make it appear otherwise, the plaintiff must (*d*) again come into court, which he either does by *scire facias*, or an action of debt on the judgment.

2 G. 2. c. 23. § 22. [Where the attorney sues for himself, his name need not be indorsed on the writ. 4 Term R. Fields, one, &c. v. Lewen.]

By the 2 G. 2. cap. 23. § 22. it is enacted, "that every writ "and process for arresting the body, and every writ of execu- "tion, or some label annexed to such writ or process, and every "warrant that shall be made out upon any such writ, process, "or execution, shall, before the service or execution thereof, "be subscribed or indorsed with the name of the attorney, clerk "in court, or solicitor, written in a common legible hand, by "whom such writ, process, execution, or warrant respectively "shall be sued forth; and where such attorney, clerk in court, "or solicitor, shall not be the person immediately retained or "employed by the plaintiff in the action or suit, then also with "the name of the attorney or solicitor so immediately retained "or

" or employed, to be subscribed or indorsed, and written in " like manner; and that every copy of any writ or process that " shall be served upon any defendant, shall before the service " thereof be in like manner subscribed or indorsed with the name " of the attorney or solicitor who shall be immediately retained " or employed by the plaintiff in such writ or process."

‖By a rule of the King's Bench, the attorney concerned for the plaintiff in the cause, or his agent, shall upon all *mesne* process, and every writ of attachment indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give.‖ R. H. 2 & 3 G. 4. K. B. 4 Barn. & A. 560. 1 Dow. & Ry. 471.

All warrants for confessing judgments taken by any sheriff or bailiff from any person in his or their custody by arrest, if not executed in the presence of some sworn attorney of either court, and his name set or subscribed thereto as a witness, shall not be good or of any force; and upon oath made that the same was not done, the same shall be set aside, and the sheriff or officer may be punished for so doing; and if judgment be entered thereon, the same on motion will be vacated and set aside; and if execution thereon be executed, the party will have restitution awarded him. Pasch. 15. Car. 2. *B. R.* Salk. 402. 6 Mod. 85. Stra. 530. Barnes, 44. Wilmot v. Barry, Esq. [By a subsequent rule, Pasch. 4 G. 2. the attorney required to be present must be an attorney on the behalf of the defendant. 2 Stra. 902. He must be an actual attorney at the time; therefore one who had served a clerkship, though he was sworn an attorney soon after the execution of the warrant, and before any motion was made to set aside the subsequent proceedings, was not thought sufficient. Barnes v. Ward, Barnes, 42. These rules are universal; they extend to warrants of attorney executed abroad. Fitzgerald v. Plunket, 2 Stra. 1247. But they are limited to the case of arrests upon mesne process; for one in execution may give a warrant of attorney to confess a new judgment, though an attorney on his part be not present. Watkins v. Hanbury, 2 Stra. 1245. Fell v. Riley, Cowp. 281. Birch v. Sharland, 1 Term R. 715. But even in execution, if the party had been prevailed upon to acknowledge a judgment for more than was really due, the court would give relief. Cowp. 281. They are limited too to the particular cause, and the particular person at whose suit the defendant is in custody; to warrants to confess judgments in other actions, to other persons they do not extend. 5 Mod. 144. Churchy v. Rosse, 2 Ld. Raym. 797. Finn v. Hutchinson, 3 Burr. 1792. Holcombe v. Wright, Cowp. 141. Of course they do not apply to the case of a person in custody on criminal process. Charlton v. Fletcher, 4 Term R. 433. Though in strictness they are confined to the case of persons in custody of sheriffs' officers, yet where a *cognovit actionem* was taken from a prisoner in custody of the marshal, no attorney on his part being present, the court thought that the plaintiff's attorney had acted improperly, and relieved the prisoner. Parkinson v. Caines, 3 Term R. 616. But these rules, intended for the protection of defendants, are not to be converted by them into instruments of fraud: therefore, where it appeared that a warrant of attorney given by one in custody without an attorney on his part being present, was so given *purposely with a view to cheat the plaintiff*, the court refused to set it aside. Gilman v. Hill, Cowp. 141. Where the defendant is himself an attorney, the presence of another attorney on his part is not necessary. Walton v. Stanton, Barnes, 57. ‖Where defendant, on being arrested at suit of a third person, is taken to the house of a sheriff's officer, to whom he voluntarily offers to give a warrant of attorney, it is necessary for an attorney to be present on his part at the time of the execution. 2 Moo. 176. 8 Taunt. 235. See Tidd, 549. (9th edit.)‖

In *assumpsit* the defendant pleaded *non assumpsit infrà sex annos;* the plaintiff replied, and for want of the defendant's joining issue in due time, the plaintiff's attorney signed judgment, but afterwards consented to accept the joinder in issue; but upon motion to the court to compel him to accept it, it was opposed, because the plea was a hard plea, and the client had Salk. 86. pl. 2. (*a*) That the attorney's consent to stand to an arbitration will bind the client, *vide* Carth. 412.

Salk. 70. pl. 3. Skin. 679. 2 Salk. 787. 12 Mod. 129. Comb. 439. [See tit. *Arbitrament* (C).] notice of the advantage, and ordered the attorney to insist upon it. The court said, that since it was a hard plea, they would not have compelled him if he had not consented to wave the advantage; but now they would hold him to his consent; and for the client, he was bound by the consent of his attorney (*a*), and they could take no notice of him.

‖And it has been held, that the party is bound by a reference agreed to by his attorney, though he had expressly desired him not to refer. Filmer v. Delbar, 3 Taunt. 486. 1 Chitt. R. 193. note (*a*). And an enlargement of the time for making the award by consent of the attorney will bind the client. Rex v. Hill, 7 Price, 644.‖ [Payment of a debt to the attorney, is payment to the party; but payment to an agent employed by the plaintiff's attorney, merely to sue the defendant, is not so. Yates v. Freckleton, Dougl. 623. But if an agent in town take money out of court, which the defendant has irregularly paid in under a judge's order, that shall bind the plaintiff, and be a waver of the irregularity. Griffiths v. Williams, 1 Term R. 710.]

8 Co. 58. Cro. Jac. 211. Jenk. 283. In debt the plaintiff by attorney cannot enter a *retraxit*, because that is a perpetual bar, and in nature of a release.

In trespass in C. B. there was a verdict for the plaintiff, and his attorney entered a *remittit damna* as to part, and judgment for the rest; and it was held, that the attorney, by his being constituted attorney, may remit damages, and that a *remittitur* need not be by the plaintiff *in propria persona*, as a *retraxit* must. Salk. 89. pl. 9. Lamb and Williams. Ld. Raym. 589. Coux v. Lowther.

Jenk. 52. Where two brought a writ of error, and If a client desires his attorney to put in a plea, which the attorney knows to be false, in such case he may plead *quod non fuit veracitèr informatus*, and thereby he discharges his duty.

the attorney for one of the parties assigned errors, to which the defendant took issue, and the other would plead in abatement. *Vide* 6 Mod. 40. 2 Stra. 783. Barnard. K. B. 4. Fitzgib. 1. and tit. *Error*.

Vincent v. Groome, 1 Chitt. 182.; but see Merrington v. A'Beckett, 2 Barn. & C. 81. ‖And an attorney has been held liable to pay the costs of sham pleas, though instructed by his client so to plead.

Johnson, v. Alston, 1 Camp. 176. An attorney retained to defend an action, is not bound in following the instructions of his client, to do what is meant merely for delay.‖

Earl of Yarmouth v. Russel, 2 Ld. Raym. 1142. [A *remittit damna* may be entered by attorney.

2 Inst. 378. Gilb. Exec. 92. ‖But it does not extend to The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution.]

a *sci. fa.* against the bail, or to revive the judgment, this being a new action and a different record. Cro. Eliz. 177. 2 Ld. Raym. 1048. 1252.‖

(E) Of the Determination of his Power; and herein of dismissing or changing him.

Vide Fareal. 50. 12 Mod. 440. ‖(*b*) Kaye v. De Mattos, 2 Black. R. 1223. Macpherson v. Ro- BY an order of the courts it is provided, that no person without rule of court, order of the judge or secondary, and notice to the adverse party or his attorney, shall change or shift his attorney (*b*); or if done by such order as aforesaid, the attorney newly coming in is to take notice, at his peril, of the rules in the cause, whereof the former attorney was liable to take notice, and

and shall also pay such first attorney, upon demand, all such fees as the secondary shall tax to be due to him. rison, Dougl. 217.] ‖Ginders v. Moore,

1 Barn. & C. 654.‖ Walmesley v. Booth, 2 Atk. 27. Ld. *Hardwicke* said, that he did not know that a sixty clerk could not be changed merely at the pleasure of the party. Taylor v. Lewis, 2 Ves. 112. Payment to the plaintiff's late attorney, changed without leave of the court, is good. Powell v. Little, 1 Black. R. 8.]

‖As a *sci. fa.* is a new action, it may be sued out by a new attorney, without an order of court, and without notice to the opposite party. 1 Salk. 89. 2 Salk. 605. 2 Ld. Raym. 1252. S. C.

So a writ of error may be brought by a new attorney. Bachelor v. Ellis, 7 Term R. 337.

And in the Common Pleas, even a writ of execution may be sued out by a different attorney, without an order of court. Tipping v. Johnson, 2 Bos. & Pull. 357.

Where the attorney is changed pending the suit on obtaining the proper order, a new warrant is unnecessary. 1 Taunt. 45.

Notice of justifying bail (*a*) or a plea put in (*b*) by a new attorney, without any order for changing the attorney is irregular, and the plaintiff is not bound to accept such notice or plea. (*a*) 2 Black R. 1325. Dougl. 217. 6 Taunt. 532. 2 Marsh. 257. 7 Taunt. 48. (*b*) 6 East, 549.; *sed vide* 13 Ves. 161. 195.

But the sheriff or his bail may put in and justify bail above by their own attorney. 7 Taunt. 48. 2 Marsh. 365. 1 Chitt. R. 81. 2 Barn. & A. 604. 1 Chitt. R. 329.

And where the defendant is a prisoner, notice of justification may be given by a new attorney, without an order for changing the attorney. 1 Chitt. R. 291.; and see 2 New R. 509.

And a party called upon to shew cause may oppose the rule in person, after an order has been obtained for changing the attorney, although a copy of it has not been served on the opposite party.‖ 4 Taunt. 669.

That where the attorney for the plaintiff or defendant dies pending the suit, and the party whose attorney is dead, will not retain another attorney to manage his cause, the attorney against him may proceed, and is not bound to hinder his client's cause. *Vide* Jenk. 179. Style's Prac. Reg. 137. 141. ‖But where a new attorney is appointed notice thereof must be given to the opposite party before he can proceed in the cause. Ryland v. Noakes, 1 Taunt. 342.‖

If *A.* gives a warrant of attorney to one to confess judgment in debt to *B.* by *non sum informatus* at eight in the morning, and at ten the same day *A.* dies before the judgment is signed by the secondary, yet the judgment is regular. Raym. 18. Andrews v. Showell.

A warrant of attorney to confess a judgment is not revocable (*c*), and the court will give leave to enter up the judgment though the party does revoke it, but it is determinable by the party's death; but if the party dies in the vacation, the attorney may enter up the judgment that vacation, as of the precedent term; and it is a judgment at the common law, as of the precedent term (*d*), though it be not so upon the statute of *frauds* in respect of purchasers, but from the signing; also the attorney must bring in [(*c*) Where the plaintiff after judgment received the money, and gave a warrant to an attorney to acknowledge satisfaction, and after-

wards, and before satisfaction acknowledged, revoked his warrant, the court would not suffer any proceeding upon the judgment without their leave. Manser v. Shelley, Raym. 69.] Salk. 87. pl. 6. Vide Raym. 69. Latch 8. Far. 2. 93. 2 Ld. Raym. 766. 849, 850. 2 Stra. 718. 882. 1081. Andr. 54. 309. Barnard, K. B. 357, 358. 404. Cas. temp. Hardw. 158. Barnes, 270. [(*d*) A judgment entered up by an attorney, on a warrant of attorney given to him after the death of his testator, as of a term when his testator was alive, will be set aside. Gainsborough v. Follyard, Stra. 1121. If it be made appear to the court that the party is dead at the time of moving to enter up judgment, they will not allow it to be done. 2 Stra. 1081. But this relation does not operate in adversary suits. Sibbet v. Russel, Ca. temp. Hardw. 183.] ‖See Tidd's Prac. 551. (9th edit.)‖

in the roll before the essoin of the subsequent term, otherwise the court will not admit it to be filed.

(F) Of his Fees and Disbursements, and the Remedy for the Recovery of them.

Vide Cro. Car. 159. and title *Maintenance.* (*a*) If an attorney alleges a special promise to pay, the statute cannot be pleaded. Salk. 86. pl. 1. Comb. 126. All. 4. So, if there be three counts in the declaration; the first for work done in prosecuting,

BY the 3 Jac. 1. cap. 7. it is enacted, "that no attorney, "solicitor, or servant to any, shall be allowed from his client "or master, of or for any fee given to any serjeant or counsellor "at law; or of or for any sum or sums of money given for copies, "to any clerk or clerks (*a*), or officers in any court or courts of "record at *Westminster* (*b*), unless he have a ticket subscribed "with the hand and name of the same serjeant or counsellor, "clerk or clerks, or officers aforesaid, testifying how much he "hath received for his fee, or given or paid for copies, and at "what time, and how often; and that all attorneys and solicitors "shall (*c*) give a true bill unto their masters or clients, or their "assigns, of all other charges concerning the suits which they "have for them, subscribed with their own hand and name, "before such time as they or any of them shall charge their "clients with any the same fee or charges."

&c. 2d. Upon an executory consideration to prosecute and defend suits, and alleging a performance. 5d. Upon a general *insimul computassent*. Carth. 57. Show. 48. S. C. 2 Barnard. K. B. 164. (*b*) Therefore does not extend to matters transacted in, or where part of the business was done in an inferior court, and part in *Westminster*. Carth. 147. (*c*) *Vide* Raym. 245. and 3 Keb. 118. 514. Where this clause of the statute was pleaded, and held a good plea. But where the executor of an attorney sued for fees, the court held that it was not necessary to have the bill signed. Comb. 348. Rep. and Cas. of Pract. C. P. 58. [But, on the defendant's undertaking to pay, the court will, in the case of an executor, refer it to be taxed. Imp. K. B. 482. Weston v. Pool, 2 Stra. 1056.] ‖Penson v. Johnson, 4 Taunt. 724.;‖ [though the practice seems to have been different formerly. Andr. 276. Wellis v. Nicholson, Barnes, 119. Lee v. Knight, *Ibid.* 122. Chapple v. Chapman.] This act may be given in evidence upon *non assumpsit* pleaded to an action brought for fees. Show. R. 338. 12 Vin. Abr. 76. pl. 71.

Salk. 89. pl. 1.

See note (*c*), *suprà*.

The executor of an attorney brought an action for fees and law business done by his testator; defendant moved to refer the plaintiff's demand to the master, but denied, because all the business was done in another court; otherwise, had the business been done in this court, or partly in this; and besides, the plaintiff was an executor.

2 G. 2. c. 23. § 23. (*d*) This act does not extend to any

By the 2 G. 2. c. 23. § (*d*) 23. made perpetual by 30 G. 2. c. 19. § 75. it is enacted, "that no attorney of the Courts of "King's Bench, Common Pleas, or Exchequer, *&c.* solicitor "in Chancery, *&c.* shall commence or maintain any action or "suit

" suit for the recovery of any fees, charges, or disbursements at " law or in equity, until the expiration of one month or more (*e*) " after such attorney or solicitor respectively shall have delivered " unto the party or parties to be charged therewith (*g*), or left " for him, her, or them, at his, her, or their dwelling-house (*h*), " or last place of abode, a bill of such fees, charges, and dis- " bursements, written in a common legible hand, and in the " *English* tongue, (except law terms and names of writs) and in " words at length, (except times and (*i*) sums) which bill shall " be subscribed with the proper hand of such attorney or soli- " citor respectively (*k*), and upon application of the party or " parties chargeable by such bill, or of any other person in that " behalf authorised, unto the lord high chancellor, or the " master of the rolls, or unto any of the courts, or unto a judge " or baron of any of the said courts respectively, in which the " business contained in such bill, or the greatest part thereof in " account or value, shall have been transacted; and upon the " submission of the said party or parties (*l*), or such other " person authorised as aforesaid to pay the whole sum, that " upon taxation of the said bill shall appear to be due to the " said attorney or solicitor respectively, it shall and may be " lawful for the said lord high chancellor, the said master of " the rolls, or for any of the courts, or for any judge or baron " of any of the said courts respectively, and they are hereby " required to refer the said bill, and the said attorney or soli- " citor's demand thereupon, (although no action or suit shall " then be depending in such court touching the same (*m*),) to be " taxed and settled by the proper officer of such court, without " any money being brought into the said court for that pur- " pose (*n*); and if the said attorney or solicitor, or the party or " parties chargeable by such bill respectively, having due " notice, shall refuse or neglect to attend such taxation, the " said officer may proceed to tax the said bill *ex parte*, (pend- " ing which reference and taxation no action shall be com- " menced or prosecuted touching the said demand); and upon " the taxation and settlement of such bill and demand, the said " party or parties shall forthwith pay to the said attorney or " solicitor respectively, or to any person by him authorized to " receive the same, that shall be present at the said taxation, or " otherwise unto such other person or persons, or in such " manner as the respective court aforesaid shall direct, the " whole sum that shall be found to be or remain due thereon; " which payment shall be a full discharge of the said bill and " demand; and in default thereof, the said party or parties " shall be liable to an attachment or process of contempt (*o*), or " to such other proceedings at the election of the said attorney " or solicitor, as such party or parties was or were before liable " unto: and if upon the said taxation and settlement it shall be " found that such attorney or solicitor shall happen to have " been overpaid, then in such case the said attorney or solicitor " respectively shall forthwith refund and pay unto the party or " parties

bill of fees and disbursements due from one attorney and solicitor to another. Stat. 12 G. 2. c. 13. § 6.; ‖and see Nelson v. Garforth, 1 Esp. N. P. C. 221., and Bridges v. Francis, Peake's N. P. C. 1.‖ [But under the general jurisdiction of the courts an agent's bill may be referred to be taxed; and it hath accordingly been done, the employer bringing into court the sum remaining due on the amount of the plaintiff's claim, the sum that should be deducted, if any, to be afterwards repaid. *Ex parte* Bearcroft, E. 7 G. 3. Dougl. 200. Dixon v. Plant, M. 19 G. 3. *Ibid.*] ‖But see Wildbore v. Bryan, 8 Price, 677., where an application by the client to the Court of Exchequer for referring the agent's bill for taxation was refused.‖

[(*e*) If action be brought before the expiration of a month after the delivery of the bill, it is a

ground of non-suit; but not of motion to stay proceedings. Harper v. Leech. Barnes, 125. But in order to enable an attorney to *set off* his bill, it is not necessary that he should deliver it a month before; he must not indeed produce it at the trial by surprise. Murphy v. Cunningham, Exchequer,

" parties entitled thereunto, or to any person by him, her, or " them authorized to receive the same, if present at the settling " thereof, or otherwise unto such other person or persons, or in " such manner as the respective court aforesaid shall direct, all " such money as the said officer shall certify to have been so " over-paid; and in default thereof, the said attorney or so- " licitor respectively shall in like manner be liable to an attach- " ment or process of contempt, or to such other proceedings at " the election of the said party or parties, as he would have been " subject unto if this act had not been made: and the said re- " spective courts are hereby authorized to award the costs of " such taxations to be paid by the parties, according to the event " of the taxation of the bill, (that is to say) if the bill taxed be " less by a sixth part than the bill delivered (*p*), then the attorney " or solicitor is to pay the costs of the taxation; but if it shall " not be less, the court in their discretion shall charge the attor- " ney or client, in regard to the reasonableness or unreason- " ableness of such bills."

1793.; but if he deliver it time enough for the plaintiff to have it taxed before the trial, that is sufficient. Martin v. Winder, E. 23 G. 3. Dougl. 199.] ‖The case of Murphy v. Cunningham is reported in 1 Anstr. 198.; and it is there left doubtful whether the court considered delivery a month before necessary. In that case, however, no bill had been delivered at all, which brought it within the case of Martin v. Winder.‖ [The object of the legislature in making this requisition was, that the client may have due time to examine the charges, and take advice upon them if necessary; and therefore the attorney must not only deliver the bill, but *leave* it with the client; if he take it back again, the statute is not complied with. Brooks v. Mason, 1 H. Black. R. 290. 1 Stra. 633. It seemeth to have been formerly a common practice with attorneys to deliver in their bills at any time pending the suit. Barnard. K. B. 316. But the client having this time given him to examine the bill, and a summary way of trying the reasonableness of the items by reference to the master, shall not be allowed if he put the attorney to his action to discuss the items at the trial; for if the business were really done, the delay of the defendant for more than a month in objecting to the *quantum*, is an admission that he thinks *that* reasonable. Dougl. 198, 199. Williams v. Frith, Harper v. Till.] ‖Anderson v. May, 2 Bos. & Pull. 237.‖ [But a bill may be taxed after action brought, and at any time before verdict or judgment, if the money be not paid. Shaw v. Pickering, *B. R.* M. 30 G. 3. Dougl. 198. notes.] ‖The term month here means a lunar month. Hurd v. Leach, 5 Esp. N. P. C. 165. (*g*) The attorney having been changed in the progress of a cause a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney, which delivery was accordingly made to the second attorney; and this was held a sufficient delivery to " the party to be charged therewith," to enable the first attorney to bring his action against the client for the amount of such bill. Vincent v. Playmaker, 12 East R. 372. And where several are jointly liable the delivery of a copy of a bill to one of them from whom the attorney received his instructions, is sufficient. Finchett v. How, 2 Camp. 277.; and see Oxenham v. Lemon, 2 Dow. & R. 461. (*h*) Leaving it at the counting-house is not a good delivery. Hill v. Humphreys, 2 Bos. & Pull. 345. A mistake in the date of items which does not mislead does not vitiate the delivery of the bill a month before action brought. Williams v. Barber, 4 Taunt. 806. An attorney will not be allowed on taxation of costs to vary from the bill thus delivered, so as to increase the charge on any item; and it will be considered strong presumptive evidence against any additional items. Loveridge v. Botham, 1 Bos. & Pull. 49. A copy of the bill delivered is good evidence. Anderson v. May, 2 Bos. & Pull. 237.‖ [(*i*) By 12 G. 2. c. 13. § 5. the bill may be written with such abbreviations as are commonly used in the English language]; ‖and see Reynolds v. Caswell, 4 Taunt. 193.‖ [(*k*) Taxation cannot regularly be applied for before bill delivered. Cowper v. Milburn, Barnes, 126.; but the delivery of the bill may be compelled. Imp. K. B. 479. (*l*) Where a person who has obtained an order of taxation dies, his representative shall not revive it, but on an undertaking to pay. 2 Atk. 114. (*m*) Heretofore, it seemeth, that no rule could properly be made for taxation, unless there was an action pending upon the bill. Springate v. Springate, Salk. 332.] ‖The want of a proper signature will not entitle the defendant, who has been arrested by an attorney for fees, to be discharged out of custody, on entering

entering a common appearance, this omission being a matter of defence on the trial. Tomlinson v. Clark, 4 Moore, 4.‖ [(*n*) The year before this statute passed, Lord Chancellor *King* declared, that *he* first introduced the practice of bringing in the money into the courts of law when he was Lord Chief Justice C. P.; and that the same rule was afterwards adopted by the Court of K. B.; for the party being stopped from suing at law, he thought it reasonable that the attorney should have security for his money; but his lordship refused to do it in Chancery. Mos. 68. p. 40. And this was thought, saith Lord *Hardwicke*, a great hardship on clients at the time of making the act, because an attorney might make a very unreasonable bill, and put a burden on his client to raise it: the act, therefore, varied the rule both of courts of common law and equity; so that the client submitting to pay what should become due, the bill should be taxed, and that without bringing the money into court. 2 Ves. 451. In general, accounts cannot be taken on taxation of a bill, much less can the client after taxation allege an antecedent demand, and desire to have that deducted; this would be to open a judgment (for this is a judgment of the court upon the client's own submission to pay what may be due), and would make these things so uncertain that there would be no end of them. *Ibid.* (*o*) In equity, after taxation, the solicitor may take out an attachment for the bill without first of all taking out a *subpœna*. But he must previously leave a copy of the order of taxation, and the master's report of the sum at which the bill is taxed, at the client's house. 2 Atk. 114. Barnard. Ch. 266. (*p*) But the executor of an attorney pays no costs, although above a sixth part be taken off. Weston v. Pool, 2 Stra. 1056. Where an attorney accepted a less sum than he demanded in discharge of his bill, and the bill was afterwards taxed, and a sixth part of the sum originally demanded taken off, the court considered the sum accepted in full of his bill as his demand; and, therefore, that he was not absolutely liable to pay the costs of taxation. Ecollier v. Dutour, Barnes, 128.]

‖The provisions of this statute have been construed favourably for the client.

Thus a charge in an attorney's bill for a *dedimus potestatem*, has been held a sufficient item to enable the court to refer the whole bill for taxation, although the other charges were entirely for conveyancing. So also a charge for attending at a lock-up house and obtaining the defendant's release, and filling up a bailbond, renders the bill taxable. (*a*) But a charge for preparing an affidavit of the petitioning creditor's debt and bond for obtaining a commission of bankrupt, was held not a taxable item. (*b*)

Ex parte Prickett, 1 New R. 266. So a charge for preparing a warrant of attorney renders the bill liable to be taxed. Sandon v. Bourn, 4 Camp. 68. Weld v. Crawford, 2 Stark. 538., and Wilson v. Gutteridge, 3 Barn. & C. 157.; *sed vide* 3 Barn. & A. 488. See also the judgment of Lord *Eldon* C. J. in Hill v. Humphreys, 2 Bos. & Pull. 343. In this last case a bill had been delivered, though not in conformity with the directions of the statute. But where no bill had been delivered at all, Lord *Kenyon* allowed evidence to be given of business done as conveyancer, though the plaintiff was precluded from recovering on the other items of his bill. Miller v. Towers, Peake N. P. C. 102. And the same doctrine was laid down in Mowbray, Gent. one, &c. v. Fleming, 11 East, 285., where, under like circumstances, the plaintiff was permitted to recover for such items as were not taxable, although a bill of particulars had been delivered under a judge's order, containing other items which were taxable. (*a*) Fearne v. Wilson, 6 Barn. & C. 86. (*b*) Burton v. Chatterton, 3 Barn. & A. 486.; and see 5 Barn. & A. 898.

So where the whole is for business done at the quarter sessions, the bill may be referred to the master for taxation.

Ex parte Williams, 4 Term R. 494.; and see Dougl. 197.

And an attorney was not permitted to recover for business done at the quarter sessions, where the bill, though properly delivered was not signed as required by the statute.

Clarke v. Donovan, 5 Term R. 394.

An attorney of the superior courts cannot maintain an action for business done in the Court of Insolvent Debtors without first delivering his will as directed by the statute.

Smith v. Wattleworth, 4 Barn. & C. 364.

And even fees charged by an attorney as steward of a court leet have been considered taxable.

Luxmore v. Lethbridge, 5 Barn. & A. 898. See also 3 Price, 280., and 2 Taunt. 331.

Money

Crowder and others v. Shee, 1 Camp. 437.

Money paid by an attorney for costs which his client is adjudged to pay, is a disbursement within the statute, and cannot be separated from other items in the bill.

But where the attorney, at his client's request, having put in bail paid the debt and costs, it was held, that he might recover for this disbursement without delivery of a bill according to the statute; no charge having been made for his own labour. Prothero v. Thomas, 6 Taunt. 196. 1 Marsh, 539.

Hillier v. James, Barnes, 41. Williams v. Odell, 4 Price, 279. Burton v. Chatterton, 3 Barn. & A. 486.

But where the charges are for business done entirely out of any court, the courts at *Westminster* will not interfere; as where the bill is solely for conveyancing, or for business done in parliament (*a*), or for business preliminary to the suing out a commission of bankruptcy.

(*a*) See 3 Ves. & Bea. 21. For establishing a taxation of costs on private bills in the House of Lords, it is enacted by 7 & 8 G. 4. c. 64. § 1 & 2., that on application made to the Clerk of Parliament as to the costs and expenses of such bills, he shall direct the same to be taxed by such persons as he shall appoint; and in actions against persons liable to pay, the speaker's certificate shall have the effect of a warrant to confess judgment. And there is a similar provision for taxing costs on private bills in the House of Commons by 6 G. 4. c. 123. § 1. & 2.

By the stat. 6 G. 4. c. 16. § 14. (the Bankrupt Act) "the "petitioning creditor or creditors shall, at his or their own "cost, sue forth and prosecute the commission, until the choice "of assignees; and the commissioners shall, at the meeting "for such choice, ascertain such costs, and by writing under "their hands direct the assignees, (who are thereby thereto "required,) to reimburse such petitioning creditor or creditors "such costs, out of the first money that shall be got under "the commission; and all bills of fees or disbursements of "any solicitor or attorney employed under any commission, "for business done after the choice of assignees, shall be settled "by the commissioners, except that so much of such bills "as contain any charge respecting any action at law or suit in "equity, shall be settled by the proper officer of the court in "which such business shall have been transacted, and the same, "so settled, shall be paid by the assignees to such solicitor or "attorney: provided, that any creditor who shall have proved to "the amount of twenty pounds or upwards, if he be dissatisfied "with such settlement by the commissioners, may have any such "costs and bills settled by a master in chancery, who shall receive "for such settlement, and the certificate thereof, twenty shillings "and no more." The former part of this clause appears to have been taken from the stat. 5 G. 2. c. 30. § 25. upon which it has been holden, that the petitioning creditor is liable to the solicitor for the expense of conducting the commission, up to the choice of assignees. (*b*) But, as between the solicitor and messenger, there is no implied contract on the part of the former, to pay him his expenses. (*c*) The solicitor is an agent merely, and is not to be regarded as a principal, as respects the messenger; and although he make himself responsible to the messenger, the petitioning creditor will not therefore be exonerated, without the express consent of the messenger to discharge him. (*d*) And the messenger under a commission of bankrupt,

(*b*) 1 Rose, 449.; and see Holt Ni. Pri. 245. 376. 5 Moore, 290. 2 Brod. & Bing. 457. S. C. 3 Barn. & C. 45. 4 Dow. & Ry. 621. S. C.

(*c*) Holt Ni. Pri. 247. *in notis*; and see 2 Maule & S. 2 Carr. & P. 124. 5 Barn. & C. 330. 8 Dow. & Ry. 52. S. C.

(*d*) Holt Ni.

bankrupt, may recover from the petitioning creditor, his fees for his services before the party be declared a bankrupt; although the party was duly declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignee out of the estate. (*e*) The latter part of the above clause of the stat. 6 G. 4. c. 16. § 14. appears to have been taken from the stat. 5 G. 2. c. 30. § 47. upon which it has been determined, that the bill of costs of a solicitor, under a commission of bankruptcy, is taxable, though approved by the commissioners, and stated and allowed in the accounts of the assignees. (*g*) And an attorney's bill for obtaining a bankrupt's certificate, must be signed and delivered a month before he can sue thereon. (*h*) But an action may be maintained by a solicitor against an assignee, for business done under a commission of bankrupt, one month after he has delivered a copy of his bill, although it has not been taxed by a master in chancery. (*i*)

Pri. 376.; and for the messenger's remedy against the assignees, see *ibid.* 247. *in notis.*
(*e*) 2 Carr. & P. 123.
(*g*) 3 Madd. R. 49.
(*h*) 2 Taunt. 321. 1 Rose, 119. S. C.
(*i*) 1 Stark. Ni. Pri. 278.; and see 2 Camp. 278. 2 Stark. Ni. Pri. 59. 3 Barn. & A. 486.

The statute of 2 G. 2. c. 23. § 23. does not, (*a*) extend to any bills of fees, *&c.* due from any attorney or solicitor to any other attorney or solicitor or clerk in court; but every such solicitor, attorney, or clerk in court, may use such remedies for the recovery of his fees, *&c.* against such other attorney or solicitor, as he might have done before the making of the said act. And there is a case in *Wilson's* reports (*b*), where a judge of the King's Bench having made an order to refer an agent's bill to be taxed, and the master not having obeyed it, the court was applied to, and held that the order was irregular, the master declaring he had never taxed a bill for agency. It is now the uniform practice, however, of all the courts (*c*) to refer an agent's bill to be taxed on the application of his employer, and upon his bringing into court the sum claimed by the plaintiff. But the bill of an agent to the attorney employed by the party, in respect of whose business the agency charges have been incurred, cannot be taxed on the application of the client. (*d*) It is not necessary that an agent's bill should be signed or delivered before the commencement of an action. (*e*) And where business has been done by an attorney, for a client who afterwards becomes himself an attorney, the former need not deliver a bill signed in order to recover his costs. (*g*)

(*a*) Dick. 112. 1 Cox, 49. in Chan.
(*b*) 1 Wils. 266.
(*c*) Dougl. 199, 200., and the cases there cited *in notis.* Groome v. Symonds, E. 55 G. 3. K. B.; and see Dick. 285. in Chan.
(*d*) 8 Price, 677.
(*e*) Dougl. 199. *in notis.* Peake's Cas. in Ni. Pri. (3d edit.) 1, 2.; and see the case of Jones, one, &c. v. Price, *Id.* 2. (*a*). 1 Esp. R. 221.
(*g*) 1 Esp. R. 420. 2 H. Black. 589. S. C.

It is not necessary for an executor or administrator of an attorney to deliver a bill of costs, for business done by his testator or intestate before the commencement of an action (*h*); the statute 2 G. 2. c. 23. § 23. being confined to actions brought by the attorney himself, and not extending to his personal representatives: but such a bill may be referred to be taxed, on the defendant's undertaking to pay what is due. (*i*) An attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was taken off: it was moved that the executrix might pay the costs; but the Court of King's Bench held that

(*h*) 1 Barnard. K. B. 453. Andr. 276. Cas. Pr. C. P. 58. 1 Carr. & P. 5.
(*i*) 1 Salk. 89. 2 Stra. 1056. Say. Costs, 324, 325. 4 Taunt. 724.; but see Cas. Pr. C. P. 58.

that she should not: for the words of the act 2 G. 2. c. 23. § 23. impose them upon the attorney or solicitor only, and the executrix is not to blame if she stand upon his bill or make out one from his books. (*k*)

Before an attorney's bill has been settled and paid, it may be taxed as a matter of course, at any distance of time (*a*); but after it has been settled and paid, and the payment has been long acquiesced under, the courts will not refer it to be taxed as a matter of course; nor, as it seems, unless a gross error or imposition be pointed out. (*b*) So, where a bond had been given for the debt five years before, and the vouchers had been delivered up, the Court of Common Pleas would not refer the bill to be taxed, saying, that an attorney at this rate could never be safe. (*c*) But though an attorney's bill has been settled and paid, yet the courts, under special circumstances, will refer it to be taxed; for the client may by affidavit shew that the business charged was never performed, or that the charges are fraudulent; and where that is the case, neither payment, nor a release, nor a judgment for the money due, will preclude the court from having the bill taxed. (*d*) But overcharges alone, without circumstances shewing fraud, do not seem to be sufficient. (*e*) An attorney's bill may also be taxed, though there was a special agreement between the attorney and his client that the former should be paid for his time at a certain rate by the day, besides his expenses (*g*); or though he has obtained a warrant of attorney from his client for confessing judgment for the money due upon his bill, and has entered up judgment thereupon. (*h*) But the plaintiff having paid to an attorney the amount of his bill, cannot, after a reduction of the bill by taxation, maintain an action for the difference. (*i*) And when a rule has been served for taxing an attorney's bill, the Court of King's Bench will not grant an attachment against the attorney for not paying the balance due to his client, until the costs have been taxed, though the balance is admitted, and it has been agreed to dispense with the taxation. (*k*)

Where an action is brought on an attorney's bill, the court will order it to be taxed at any time before trial, though after plea pleaded and issue joined. (*l*) But it is a general rule, that an attorney's bill cannot be taxed at the trial of an action brought upon it (*m*), nor after judgment by default, and a writ of enquiry executed (*n*): for if the business was really done, (which must be proved at the trial,) the delay of the defendant for more than a month in objecting to the quantum is an admission that he thinks it to be reasonable. In a modern case, however, an attorney's bill was referred to the master for taxation, after an action had been brought upon it, and a verdict recovered, on a suggestion that some of the items in the bill would not have been allowed by the master had it been originally referred to him for taxation; but upon the terms of the defendant paying the costs of the application, and of the taxation, with the costs of

Barnes, 119. 122. *contrà*. (*k*) 2 Stra. 1056. Say. Costs, 327.

(*a*) *Per cur.* T. 34 G. 3. K.B. (*b*) Say. Costs, 323. Dougl. 199.; and see 14 Ves. 262. 1 Ves. & Bea. 126. 3 Ves. & Bea. 174, 175. in Chan. 7 Moore, 496. 6 Dow. & Ry. 339. (*c*) Cas. Pr. C. P. 109. Pr. Reg. 37. S. C.; but see 1 Barnard. K. B. 144, 145. (*d*) Say. Costs, 325. Dougl. 199. S P.; and see 2 Atk. 295. Dick. 403. 14 Ves. 262, 263. Meriv. 285. Buck. 111. in Chan. 5 Price, 42. *in Scac.* (*e*) 14 Ves. 262. 3 Ves. & Bea. 174.; and see 1 Anstr. 186. (*g*) Say. Costs, 322.; and see 4 Bro. Ch. Cas. 350.; but see 2 Barnard. K. B. 164. *contrà*. (*h*) Say. Costs. 322. (*i*) 2 Stark. Ni. Pri. 85. (*k*) 2 Chitt. R. 66.

(*l*) *Per cur.* T. 21 G. 3. K.B. (*m*) Dougl. 199.; and see 2 Bos. & Pull. 237. 7 Price, 234. 2 Chitt. R. 65. 1 Car. & P. 627. (*n*) Barnes, 124.

of the cause as between attorney and client, the plaintiff being at liberty to take out the money forthwith, which had been paid into court. (*a*)

(*a*) 2 Chitt. R. 63.; and see 3 Dow. & Ry. 33.

The statute 2 G. 2. c. 23. § 23. only requires the delivery of a bill for the bringing of an action, and therefore though an attorney cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to set it off: but he must not produce it at the trial by surprise: it is sufficient, in such case, to deliver the bill time enough for the plaintiff to have it taxed before the trial. (*b*) The delivery of a former bill is conclusive evidence against an increase of charge in a subsequent bill, on any of the items contained in it, and strong presumptive evidence against any additional items; but if there were any real errors or omissions in the former bill, they may be rectified. (*c*) And a mistake in the date of items in an attorney's bill which does not mislead will not vitiate the delivery. (*d*) If a defendant be arrested by an attorney for fees, after a bill of costs has been delivered to him without being signed, he cannot be discharged out of custody on entering a common appearance in the Common Pleas, as the want of such signature will be a defence to the action, on producing the bill at the trial. (*e*)

(*b*) Dougl. 199. *in notis.* Martin and Wife, administratrix, v. Winder, one, &c. E. 23 G. 3. K. B. 1 Esp. R. 449. S. P.

(*c*) 1 Bos. & Pull. 49.

(*d*) 4 Taunt. 806.

(*e*) 4 Moore, 4.

The statute requires the bill to be delivered one month or more before the commencement of the action, which is construed to be a lunar month. (*g*) And where a bill of costs is delivered to the party, it must be left with him, and not taken back again. (*h*) When two persons are liable to an attorney for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill to one of them, from whom he received his instructions, and to whom the management of the business was left by the other (*i*); but it seems that the delivery of a copy of the bill in such case to the one who did not intermeddle would not be sufficient; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill. (*k*) And where a party in a cause having changed his attorney in the progress of it, a judge's order was afterward obtained by the second attorney for the delivery of a bill signed by the first, of his fees and disbursements, which delivery was accordingly made to the second attorney; this was holden by a majority of the judges of the King's Bench to be a sufficient delivery of the bill to the party to be charged therewith, within the words and meaning of the statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. (*l*) So the delivery of a bill to the attorney of the party, to be charged, is deemed sufficient if the party himself attend the taxation, or the bill be shewn to have come to his hands. (*m*) If the bill be not delivered to the party, it must be left for him at his dwelling-house or last place of abode; leaving it at the counting-house not not being deemed sufficient. (*n*)

(*g*) 5 Esp. R. 168.

(*h*) 1 H. Black. 290.

(*i*) 2 Camp. 277.; and see 1 Camp. 437. 2 Dow. & Ry. 461.

(*k*) 2 Camp. 277.

(*l*) 12 East, 372.

(*m*) 1 Gow, 71.

(*n*) 2 Bos. & Pull. 343.; but see 1 Stark. Ni. Pri. 324. 1 Gow, 73. n.

In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, the defendant's under-

taking to pay what shall appear to be due, and the master's *allocatur* thereupon (*a*); and the defendant will not be permitted to question the reasonableness of the items before a jury. (*b*) In such an action the *nisi prius* record is good *primâ facie* evidence, to shew that the action was not commenced till the expiration of a month after the delivery of the bill. (*c*) And where it is material for the defendant to shew that the action was commenced earlier than it appears to have been by the *nisi prius* record, the declaration delivered by the plaintiff is admissible evidence. (*d*) When an attorney has regularly delivered a bill signed, he may give a copy of it in evidence, without proof of notice to produce the original. (*e*) It may indeed be inferred from one case (*g*), that unless a duplicate of the bill be kept, the plaintiff cannot give parol evidence of its contents without a notice to produce it: but in a subsequent case it was decided, that a copy of an attorney's bill not signed by the attorney, the original of which, duly signed, has been delivered to the defendant, is admissible in evidence with proof of notice to produce the original. (*h*)

(*a*) 2 Camp. 496.
(*b*) Dougl. 199. Tidd, 333.
(*c*) 1 Bos. & Pull. 263.
(*d*) 2 Camp. 497. n.
(*e*) 2 Bos. & Pull. 237. 3 Esp. R. 167. S. C. Peake's Evid. (5th ed.) 104. 261. Tidd, 355.
(*g*) 2 Camp. 110.
(*h*) 6 Barn. & C. 394.; and see 7 Moore, 112. 5 Bro. & Bing. 288. S. C.

If an attorney refuse to deliver a signed bill to his client, the latter may compel him, by taking out a summons before a judge entitled in one of the causes in which he was concerned; and in the King's Bench, if the attorney on being served therewith do not attend, an order will be made for delivering it within a reasonable time. In the Common Pleas three summonses are necessary in case of nonattendance, before an order can be obtained. (*i*) And, in either court, if the attorney still neglect to deliver it, the order should be made a rule of court; and on personal service of the rule (*k*), and making affidavit thereof, the court on motion will grant an attachment. The bill being delivered, a judge's summons may be obtained for the attorney to shew cause why it should not be referred to the master in the King's Bench, or one of the prothonotaries in the Common Pleas, to be taxed; upon which, if the attorney attend, and the judge think it reasonable, he will make an order of course for taxing it, on an undertaking signed by the client or his attorney in the judge's books, to pay what shall appear to be due upon such taxation. (*l*) And in the King's Bench a peremptory order will be made in like manner upon the first summons, in case of nonattendance (*m*); but in the Common Pleas, if the attorney do not attend, there must be three summonses taken out, and an affidavit made of the service and attendance thereon before the judge will make an order *ex parte*. (*n*) But in neither court can the client have a summons for delivery of the bill and taxing it together. (*o*) In the Exchequer a rule for an attachment against an attorney for not delivering his bill of costs, is not absolute in the first instance, but only a rule *nisi* (*p*); and where it appeared on shewing cause that the bill had been delivered since the rule was served, and illness was assigned in the affidavit as the cause of not obeying the order, the rule was discharged without costs. (*q*)‖

(*i*) Imp. C. P. (7th edit.) 556.
(*k*) 2 Chitt. R. 66.
(*l*) For the form of an undertaking to pay an attorney's bill on taxation in the Exchequer, see Tidd, Append. ch. 14. § 53. (9th ed.)
(*m*) Imp. K. B. (10th edit.) 506.
(*n*) Imp. C. P. (7th edit.) 556, 557.
(*o*) Imp. K. B. (10th edit.) 506. Barnes, 126.
(*p*) 11 Price, 593.
(*q*) *Id. ibid.*

[A solicitor cannot bring a bill in equity for his bill: nor can he go there for an account after his bill has been taxed, upon the ground that the officer has not made proper allowances. Parry v. Owen, Ambl. 109. Osbaldiston v. Cross, Com. R. 611.

Where a client, unassisted by an attorney, has paid a law-bill, and accepted of a receipt for it, a court of equity has allowed him to open the whole account notwithstanding, and to take exceptions to any improper or extravagant charges. And where a client has given an attorney a bond or mortgage to secure the payment of what was charged to be due to him on account of a law-suit, the courts of equity have relieved the client, and ordered the bill to be taxed: and the ground on which this relief is given, is, the great power and influence which the attorney has over his client. *Per* Lord *Hardwicke.* Walmesley v. Booth, 2 Atk. 27. See too Sir William Sanderson v. Glass, 2 Atk. 296. ‖But a court of common law will not grant an application of this nature, see Piston v. Dunbar, 1 Anst. 186.‖ Proof v. Hines, Cas. temp. Talbot, 115. Newman v. Payne, 4 Bro. Ch. R. *acc.*

A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, and several extraordinary charges appearing in the bill, Lord *Hardwicke* referred it to be taxed, though it had been adjusted and allowed seventeen years before, and ordered the judgment and securities to be given up. Drapers' Company v. Davis, 2 Atk. 295. 4 Bro. Chan. R. S P.

An attorney cannot be compelled to deliver up any deeds, or writings belonging to his client, which may come into his hands in the course of the business in which he hath been engaged, until his bill, taxed by the proper officer, hath been paid. But whether he have such a lien upon deeds and writings the property of third persons, which he hath so become possessed of, is a matter of doubt. Comb. 43. 337. 4 Term R. 123. Mos. 319.

Where an attorney had been employed by one who afterwards became bankrupt, and the assignees petitioned to have the papers delivered up, and that the attorney might come in for his demands *pari passu* with the other creditors; the Lord Chancellor said, that the attorney had a lien upon the papers in the same manner against the assignees, as against the bankrupt; and though it doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law. But, he said, that papers received after the bankruptcy could not be retained. Park v. Carter, C. P. Trin. 1788. *Ex parte* Bush, Mich. 1734. 7 Vin. Abr. 74. 1 Co. Bankrupt Laws, 514.

An attorney hath, in consideration of his trouble, and the money he is in disburse for his client, a right to be paid out of the duty decreed, or money recovered by him. If such money come to the attorney's hands, he may retain to the amount of his bill. He may stop it *in transitu*, if he can lay hold of it. If he apply to the court, they will prevent it from being paid over till his demand is satisfied; and it seemeth, that a payment by a defendant after notice from an attorney not to pay it till his bill is discharged, would be a payment in his own wrong, and like paying a debt, which hath been assigned, after notice. He is entitled to be paid out of money levied by a sheriff upon an execution under a judgment recovered by his client; notwithstanding Dougl. 238. 5 Atk. 720. 1 H. Black. R. 122.

standing the sheriff may have had notice from the party against whom the execution issued, to retain the money, as the court would be moved to set aside the judgment for irregularity; and notwithstanding a docket may have been struck against the client becoming a bankrupt.

Owston v. O'Bryan, Barnes, 115. The assignees of a bankrupt cannot take out of court money paid in by a defendant in an action at the bankrupt's suit till they have paid his bill.

Barnsley v. Powell, Ambl. 182. *Ex parte* Price, 2 Ves. 407. It hath been determined in equity, that he hath a lien on a lunatic's estate for money expended by him in suits at law and in equity. But the reporter questions this doctrine. However, in a case in the following year, on a petition by a solicitor to be paid his bill of costs for taking out a commission of lunacy, out of the lunatic's estate, and not to be obliged to come under a commission of bankrupt which had issued against the person who took out the commission of lunacy, Lord *Hardwicke* said, that solicitors have this equity allowed them, to be entitled to a satisfaction out of the fund for their expenses, whether in the way of suit, or prosecution in lunacy, or bankruptcy.

3 Atk. 720. His lien upon a duty decreed his client gives him a preference to specialty creditors.

Sharston v. Hipsley, 4 Vin. Abr. 103. If employed in a suit by husband and wife for a term of years in right of the wife, and the husband die leaving no assets, equity will decree him satisfaction out of the profits of the term.

2 Ves. 25. The courts will not permit an attorney to be defeated of this remedy for his costs by collusion between his client and the defendant; as where a client, at whose suit a defendant was in custody for nonpayment of costs taxed for scandal and impertinence, executed a mere voluntary release to the defendant without the knowledge of the clerk in court, the Chancellor would not discharge the defendant till he had paid the clerk his fees.

Dougl. 238. 2 Ves. 25. This however is to be confined to cases of fraud and collusion; for if the client has fairly and honestly terminated the affair with his adversary, and the *whole* debt and costs have been paid, this equity cannot be set up against the defendant.

1 H. Black. R. 23. 2 Black. R. 827. The attorney's lien upon the costs is subject to the equitable claims of the parties in the cause.

4 Term R. 123. But where a party against whom a judgment hath been obtained applies to get rid of the judgment, the court will take care that the attorney's bill is satisfied.

As where *A.* recovered against *B.*, and *B.* recovered against *A.* and *C.*, and *B.* moved to set off the damages which he had recovered against those obtained by *A.*; the court insisted upon his undertaking to satisfy the bill of *A.*'s attorney in the first action, he having a lieu on the judgment for his costs.

Ambl. 102. If a solicitor recover an estate for his client in equity, and the client die, he loses his lien upon the estate in the hands of the heir at law; but if the suit be revived, the lien will revive too, *Per* Lord *Hardwicke.*]

(G) Of

(G) Of the Privileges which an Attorney has.

ATTORNEYS have privilege (*a*) not to be sued in any other courts except those in which they are sworn and admitted, because of the prejudice that may accrue to the business of those courts in which their attendance is required; neither are they to be held to special bail, because they are obliged to attend, and therefore are presumed to be always amenable; also as officers of the court they are entitled to the process of attachment, and may sue by attachment of privilege.

2 Leon. 256. *Vide* head of *Privilege*, and tit. *Abatement*.

(*a*) But this privilege an attorney shall not have at the king's suit. 2 Roll. Abr. 270. Bro. Supersedeas, 1. 9 H. 6. 44. [But actions *qui tam* are not considered as the king's suits. T. Raym. 275. 1 Black. R. 373. Cowp. 367.] Nor unless there be the same remedy in his own court; therefore shall not have it when money is attached in his hands by foreign attachment in the sheriff's court in *London*. Sand. 67. *Vide* Comb. 427. Nor in an action real against an attorney of the King's Bench. Sand. 67. Nor appeal against an attorney of the Common Pleas. Sand. 67. Nor when he sues, or is sued in *auter droit*, as executor or administrator. 12 Mod. 316. Ld. Raym. 533. Hob. 177. Salk. 2. pl. 4. Nor when one attorney sues another, if both of the same court. 2 Mod. 298. 2 Roll. Abr. 274. Barnes, 35.; [for if of different courts the plaintiff is entitled to his privilege. 2 Stra. 1141; 1 Black. R. 19.] Nor when he joins, or is joined in the same action with others. Vent. 298. Dyer, 277. Godb. 10. 2 Roll. Abr. 275.

Also if an attorney of any of the courts of *Westminster*-hall be chosen constable, he may have a writ of privilege for his discharge, for his attendance being necessary in those courts, it is apparent that he cannot execute any inferior office in person; and this privilege he shall have, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom in respect of their estates, or otherwise, for that no such custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them.

Cro. Car. 389. Noy, 112. March, 30. Vent. 16. 29. 2 Keb. 477. 508. Lev. 265. Raym. 179.

Vide tit. PRIVILEGE (B).

(H) Of Offences and Misbehaviour for which he is punishable; and herein of the Form of the Proceedings against him.

ATTORNEYS are officers of the court, and liable to be punished in a summary way, either by attachment, or having their names struck out of the roll of attorneys, for any ill practice attended with fraud and corruption, and committed against the obvious rules of justice and common honesty: but the court will not easily be prevailed on to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident, than design; or if the party injured has other remedy provided by act of parliament, or action at law. Freeman, 74. 4 Mod. 367. 2 Black. R. 991. 4 Burr. 2060. Pitt v. Yalden. ‖A special case was stated for the purpose of obtaining the opinion of the court, which set out a fictitious statement of previous proceedings at law. The court fined the attorney. 3 Barn. & C. 597. 5 Dow. & Ry. 389.‖ [An attorney, convicted of felony and punished for it, was struck off the roll as a person unfit for the profession, though no particular misconduct was imputed to him. *Ex parte* Brownsall, Cowp. 829.]

2 Hawk. P. C. 217, 218, 219. St. W. 1. 21. c. 29. 2 Atk. 173. Stile, 426. Cro. Car. 74. 6 Mod. 16. 187. 8 Mod. 109. 12 Mod. 251. 318. 440. 583. 657. 666.

38 E. 3. 8. b. Rastal, 93. [2 Stra. 1197. 1 Wils. 30. Oppenheim v. Harrison, 1 Burr. 20.]

But if an attorney take upon him to prosecute or defend a suit for another (*a*), without any manner of directions from him, the court will grant an attachment against him. [So if he put another attorney's name to process without his authority.]

(*a*) Also a person taking upon himself to prosecute or defend any action, who is no attorney, is liable to be punished in this manner, whether he had any directions or not. 2 Hawk. P. C. 217. In strictness, he is liable to be punished unless he record his authority or warrant of attorney in time. 2 Hawk. P. C. 217. See too 25 G. 3. c. 80. § 13., &c.

2 Hawk. P. C. 218. [R. v. Tew, Say. R. 50. (*b*) Where they are guilty of gross negligence, the courts will, upon motion, compel them to indemnify their clients from the consequences. Fawkes v. Pratt, 1 P. Wms. 593. But for a mere mistake, the clients will be left to their ordinary remedy. Barker v. Butler, 2 Black. R. 780.]

Attorneys are also punishable for base and unfair dealings towards their clients in the way of business (*b*), as for protracting suits by little shifts and devises, and putting the parties to unnecessary expenses in order to raise their bills; or demanding fees for business that never was done; or for refusing to deliver up to their clients writings with which they had been intrusted in the way of business (*c*), or money which had been recovered and received by them to their clients' use (*d*); and for other such like gross and palpable abuses.

(*c*) But the court will seldom grant an attachment for the detainer of such writings or money, without first making a rule on the attorney to deliver them to the party; also it will justify an attorney's detaining such writings or money for his security, till he be paid all his just fees; nor will it ever interpose in this manner, as to any writings or money received by an attorney on any other account, except only in his way of business as an attorney, but will leave the party to his ordinary remedy by action. Salk. 87. pl. 5. [But in the case of Strong v. How, though it appeared that the deeds did not come into the hands of the attorney in the way of his profession, yet the court ordered him to deliver them up, otherwise attachment. Stra. 621. 8 Mod. 339. S. C. And a like order was made in 3 Term R. 276., where they came into his possession as steward of a court and receiver of rents. Where an attorney accidentally lost a deed intrusted to his care, an attachment was granted, but ordered to lie in the office till further directions. The mode of proceeding in this case seems to be, for the plaintiff to file a bill in equity against the attorney for a discovery of the deed; the expense of doing so to be paid by the attorney. Court v. Gilbert, 2 Barnard. K. B. 263. Where an attorney delivered back to his client a deed which he had received from him, the court would not, upon the motion of a third person by whom the deed had been lent to the client, grant a rule against the attorney to deliver it up. Dottin's case, Stra. 547. Where it appears that a third person is interested in the deeds, the court will take a security from the person to whom they are delivered to produce them on demand for the inspection of such third person. Hughes v. Mayre, 5 Term R. 275. An attorney of one court practising in another court, thereby becomes amenable in this instance to the jurisdiction of such other court. 8 Mod. 340.] (*d*) Attorneys embezzling their clients' money excepted out of the insolvent debtors' act.

1 Chitt. R. 186. Tidd, Append. c. 3. § 19.

‖ Where an attorney is charged by affidavit with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the court on motion will order him to answer the matters of the affidavit; and in general, if he positively deny the malpractice imputed to him, they will dismiss the complaint: but otherwise they will grant an attachment.

(*e*) 6 Durnf. & East, 701.

And where an attorney, required to answer the matters of an affidavit, swore in his exculpation to an incredible story, the Court of King's Bench granted an attachment against him, though he positively denied the malpractices with which he was charged. (*e*) And where an attorney had behaved himself in such a manner as to afford reasonable ground for thinking he had misconducted himself in his professional character, although it turned out, upon investigation, that there was no sufficient ground

ground for imputing actual misconduct to him, the court would not give him his costs of the application (*g*); but the court will not call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence, but will leave the parties complaining to prosecute the same. (*h*) It has been doubted whether the affirmation of a Quaker is admissible, to call upon an attorney of this court to answer the matters of an affidavit (*i*): and the true distinction to be collected from all the cases upon the subject, seems to be this, that if the object of the suit or proceeding be to recover a debt, or give to a party any legal civil right, the affirmation of a Quaker is admissible; and actions on penal statutes are to be considered as actions for debts; but that where the object is not to give to the party any legal civil right, but to punish a person who has done something wrong, the affirmation of a Quaker is not admissible. (*k*)

(*g*) 3 Dow. & Ry. 226.

(*h*) 1 Bing. 102. 7 Moore, 424. S. C. 1 Bing. 142.

(*i*) 1 Dow. & Ry. 121.

(*k*) 1 Dow. & Ry. 124. *per Bayley* J.

When an attorney has been fraudulently admitted (*a*), or convicted, after admission, of felony (*b*), or other offence which renders him unfit to be continued an attorney (*c*), or has knowingly suffered his name to be made use of by an unqualified person (*d*), or acted as agent for such person (*d*), or has signed a fictitious name to a demurrer, as and for the signature of a barrister (*e*), or otherwise grossly misbehaved himself (*g*), the court will order him to be struck off the roll. If an attorney practise, after he has been convicted of forgery, perjury, subornation of perjury, or common barratry, he is liable to be transported. (*h*) And where an attorney had been struck off the roll of the Court of King's Bench, on the report of the master, for misconduct, the Court of Common Pleas, on motion, supported by an affidavit of the master's report, struck him off the roll of the latter court. (*i*) But in a subsequent case, the rule for striking of the roll was refused; the contents of the affidavits on which the Court of King's Bench acted not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanor. (*k*) And striking an attorney off the roll is not always understood to be a perpetual disability; for the court have in some instances permitted him to be restored, considering the punishment in the light of a suspension only. (*l*)‖

(*a*) 2 Black. R. 991, Tidd, 67.

(*b*) Cowp. 829.

(*c*) 6 East, 143. and see 1 Chitt. R. 557. *in notis.*

(*d*) Tidd, 73, 74.

(*e*) 4 Dow. & Ry. 738.

(*g*) Potter's case, H. 26 G. 3. K. B. Priddle's case, E. 27 G. 3. K. B.

(*h*) St. 12 G. 1. c. 29. § 4.

(*i*) 1 Brod. & Bing. 522. 4 Moore, 319. S. C.

(*k*) 3 Brod. & Bing. 257. 7 Moore, 64. S. C. Tidd, 67.

(*l*) 1 Black. R. 222. The like was done by the court in Trin. 37 G. 3. K. B.

Attorneys are punishable for disobeying the rules of court, of which they have notice, either expressly or impliedly; also for forging a writ, or any other matter of record, or but attempting to do it; or for taking out a *capias* which has no original to warrant it; or for receiving money of a client for suing out an original; and also for the fine due thereon to the king, where in truth no original was sued out, nor any fine paid to the king; or for endeavouring to impose upon the court; as by causing an action to be brought against one in it, by collusion, without any just ground, in order thereby to entitle the party to the privilege of the court, and afterwards, upon the examination of the matter in court, giving a false account of it; or for giving

Cro. Car. 74. Dyer, 241. pl. 50. 244. pl. 58. Fitz. Attachment, 3. 7. 16 E. 4. 5. Bro. Privilege, 43. Moor, 882. 2 Hawk. P. C. 145. c. 22. § 11. 1 Com. Dig. 475. 20 H. 6. 37. a. 2 Inst. 215. Lit. R. 46.

4 Inst. 101. Hetl. 29. [See too several

directions to a sheriff concerning what person he should return on a panel. (*a*)

other instances where attorneys are punishable. Stra. 420. 576. 899. 1024. C. T. H. 131. 257. Andr. 275. 2 Barnard. K. B. 219. Black. R. 2. The striking off the roll is not to be understood as a perpetual disability, but may be considered in the light of a suspension only, and the party may, if the court sees cause, be readmitted. Rex v. Greenwood, 1 Black. R. 222.] (*a*) An attorney ordered to pay costs (as well as his client) having joined in an affidavit, to support a frivolous complaint, and made resentful declarations, which shewed him to be personally active in it. 2 Burr. 654.

Evans v. P——, 2 Wils. 382. ‖See 3 Dow. & Ry. 602.‖

[If attorneys do any thing wrong *quâ* attorneys in inferior courts, the superior courts will punish them for it, for they cannot act in the former, unless they are admitted of the latter.]

AUDITA QUERELA.

‖*Vide* 2 Saund. R. 147. note (1).‖

AN *audita querela* is a writ to be delivered against an unjust judgment or execution, by setting them aside for some injustice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded it was the party's own fault, and therefore he shall not be relieved, that proceedings may not be endless.

(A) Who may be relieved by *Audita Querela*, and against whom.

(B) In what Cases an *Audita Querela* will lie.

(A) Who may be relieved by *Audita Querela*, and against whom.

2 Inst. 673. Dyer, 232. S.P. Moor, 75. S.P. adjudged. 10 Co. 43. S.P.

IF an infant acknowledges a recognizance, statute-merchant or staple, or recognizance in nature of a statute-staple, he cannot avoid this without an *audita querela* brought before his full age, because his nonage ought to be tried by inspection.

Noy, 16. Yelv. 88. Cro. Jac. 59. 2 Roll. Abr. 57. 2 Bulst. 320. *Vide* Reg. 149. F. N. B. 105. That an infant may bring an *audita querela* to avoid a statute for his nonage, although it be not certified or returned in any court. Ander. 228. And there said, that the common practice was so, else the conusor might be of age before the conusee would procure it to be certified. *Vide* 3 Bulst. 307. *Vide* title *Infant*.

Yelv. 155. Cro. Jac. 646.

If *A.* being within age becomes bail for *B.*, and after two *scire fa.* and *nihil* returned, judgment is given against *A.*, *&c.* he may have

have an *audita querela* and avoid the recognizance, and so the judgment thereupon of consequence shall be avoided. S. P. *Vide* Co. Ent. 87, 88. Where an infant was bail, and taken in execution, and he brought an *audita querela*, and moved to be inspected; the court, as a matter discretionary, refused to admit him to bail till he corroborated his allegation by the oaths of witnesses, and a copy of the register where he was born, was produced; but if he had brought his *audita querela* before he was taken in execution he must have had a *supersedeas* of course. Carth. 278, 279.

But if *A.* being within age enters into a bond to *B.*, who procures *C.*, without any warrant, to appear for *A.*, and confesses a judgment thereupon, yet *A.* shall not have an *audita querela*, but he must take his remedy by action of disceit against the attorney.(*a*) Cro. Jac. 694. *Vide infrà*, letter (B). (*a*) *Sed qu.* If the court would not, on motion, have set aside the judgment?

If tenant in tail acknowledges a statute, and dies, and the conusee sues execution against the heir, he may avoid it by assise, without being put to his *audita querela*. Roll. Abr. 305. Cro. Jac. 85. *Vide* Sid. 55. But the issue at his election may have an *audita querela* if he will. Roll. Abr. 305. Cro. Jac. 85. That this is only an equitable action, and may be brought by a reversioner, or him that has but *interesse termini*, or might have been by *cestui que use* before the statute. March, 71.

So if a disseisor acknowledges a statute, and the disseisee enters, the conusee extends the land, the disseisee is not put to his *audita querela* to avoid the extent, because there is not the appearance of justice in this extent, the conusor having only a tortious and unlawful seisin of the land, and consequently no power to charge it. Roll. Abr. 304. Cro. Jac. 424. 477.

But if *A.* be tenant for life, remainder to *B.* his son in tail, *A.* enters into a recognizance and dies, *C.* brings a *scire facias*, and *B.* is returned heir and terretenant, and warned, but makes default; he can have no *audita querela* to avoid this execution, because he had a day given him in court to set aside the recognizance, and it was his folly not to appear when warned. Raym. 19. Sid. 54. Keb. 112. 141. Lev. 41, 42. S. C. between Day and Guildford. [So in a *scire facias* on a judgment, if defendant has a release, but omits to plead it, he shall not have an *audita querela*. 1 Wils. 98.]

If a statute be acknowledged to two, of which one is an infant, and they make a defeasance, and after sue execution contrary to it, an *audita querela* shall be brought against both, for it does not appear within the deed that he is an infant; also the deed of an infant is only voidable, and peradventure he will affirm it. 48 E. 3. 12. b. Roll. Abr. 312.

If a statute be made to baron and feme, and they make a defeasance, and sue execution contrary to it, the *audita querela* shall be brought against both, although the defeasance be void as to the wife; for this action is in lieu of an answer of the execution, which is sued by both; and this is all one as if the baron alone had made the defeasance, which would have been a sufficient discharge. Roll. Abr. 312. [*Contrà*, 48 E. 3. 12. Bro. Brief, pl. 81. Audita Querela, pl. 11. Baron and Feme, pl. 24.]

If a statute be acknowledged to a feme sole and *J. S.*, and after the feme take husband, and *J. S.* release, and after execution be sued, the *audita querela* may be brought against the baron and feme and *J. S.* 11 E. 4. 8. b. Roll. Abr. 312.

If two executors sue execution for damages recovered by the testator, 21 E. 3. 13. b.

Co. Ent. 89. Roll. Abr. 312. That no *audita querela* lies against the king. Noy, 26. 2 Bulst. 325. Jenk. 129.

testator, where one hath released, an *audita querela* lies against both.

(B) In what Cases an *Audita Querela* will lie.

Cro. Eliz. 40. And. 135. Roll. Abr. 313. Co. Lit. 265. 291. 10 Co. 47.

IF a conusee of a statute releases to the terretenant all right, interest and demands, together with all suits and executions, and afterwards sues execution, the terretenant shall have an *audita querela* to set aside this execution.

But it may be demanded, how a statute, which has the force and solemnity of a judgment, can be avoided by an act of less notoriety than itself; as a release, which is an act *in pais*, must be confessed to be, which overthrows the established rule *unumquodque solvitur eo ligamine quo ligatur*. The answer to this is, that notwithstanding the release, &c. from the conusee, the statute still continues in force; but the law, with reason, construing all men's deeds most strongly against themselves, by this act precludes the conusee from execution; but this must be by bringing an *audita querela*; for without this, nothing appears to the court destructive of the statute: the words of the release must be comprehensive enough. *Vide* Cro. Eliz. 552. and the authorities *suprà*.*

* See farther, Com. Dig. 1 V. 485. &c. &c.

Roll. Abr. 307. Noy, 26. Cro. Jac. 646. Hob. 162. Yelv. 125. [Bro. Contin. p. 27. *Infrà*, tit. *Pleas and Pleadings* (P).

So in trespass or other action, if it be found for the plaintiff at *nisi prius*, and after, before the day in Bank, the plaintiff release to the defendant, and after judgment be given for the plaintiff, the defendant shall have an *audita querela* upon this matter, because he could not plead the release at the day in Bank.

See the case of Lovell v. Eastaff, 5 Term R. 554. where the bankruptcy of the plaintiff, between the trial and the day in bank, was pleaded as a plea *puis darrein continuance*.] But if it had been in the case of the king, the defendant at the day in bank might have pleaded it, because no *audita querela* lies against the king. Noy, 26. If there be judgment against the defendant for debt and damages, and before execution the money is paid to the plaintiff, who thereupon releases the defendant, and afterwards takes him in execution within the year, yet he shall not have an action for this vexation, but must bring an *audita querela*. 4 Mod. 14.†

† *Sed qu.* Would not a special action on the case lie?

Roll. Abr. 307. F. N. B. 105.

If a conusee of a statute gives a deed of defeasance to the conusor, and afterwards sues execution, contrary to the form of the defeasance, the conusor may have an *audita querela*, because the defeasance precludes the execution; if the terms or condition of it be performed by the conusor; and the conusor may have an *audita querela*, though the condition be not performed according to the defeasance, if execution was sued before the condition broken, because the conusee extended before his time; and therefore the execution, being unjustly sued, must consequently be an injury to the conusor.

Moor, pl. 1097.

In *audita querela* the case was this: the conusee gave a defeasance, that if he sued execution of the lands the conusor had in *Kent*, the statute should be void; the conusee, contrary to his defeasance, extended the land in that county; and it was adjudged this writ well lay to avoid the execution and vacate the statute; for the defeasance was no way repugnant to the statute because the conusee might still extend the lands of the conusor in any other county, and take his body and goods.

B. 104.

If *A.* enters into a statute to *B.*, and pays the money at the day

day assigned, upon which the statute is cancelled, and after *B.* forges a new statute in the name of *A.*, in this case *A.* may relieve himself by *audita querela*, for the forged statute having all the essentials of a true one, the court was obliged to look on it as such till the contrary appeared, which the conusor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee.

If the conusee of a statute, upon agreement with the conuzor, delivers up the statute in lieu of an acquittance, and after sues execution, and the conusor prays a re-extent, because that the land was extended too low, and has it granted him, he shall never avoid the extent by *audita querela*, because by his praying the re-extent, he admits the statute good and executory. Roll. Abr. 315.

If upon an *elegit* the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the sheriff returns, that he has delivered some of the lands in particular for the moiety, where it appears according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a disseisin by the entry, but only voidable by *audita querela*. Roll. Abr. 305. 12 Mod. 365.

If a man in execution upon a judgment for debt or damages, be delivered out of execution by the sheriff or gaoler, who hath him in execution, with the assent of him at whose suit he is in execution, and after, by colour of this judgment, he takes him again and puts him in prison, an *audita querela* lies upon this matter, and thereupon he shall be delivered. Roll. Abr. 307. So if the plaintiff consents that one defendant only shall be delivered out of execution, Price v. Goodrick, Stile, 387. So if one of the bail be delivered out of execution, he shall not take the other. 3 Leon. 260. Stile, 117. [It must be observed that the only point determined in the case of Price v. Goodrick was, that where the plaintiff consents to the discharge of one defendant in execution, the court will not relieve the other upon motion, but put him to his *audita querela*. Whether entitled to relief or not upon the *audita querela*, was left open by that case. So considered by the Court of Common Pleas, who acted accordingly in a like case of Williams v. Jaques and Griffin, Mich. 28 G. 3.]

But if *A.* be in execution at the suit of *B.*, and after *A.* escape with the consent of the sheriff, and after *A.* return to the prison, and the sheriff keep him in prison upon the said execution, *A.* shall not be discharged by *audita querela*, for *B.* has it still in his election to have him in execution at his suit, and shall not be compelled to take his remedy against the sheriff, who perhaps may be worth nothing, for this voluntary escape. *Vide* tit. *Execution*, and Roll. Abr. 307. Hob. 60. Cro. Eliz. 555. Moor, 57. 2 Leon. 118.

If the principal be taken in execution upon a judgment, and after a *scire facias* returned according to the course of the court, judgment be given against the bail, and thereupon he be taken in execution, and after the principal be delivered upon an *audita querela*, because the recoverer had acknowledged satisfaction, *&c.* in this case, though the recognizance was forfeited by the bail, by not bringing in the principal at the time appointed by law, yet in as much as the judgment and execution against the bail depends upon the judgment against the principal, and he was but a security *Vide* head of *Bail in Civil Cases*, and Roll. Abr. 308. (*a*) If the principal is taken in execution, the bail may plead it in discharge of themselves,

and if by accident they omit to plead

a security for the payment of the money, of which the recoveror is satisfied, the bail shall be discharged. (*a*)

it, and execution issues against them, I conceive, on motion, the court would set the execution aside, the plaintiff being satisfied by having the body of the principal in execution.

1 Bos. & Pull. 428.

‖It has been said by *Eyre* C. J. that the court will interpose in a summary way in all cases where the party would be entitled to relief on an *audita querela*; but the point must be clear, or they will not assist him.

Hewes v. Mott, 2 Marsh R. 37. The defendant being afterwards rendered in discharge of his bail, a motion was made to discharge him under the 49 G. 3. c. 121.; but the court

Thus where the plaintiffs had entered into a bail-bond for the defendant, and on the bond being forfeited had paid the money, and the defendant became bankrupt, and the plaintiffs sued him, and obtained judgment before he got his certificate, the bail for the defendant in that action applied to the court for an exoneretur, on the ground that the plaintiffs were sureties within the meaning of the 49 G. 3. c. 121. § 8. and might have proved under the commission against the defendant; but the court refused to decide the question on a summary application, and left them to an *audita querela*.‖

held that the plaintiffs being only sureties for his appearance, the case was not within the statute, 6 Taunt. 330. But bail are now expressly named in the clause as to sureties in the New Bankrupt Act, 6 G. 4. c. 16. § 52.

5 Co. 86. Bloomfield's case. Roll. Abr. 308. S. C. *Qu.* If there be a diversity where the plaintiff recovers against the sheriff in debt, and where in case.

If *A.* and *B.* are bound in an obligation jointly and severally, and judgment given against each on several actions brought, and both taken in execution, and after *A.* escapes, yet *B.* shall not be delivered upon an *audita querela*; for though the obligee may have an action against the sheriff for the escape, yet till he is actually satisfied the other shall not have an *audita querela*, for perhaps the sheriff is worth nothing.

Vide Mod. 170. 12 Mod. 105. 598. Danv. Abr. 635.*

* I should conceive there is not any diversity, but that plaintiff being *satisfied* by the sheriff (and not till then) the court would discharge *B.* out of custody, on motion.

Roll. Abr. 304. Cro. Jac. 424. 477. S. C. between Harrington and Garraway.

If *A.* leases *Black-acre* for years to *B.*, and then acknowledges a statute to *C.*, and afterwards another to *D.*, and then *C.* takes a lease of the reversion, and the rent from *A.*, by which he has suspended the execution of the statute during the term, and consequently laid the land open to the extent of *D.*, the second conusee, who sues execution; if therefore *C.* should extend the reversion and rent during his own lease, *B.* the lessee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, because *C.* hath suspended the execution of his statute, the first in date, by the acceptance of the lease from the conusor.

Cro. Eliz. 233. 319. 810. Leon. 229. Owen, 142. Dyer, 35. pl. 27.

If a statute is erroneously acknowledged, as before one that has no authority; or if a statute-merchant hath but one seal, an *audita querela* lies (*a*), and not a writ of error, for this is no record; but if a statute is well acknowledged, and the execution erroneous, a writ of error lies.

(*a*) That it lies where a man ought not to be charged, and yet without any default in himself hath no other way of avoiding it. Kelw. 25. That it must be founded upon a suggestion not contrary to, but admitting the verdict. Sav. 69, 70. Where a judgment in a copyhold court reversed upon petition to the lord, and the party restored to his damages by *audita querela*. Hob. 54. Where after judgment the trespass was discharged by an act of indemnity. 2 Mod. 37. Fitzgib.

37. Fitzgib. 88. 130. Raym. 89. Keb. 634. Where the party must bring a *scire facias*, and cannot be relieved by *audita querela*, *vide* title *Scire Facias*. And where a writ of error, *vide* title *Error*, and Carth. 282. 4 Mod. 314. Ld. Raym. 27. Salk. 262. pl. 3. And where the party may be relieved on motion. Salk. 93. pl. 4. [Where a *feme sole* married between interlocutory judgment and the final judgment, and after the final judgment, the husband and wife brought a *scire facias* thereupon for the defendant to shew cause *quare executionem non, &c.* the Court of Exchequer would not set aside the judgment upon motion, but put the defendant to his *audita querela*. Lord Sutherland & Ux. v. ——, Bunb. 282. So where a *feme* married after the interlocutory judgment, and before executing the writ of enquiry, the court refused to interpose upon motion, and left the defendant to his *audita querela*. Chubbs v. Billington, Bunb. 283. The court will not relieve upon motion if the law is doubtful, though the facts are admitted, but will oblige the party to resort to an *audita querela*. Lord Porchester v. Petrie, K.B. Tr. 23 G. 3. Williams v. Jaques and Griffin, C.P. M. 28 G. 3.] ‖Hewes v. Mott, 2 Marsh R. 37.‖

If a statute be delivered to *B.* to be kept in an indifferent hand, upon certain conditions between the conusor and conusee; if *B.*, before the conditions performed, deliver it to the conuzee, and he sue execution, the conusor at his election may either have an *audita querela* upon this matter, or a writ of *disceit* against *B.* (*a*) F. N. B. 104. Roll. Abr. 308. *Qu.* (*a*) Or perhaps a special action upon the case.

If the conusor is taken in execution upon a statute, and the conusee covenants to discharge him from the statute, the conusor shall not thereupon have an *audita querela*; but must take his remedy by action of covenant. Cro. Jac. 218. So upon a promise to discharge, &c. an action upon the case only lies. Bulstr. 152.

If a man makes a feoffment upon condition to re-infeoff him, and after the feoffee, to the intent to deceive him, falsely and by covin between him and *B.* acknowledges a recognizance to *B.*, and after re-infeoffs him, the feoffee may have an *audita querela* upon this matter; for this is grounded upon the matter of record, as well as upon the matter of *disceit*, which is matter *in pais*. Roll. Abr. 310.

If a man acknowledges a statute, which is usuriously entered into, and the conusee sues execution, the conusor shall have an *audita querela* upon this matter. Roll. Abr. 310. An *audita querela* lies upon a suggestion that a statute was made by *duress* of imprisonment. Roll. Abr. 310. Owen, 142. Vidian Ent. 107. So upon a suggestion that it is forged. F. N. B. 104.

If *A.* hath lands in several counties, and enters into a recognizance to *B.*, and after acknowledges a statute to *C.*, upon which *C.* extends the lands in one county, and after *B.* sues execution upon the recognizance, and hath the moiety of the same lands delivered to him, but sued no execution of the moiety of the lands in the other county; *A.* hath no reason to complain, because *B.* hath taken in execution only a moiety of his lands, but *C.* may have an *audita querela* against *B.*, because it is prejudicial to him. 2 Andr. 170. Yelv. 12. Noy, 47.

If the conusor infeoffs several men of several parts of the land, and after the conusee sues execution of the statute against one, he shall have an *audita querela* (*b*) upon this matter. 1 Roll. Abr. 311. (*b*) But whether thereupon the execution shall be avoided, or the party only have contribution, *vide* 5 Co. 14. b. 2 Inst. 396. Mo. 537. Dyer, 331. Bulstr. 15. 17. But now *vide* 16 & 17. Car. 2. c. 5. made perpetual by 22 & 23 Car. 2. c. 2. by which no extent upon any statute, judgment, or recognisance, shall be avoided or delayed, because part of the lands extendable are omitted, saving to the party, whose lands are extended, his remedy for contribution. But note; no statutes, unless conditioned

ditioned for payment of money only, nor extents, unless within twenty years after judgment, &c. had, are within this act.*

* Nor is extent or contribution given by the act, against any heir within age.

8 Co. 141. Dr. Drury's case; *vide* Mod. 111. 3 Keb. 291. Rob. Ent. 157. 12 Mod. 105. 240. Ld. Raym. 439. Vent. 34. Salk. 93. pl. 4. 264. pl. 6. 2 Stra. 1075. [After two *nihils* returned the court will relieve upon motion, but not after the *scire facias* hath been served. But they will not do so in the former case if the fact on which the motion is grounded be controverted. 2 Stra. 1198. Mitford v. Cordwell.]

If *A.* brings an *audita querela* against *B.* and declares, that whereas *B.* had recovered against *A.* 200*l.* debt, *&c.*, and thereupon the said *A.* was outlawed, and upon a *capias utlagatum* taken, and in execution at the suit of the said *B.*, and after from the said execution was delivered and suffered to go at large, *&c.*, and yet *B.* hath taken out execution upon the said judgment, and endeavours, *&c.*, the defendant may plead and shew, how that after the said enlargement, and before the purchase of the *audita querela*, the outlawry was set aside and made void, and so conclude *quod non habetur tale recordum.*

Cro. Jac. 337. Roll. Rep. 11. S.C. *quod vide.*

If *A.* hath judgment against *B.* for costs and damages, and releases to *B.* all executions, and after *B.* brings a writ of *error*, and thereupon the judgment is affirmed, and further costs given for the delay of execution, and *A.* takes *B.* in execution for the whole, upon an *audita querela*, *B.* shall be discharged *quoad* the damages and first costs, but not *quoad* the second costs.

2 Sand. 148. Turner and Davis. Mod. 62. 2 Keb. 668. Lutw. 543. For this *vide* Brownl. 29. 91. Yelv. 125. Noy, 15. Stile, 417. Dyer, 203. Cro. Jac. 394. 6 Mod. 92. Fitzgib. 202. 257, 258. 10 Mod. 21, 22. 389. Comyns, 150. pl. 102. 2 Will. R. 576. pl. 186. 3 Will. R. 88, 89.; and *vide* tit. *Executors and Administrators*, and 17 Car. 2. c. 8. revived and made perpetual by 1 Jac. 2. c. 17. § 5. whereby the administrator *de bonis non* is enabled to take out execution upon a judgment obtained by the executor or former administrator; and note this *audita querela* was brought only against the first administrator, and does not discharge the judgment, but the execution at his suit only. *Vide* Co. Ent. 91. a. An executor *durante minori ætate* obtains judgment, and the infant comes of age, &c. Qu. If an *audita querela* lies? *Vide* 3 Leon. 278. Godb. 104.

If *A.*, as administrator, recovers damages in trover against *B.*, and after his administration is repealed and granted to another, upon a surmise that *A.* intends and endeavours to sue execution, *B.* may have an *audita querela*; for by the repeal of the administration, the power of *A.* is absolutely determined.

Lord Porchester v. Petrie, 2 Saund. 148. b. where the proceedings are fully stated.

‖In 23 G. 3. Lord *Porchester* brought an *audita querela* against *Petrie*, setting forth the declaration in an action by *Petrie* against Lord *Porchester*, for penalties under the bribery act, 2 G. 2. c. 24. § 8., at the *Cricklade* election, and averring that the cause was tried on 28 *July*, 1781, and a verdict found for *Petrie* for 2000*l.*, and judgment signed in *Michaelmas* term following; the *audita querela* then alleged that Lord *Porchester*, after the commission of his own offence, and within twelve months after the election, had discovered to one *Richards* an offence of bribery committed by one *Hinton*, and then set forth the proceedings in a suit by *Richards* against *Hinton* for penalties, the verdict for *Richards*, and judgment also of *Michaelmas* term 1781; and the *audita querela* then alleged, that though the defendant, by reason of the discovery, ought to be indemnified from the penalties and costs recovered by *Petrie*, yet *Petrie* threatened execution; Lord *Porchester* therefore prayed a *supersedeas*

supersedeas and process against *Petrie*. *Petrie* appeared, and pleaded to the declaration, that one *Hopkins* had committed an offence of bribery at the election, and that before Lord *Porchester*'s discovery *Hinton* discovered *Hopkins*'s offence to *Petrie*, who commenced proceedings thereupon. The plea then stated the proceedings in the action by *Petrie* against *Hopkins*, which was also tried on 28 *July*, 1781, and a verdict for *Petrie*, and judgment in *Michaelmas* term; and *Petrie* averred, that the judgment against *Hopkins* was given before the judgment against *Hinton* at suit of *Richards*, whereby *Hinton* was indemnified; and to obtain such indemnity, sued his *audita querela* against *Richards*, which was then depending. Lord *Porchester* replied, that the judgment against *Hinton* at suit of *Richards*, was given before the judgment against *Hopkins*, on which fact the rejoinder took issue; and to the rejoinder Lord *Porchester* demurred. The court held, that the averment of priority of one judgment in time over the other, was bad, when it was admitted that both were on the same day (*a*); and that the conviction, in order to indemnify under the statute, must be a legal conviction that might be followed up by punishment; and that *Hinton* appearing to be indemnified by his discovery, Lord *Porchester*'s conviction of him was not sufficient to indemnify Lord *P.*, and the judgment was for the defendant.

(*a*) The priority of the judgment does not seem material to the decision, since although the judgment against Hinton might be prior to the judgment by Hinton against Hopkins, still Hinton would seem clearly entitled to the indemnity under the statute on his *audita querela* when his judgment against Hopkins was obtained. See 2 G. 2. c. 24. § 8. As to cases where the law recognises the fraction of a day. See 2 Barn. & Ald. 586. 1 Bro. & Bing. 370. 3 B. Moo. 740. 5 Term R. 255. 3 Wils. 274.; and in 3 Burr. 1434. Lord *Mansfield* says the law admits the fraction of a day in cases where it is necessary to distinguish.

An *audita querela* is of common right, and *ex debito justitiæ*, and need not be moved for; but the *supersedeas* upon it must be moved for.

Nathan v. Giles, 5 Taunt. 558. 1 Marsh. 226.

There can be no motion in arrest of judgment in an *audita querela*, since an arrest of judgment would be nugatory, the plaintiff having already obtained his *supersedeas* of the execution in the former suit; and the arrest of judgment would not set aside that *supersedeas*.‖

2 Will. Saund. 148 f. note (*c*).

AUTHORITY.

(A) Where an Authority shall be said to be given; and herein of the Construction of the Words that create it.

(B) Who are capable of executing an Authority.

(C) Where an Authority is well pursued and executed.

(D) Where an Authority cannot be transferred.

(E) When

(E) When it shall be said to be determined and revoked.

(A) Where an Authority shall be said to be given; and therein of the Construction of the Words that create it.

11 H. 4. 71. 2 Roll. Abr. 8. Co. Lit. 52. *Vide infrà*, tit. *Feoffment* (E), tit. *Leases and Terms for Years.*

THAT power of acting which one man has, being transferred to another, is called an authority, and this the law allows of; for, as a contract is no more than the consent of a man's mind to a thing, if such consent or concurrence appears, it would be very unreasonable to oblige him to be present at the execution of every contract, since it may be as well performed by any other person delegated for that purpose.

Co. Lit. 48. b. 2 Roll. Abr. 8. Salk. 96. *Vide infrà*, Letter (C).

But such delegation or authority must be by deed, that it may appear that the attorney or substitute had a commission or power to represent the party; also that it may appear that the authority was well pursued.

Brownl. 94.

If *A.*, by letter of attorney, constitutes and appoints, and in his stead and place puts *B.* to surrender a certain copyhold, this authority is sufficient, and as full as if said for him and in his name, *&c.*

Roll. Abr. 328. Emery and Cook.

If a man signs and seals a lease of *ejectment* indented, but does not deliver it, and at the same time seals and delivers a letter of attorney, in which he recites, — *whereas by indenture of lease, bearing such a date,* &c. *hath demised to* B. *such land* habendum: *now these presents witness, that he makes* J. S. *his lawful attorney to deliver the said indenture upon the land as his deed;* though according to the proper signification of the words, the lease ought to be taken to be delivered by him, and so this letter of attorney void, to deliver it again, for this cannot be an indenture if it was not delivered; yet all parts of the letter of attorney being laid together, and the intent of the parties, and proof being made that the lease was not delivered, but only signed and sealed, it appears that this was only an improper expression of his intent, by calling it an indenture and a demise; for if he had intended that this was an indenture sealed and delivered, this letter of attorney to deliver it upon the land need not have been made.

Roll. Rep. 390. Palm. 394. Godb. 359.

If the authority, in a letter of attorney, be *ad petend., recipiend. et recuperand.* a certain debt, it is sufficient to arrest, *&c.*, because necessary in order to recover.

Skin. 415. pl. 10. Ruled by *Holt*, in evidence in *ejectment* at *Guildhall.*

Where the *mayor* and *commonalty* of *London* had constituted *J. S.* their bailiff to receive their rents, and to make demand of them, and to make entry, such general authority is not sufficient to authorize a bailiff to take advantage and demand a rent accrued due after the authority given; for it is a new right attached, and there ought to be a special authority for this purpose.

Hogg v. Snaith,

‖A power of attorney, to recover and receive all salary and money

money due to the party giving it, and to compound, discharge, and give releases, and appoint sub-attorneys, does not authorize the attorney to indorse and negotiate a bill received in payment of such salary, *&c.*‖ 1 Taunt. R. 347. Murray v. East India Company, 5 Barn. & A. 204.

If a steward makes a deputy *hâc vice* to take a surrender of a copyhold, *et ulterius ad faciend. quantum in se est*; by virtue of these last words the deputy may take a conditional surrender. Cro. Eliz. 48. See 12 Mod. 468.

An authority may be delegated by deed indented, though the attorney be not party to the deed, because the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore, since a man may take an estate in remainder, though he is no party to the deed, *à fortiori* one, not party to the deed, may receive a naked authority or power by it. 2 Roll. Abr. 8, 9. Shep. Touchstone, 217.

(B) Who are capable of executing an Authority.

THERE are few if any persons excluded from exercising a naked authority to which they are delegated; and therefore monks, infants, feme coverts, persons attainted, outlawed, excommunicated, villains, aliens, *&c.*, may be attorneys; for the execution of a naked authority can be attended with no manner of prejudice to the persons under such incapacities or disabilities, or to any other person, who by law may claim any interest of such disabled persons after their death. Co. Lit. 52. a. Perk. § 187. ‖But infants and feme coverts cannot be attorneys to prosecute suits, nor to execute an authority coupled with interest. Co. Lit. 128. a. 52. a. note (2).‖

A feme covert may be an attorney to deliver seisin to her husband; and so may he in remainder be an attorney to make livery to the tenant for life. Co. Litt. 52. a. Perk. § 148. 199.

So, if *cestui que use* had devised that his wife should sell his land, she might sell it to a second husband; for she did it *in auter droit*, and the vendee was in by the devisor. Co. Litt. 112. *Vide* Latch. 9, 10. 39. 134. Jones, 137. S.C. Noy, 80. S.C. Co. Lit. (15th edit.) 112. b. n. 6. 1 P. Wms. 149. Salk. 239.

(C) Where an Authority is well pursued and executed.

HERE it is necessary to take notice of a difference in the old books, between a naked authority and an authority coupled with an interest (*a*); for if a man devise that his executors shall sell his lands, this gives but a naked authority, and the lands, till the sale is made, descend to the heir at law; and in this case all must join in the sale; and if one die, it being a bare authority, cannot survive to the rest. (*b*) Co. Lit. 112, 113. 181.

(*a*) But it has been holden in equity, that if a man devises that his lands shall be sold for the payment of his debts and legacies, though one of the parties who was empowered die, the survivor and heir at law must join in a sale. Hard. 204. So if lands are devised to be sold, and no person is named for that purpose, the heir must do it. [Locton v. Locton, 2 Freem. 136. and 1 Chan. Ca. 179. Garfoot v. Garfoot, 1 Chan. Ca. 35. Pitt v. Pelham, 2 Freem. 134. 1 Chan. R. 285., and 1 Chan. Ca. 176. T. Jon. 25. 1 Lev. 304. Yates v. Compton, 2 P. Wms. 308.

(*b*) One devises the residue of his personal estate to *J. S.*, provided she marries with the consent of his two executors: upon the death of one the condition is gone, for this is a bare authority not coupled with an interest, and therefore cannot survive without express words for that purpose. Peyton v. Bury, 2 P. Wms. 626.]

Co. Lit. 113. b. 181. b. S. P. [This distinction between a devise *of lands to be sold by executors*, and a devise that *executors shall sell lands*, seems rather to consist in the arrangement of the words, than in any thing substantial; and the learned editor of the 1st Inst. hath a very full note upon this passage of Lord *Coke*, in which he contends that the power to sell being given to the executors *by reason of an office or interest*, which go to the survivor, may well survive with them in either case.] *Vide* Cro. Eliz. 856. ‖And see Sugden on Powers, (4th edit.) 106. Co. Lit. 113. a. n. (2).‖

But if a man by will give land to executors to be sold, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it.

Co. Lit. 112. b. (a) So if there had been but one executor living. Cro. Car. 382. Jones, 352. *Vide* And. 145. Moor, 61.

Also if lands be devised to *A.* for life, and that after his decease his lands shall be sold by his executors, and he makes three or four executors, and during the life of *A.* one of the executors dies, and then *A.* dies, the surviving executors may sell, because the land could not be sold before, and the plural number of executors remains. (*a*)

Co. Lit. 113. (*b*) *Sed qu.* and *vide* Cro. Car. 382. *cont.* 3 Leon. 106. c. 156. Moor, 147. c. 291.

But it is said, that if a will had given such power to certain persons, naming them by their names, as to *J. S.*, *J. N.*, *J. D.*, and one of them died, the survivors could not sell; for the words of the will in that case could not be satisfied. (*b*)

2 And. 59. Townsend and Wales. Owen, 155. Moor, 341. Cro. Eliz. 524. S. C.

If *A.*, being seised in fee of a reversion of twenty acres, expectant upon an estate for life, and of other twenty acres in possession, for the performance of his own and his father's will, devises all his lands and tenements to his executors, and wills that they should take the profits thereof for ten years, and that after the expiration thereof the same should be sold by his executors, or by one of them, and dies, and after the tenant for life dies, and then one of the executors dies, the other two may sell the twenty acres; for as they may perform his will, so they may sell in order thereto.

Co. Lit. 113. 181.

At common law, if one of the executors who was empowered to sell lands refused, the others could not sell; but now, by 21 H. 8. c. 4., notwithstanding part of those to whom power is devised refuse, the rest may sell; and so may such of those to whom land is devised to be sold, as are willing, though the others refuse, by a favourable construction of that statute; but they cannot, in either case, sell it to the executor that refused, for he is privy to the will, and executor still.

Co. Lit. 113. (*c*) But *vide* head of *Trust*, that they are now considered only as trustees, and shall have no more than their costs and charges.

My Lord *Coke* observes, that it is safest, in giving such power by devise, to limit it to the survivors or survivor, or those that prove the will, *&c.*; and when an estate is devised to executors to be sold, it is advisable to appoint that the profits taken by them before the sale shall be assets; for otherwise they shall not. (*c*)

Townsend v. Wilson, 1 Barn. & A. 608.

‖A power of sale was reserved by indentures of lease and release to three trustees and their heirs; and on one of the trustees dying, the other two executed the power. It was held, that the power was not well executed; although the deed expressly provided, that the money arising by the sale should be intrusted

intrusted to the trustees for the time being, and provided for the appointment of new trustees in case of death, *&c.*

Where three different classes of trustees were appointed by will for three different purposes: first, *R. Sharp* and *R. L. Rice* as to 1000*l.*; second, *Mary Sharp*, *R. Sharp*, and *G. A. Davis* as to the rest of the personal estate; and third, *R. Sharp* and *G. A. Davis* as to the real estate: and the will then contained a power, that in case either of the said trustees, *R. S.* and *R. L. R.*, so far as applied to the trusts reposed in them respectively, or the said *M. S.*, *R. S.*, and *G. A. D.*, so far as applied to the trusts in them reposed respectively, should die, or desire to be discharged from, or neglect or refuse, or become incapable to act in the trusts thereby in them reposed, before such trusts should be fully performed or determined, in such case, it should be lawful for new trustees to be appointed; it was held, that this power was only given to the two first-named classes, and not to the class last named, the trustees of the real estate; and also that it was not well executed by the two trustees, both of whom had declined to act in the trusts. ‖ Sharp v. Sharp, 2 Barn. & A. 405.; and see Sugden on Pow. 168. (4th edit.)

If a man devises lands to his executors to sell, and dies, the executors may sell part of the land at one time, and part at another time, as they can find purchasers. Co. Lit. 113.

A., by indenture, demised to *B. habend. a die datus* (which was the 10th of *June*), *indenturæ prædict.* for his life, with a letter of attorney to make livery; the attorney makes livery the 23d of *July* following; and the livery was holden to be void, because the estate for life being by the indenture to commence the 10th of *June*, the attorney had no authority to change the commencement of the estate; and therefore, having not pursued his authority, by not giving livery, to let the freehold commence according to the deed, what he did afterwards was without any authority, and consequently void; but in this case, if the deed had not been delivered till after the day of the date, and the attorney had given livery at the time of the delivery of the deed, this had been a good delivery, because the deed of feoffment was to govern the livery; but the deed itself had no effect till the delivery; and therefore the attorney making the livery at the time the deed of feoffment began to operate, which was to govern it, seems to have well enough executed his authority. Cro. Jac. 153. Cro. Eliz. 873. Lit. R. 144.

If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney deliver seisin absolutely, the livery is not good, because the attorney had no authority to create an absolute fee-simple; and therefore, such absolute feoffment shall not bind the feoffor, because he gave no such authority. 11 H. 4. 3. 2. 2 Roll. Abr. 9. And hence the attorney, in some books, is called a disseisor. Co. Lit. 258. Perk. § 188.

But if the letter of attorney had been to make livery absolutely, and the attorney had made it upon condition, this seems a good execution of his power, and the feoffment good, because when the attorney has once delivered seisin, he has fully executed his power; and the condition annexed to it, being without authority, 26 Ass. 39. 2 Roll. Abr. 9. Co. Lit. 258. Shep. Touchstone, 218. Perk. § 188.

thority, is void; and therefore shall not destroy the operation of the livery.

Perk. § 189. But if the attorney was to deliver seisin to two, and he had made livery only to one, that had been void,

If a warrant of attorney be given to make livery to one, and the attorney make livery to two; or if the attorney had authority to make livery of *Black-acre*, and he make livery of *Black-acre* and *White-acre*, though the attorney has in these cases done more, yet there is no reason that should vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity and void.

because he had no authority to deliver the whole possession to one exclusive of the other; and therefore it is void for the whole. Perk. § 189. *Vide infrà*. ‖In Adams v. Adams, Cowp. 651. where a power was given to appoint to children, and the donee appointed to children, and also to grandchildren, the appointment to children was held good, and that to grandchildren void; the latter limitation, being distinct and independent, might be rejected. But where the power was to lease for twenty-one years or three lives, and a lease was granted for ninety-nine years, determinable on lives, the lease was held bad even for the twenty-one years. Roe v. Prideaux, 10 East, 158. Here the excess was interwoven with the demise under the power; and see 2 Ves. 640. 2 East, 376. 13 Ves. jun. 576. However in equity if a lease is made for a number of years exceeding the power, it is held good to the extent of the power. Campbell v. Leach, Ambl. 740.; and see Sugden on Pow. (4th edit.) 552.‖

Co. Lit. 49. b. 2 Roll. Abr. 8.

If a letter of attorney be given to two jointly to take livery, and the feoffor make livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery, are to be considered but as one.

Co Lit. 49. 2 Roll. Abr. 8.

But if a feoffment be made to *A.* and *B.*, and the feoffor give a letter of attorney to deliver seisin, and *J. S.* give livery to *A.* in the absence of *B.*, in the name of both, this is a good livery; for though the entire possession be delivered to one only, yet they being joint-tenants by the deed of feoffment, such livery to one makes no alteration or change in the possession; because, if the livery had been made to both, each had been placed in the whole possession; besides that, every man being presumed to accept a gift for his advantage, *A.* is looked upon as the attorney of *B.* to receive the possession for him; and therefore the livery of *A.* enures to the benefit of *B.* till he disagrees to it.

Dyer, 62. Roll. Abr. 329. Co. Lit. 181. Roll. R. 299. Yelv. 26.

But if a letter of attorney be made to three *conjunctim et divisim*, and two only make livery, this is not good, because not pursuant to their authority; for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent from it.

Guthrie v. Armstrong, 5 Barn. & A. 628.

‖But where a power of attorney was given to fifteen persons jointly and severally, to execute such policies of insurance in the name of a party, as they or any of them should jointly or separately think proper; it was held, that an execution of the power by four of the attorneys was sufficient, according to the intention appearing on the instrument.‖

Co. Lit. 52.

If *A.* be disseised of *Black-acre* and *White-acre*, and give; letter

letter of attorney to enter into both, and make livery, if the attorney enter into one acre only, and make livery *secundum formam chartæ*, this is not good, because the attorney has not pursued his authority; for the estate of the disseisor cannot be defeated without an entry into both acres; and till the estate be defeated the attorney cannot execute his power in the manner it was delegated; and therefore what he did in this case was void. 2 Roll. Abr. 9.

If a letter of attorney be given to *A.* to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because whilst the lessee continues in possession the attorney cannot deliver seisin of it; and therefore to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. Co. Lit. 52. Poph. 103. Dyer, 131. a. 340. a. But, *per Rolle*, it is the safer way for the feoffor to insert a clause in the letter of attorney for the attorney to enter *et omnes alios inde expellend.* 2 Roll. Abr. 8. That an attorney cannot make livery within view, *vide* Co. Lit. 52. 2 Roll. Abr. 9.

If the king grants a warrant to four officers of the Exchequer, by which he authorizes them, or any one of them, to pay out of the king's treasure the costs and expenses of any man who shall be employed in the service of the king; and two of the four give a warrant for the payment of a certain sum to *J. S.*, this is a good warrant, though neither all four nor one only did it. [But *Rolle* adds, "*dubitatur;*" and Lord *Coke* saith, that "it was touched (but not resolved) that they had *not* pursued their authority."] 11 Co. 92. Roll. Abr. 328. 329. ‖See 5 Barn. & A. 628. *acc.*‖

So if a judgment be assigned to the king, in satisfaction of a debt due to the king, with a proviso, that if the barons of the Exchequer, or any two of them, revoke it, that it shall be void; and after three of the barons revoke it, (there being four in all,) this is a good revocation. 5 Co. 91. Roll. Abr. 328.

But if the words had been, that if the barons, or any two of them, jointly or severally revoke it, *&c.* there three of them could not revoke it, for this is neither jointly nor severally. (*a*) 5 Co. 91. Roll. Abr. 328. (*a*) *Sed qu.* If an act done by three shall not be considered in this case as a proper execution of the power? ‖See 5 Barn. & A. 628.‖

But if a sheriff makes a warrant to four or three, on a *capias* jointly or severally, to arrest one, two of them may arrest the party, for the greater expedition of justice. Co. Lit. 181. Palm. 52. 2 Roll. R. 137. Poph. 202. Cro. Eliz. 913. Noy, 47. Yelv. 26. 3 Bulst. 209. Roll. R. 406. Roll. Abr. 329. 3 Vin. Abr. 418. [Where the king directed the deputy and council of *Ireland* to cause a bishop to be installed, and the deputy was changed, it was holden, that the successor and council might do it. Palm. 27.] But a commission directed to six, four, or two, cannot be executed by three, because that is a judicial act. Yelv. 26. Noy, 47. 2 Inst. 380.

Where a person is authorized to do a thing, it is most regular to do it in the name of him who gave the authority. (*b*) *Vide* 9 Co. 76. b. ‖edit. 1826.‖ Ld. Raym. 1418. Stra. 705. Godb. 389. Roll. Abr. 331. Moor, 70. pl. 191. 818. pl. 110. b. Salk. 96. (*b*) But if executors have power to sell lands, they may do it in their own names. Roll. Abr. 331. So if a deputy steward makes an attorney, or appoints an under-deputy to take a surrender of a copyhold estate, and he does it accordingly without reciting his power, this is good: for where a man does such an act as he cannot do, so as to be effectual any other way than by virtue of his authority, that shall be taken to be in execution of his authority. Salk. 95, 96. But where a man has an interest and authority, and does an act without reciting his authority, it shall be taken to be done by virtue of his interest. Salk. 96. For this *vide*

vide 6 Co. 18. a. Jenk. 201. 215. 1 Lev. 150.] Sir Edward Cleer's case. Cro. Eliz. 878. Cro. Jac. 51. Co. Lit. 111. b. Cro. Car. 335. [Hob. 160. 1 Atk. 559. Hardr. 395. 1 Chan. Ca. 103.

White v. Cuyler, 6 Term R. 176. Wilks v. Back, 2 East, 141.

‖One who executes a deed for another should execute it in the name of his principal. But, provided it is done in the name of the principal, no particular form of execution is necessary.

Ball v. Dunsterville, 4 Term R. 313.; and see Harrison v. Jackson, 7 Term R. 207.

And where a party executed a deed for himself and his partner by the authority of the partner and in his presence, the court held it well executed although only sealed once.‖

Roll. Abr. 330. For authorities that are to be strictly pursued, see Moor, 43. Godb. 39. 2 Roll. R. 6. Owen, 73. Bulst. 104. 2 Mod. 318. Keilw. 43. Lit. R. 141. Cowp. 26.

If the lord gives licence to a copyholder for life to lease the copyholder for five years, the copyholder may lease it for three years; for this is comprehended within the lease, inasmuch as he hath given him licence to lease for more years.

One who hath power to make a lease for ten years, makes a lease for twenty; decreed good in Chancery for ten years. Chan. Ca. 23., *vide* head of *Leases and Terms for Years*; ‖and see *antè*, p. 436.‖

Roll. Abr. 330, 331. Cro. Jac. 436. S. C. Poph. 105. S. C. Cro. Eliz. 461. Owen, 72. S. C.

So if the lord gives licence to a copyholder for life to lease the copyhold for five years, if the copyholder *tamdiu vixerit*, and he leases it for five years generally, without limitation; this is a good execution, and pursuant to the licence, for the lease is determinable by his death, by a limitation in law, and therefore as much is implied by law as if he had made an actual limitation.

(D) Where an Authority cannot be transferred.

9 Co. 77. b. Roll. Abr. 330. (*a*) *Quære*, and *vide* head of *Executors and Administrators*.

ONE who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done; therefore an executor having authority to sell, cannot sell by attorney. (*a*)

9 Co. 76. 2 Roll. R. 393. Roll. Abr. 330.

So if lessee for life hath power to make leases, rendering the ancient rent, he cannot make them by letter of attorney. (*b*)

‖(*b*) Sir E. Sugden says, that a donee under a power may execute a deed of appointment by attorney, for the appointment is his own; and this is no delegation of the trust and confidence. See Sugden on Pow. 178. (4th edit.) He does not cite any authority; and the cases here in the margin bear out the text as to leases.‖

Ingram v. Ingram, 2 Atk. 88.; and see Hamilton v. Royse, 2 Scho. & Lef. 330.

‖So where a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, Lord *Hardwicke* said that this must be considered as a power of attorney which could be executed only by the husband to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person.

Attorney-General v. Berry-

Again where personal estate was given to such charitable use as *A.* should appoint, and he directed the money to be applied

applied as *B.* should appoint, Lord *Hardwicke* held the delegation void. — man, 2 Ves. 643.

So where the testator gave his wife a power to appoint personalty among their children, and she delegated the power by will to others, Sir *Thomas Clark* determined that the delegation was void. — Alexander v. Alexander, 2 Ves. 640. Bristow v. Warde, 2 Ves. jun. 336

On the same ground a person whose consent is made requisite to the due execution of a power, cannot authorize another as his attorney to give consent to it. — Hawkins v. Kemp, 3 East, 410.

Where a power is given to *A.* to create estates under the power, and he creates an estate, subject to a power of jointuring by *B.*, this is not a delegation of his power. — Doe v. Cavendish, 4 Term R. 471. n.

And the donee of a power may delegate the power, if there is an express authority to do so in the deed creating it. — Palliser v. Ord, Bunb. 166.

Where the power is annexed to an interest in the donee, and is to be executed by the donee and his assigns, it will pass to any person coming to the estate by assignment, whether an assignee in fact, or an assignee in law as an heir or executor: but it seems that unless originally authorized to be executed by the donee and his assigns, the assignee of the estate cannot exercise it. — How v. Whitfield, 1 Vent. 338, 339. Coxe v. Day, 13 East, 118.

Where the trust was to dispose of the property unto such of the relations and kindred of the testator, in such manner as his trustees and executors should think proper, and the trustees and executors died, the survivor devising the trust estates to *A.* and *B.*, and making them executors as to the personal part of the property, Sir *William Grant* decided that *A.* and *B.* could not execute the power, saying, that wherever a power was of a kind that indicated a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom by legal transmission the same character may happen to belong. — Cole v. Wade, 16 Ves. 27.

By the act 1 G. 4. c. 119. § 12. for relief of Insolvent Debtors, all powers of leasing, and all other powers over real and personal estate vested in any insolvent debtor, are thereby vested in his assignees by virtue of the act, to be executed for the benefit of all the creditors. — 1 G. 4. c. 119. § 12.

By the act 43 G. 3. c. 75. § 3. all powers of leasing lands, tenements, and hereditaments vested in any person found a lunatic shall and may be executed by the committee of his estate, under the direction and order of the Lord Chancellor or Lord Keeper. — 43 G. 3. c. 75. § 3. This act is repealed, except as to proceedings already commenced, by 1 W. 4. c. 65., but the provision in the text is reenacted by § 23. of that act.

And by 6 G. 4. c. 16. § 77. all powers vested in any bankrupt, which he might legally execute for his own benefit (except the right of nomination to a benefice), may be executed by the assignees for the benefit of the creditors. — 6 G. 4. c. 16. § 77. See further as to the transfer of powers by act of law, Sugden on Powers, (4th edit.) 180

If *A.* lends *B.* a horse to ride to *York*, *B.* cannot let his man ride him; for the licence is a matter of pleasure annexed to the person — Mod. 210. Bringlo and

Morris. But it is otherwise where a certain time is limited for the loan of the horse; for in

person of *B.*, and cannot be transferred; adjudged upon a demurrer, in an action of trespass, for immoderately riding the plaintiff's mare; where the defendant pleaded that the plaintiff *licentiam eidem dedit equitare;* and that the defendant and his servant *alternatim* had rid upon the said mare.

that case he hath an interest in the horse, and may let his servant ride him. So if *B.* for money lets a horse to *A.* to ride to *York.* Mod. 210. 2 Ld. Raym. 913. 915, 916.

Howes v. Ball, 7 Barn. & C. 481.

‖*A.* agreed to give *B.*, a coachmaker, 100*l.* for a coach, and to pay for the same by four bills of 25*l.* each; and further that *B.* should have a claim upon the coach until the debt was duly paid. The bills were given, but the first was not paid when it became due. *A.* died, his administratrix sent the coach to *B.* to have the wheels repaired. *B* detained it on the ground that the bills had not been paid. It was held, in an action of trover brought by the administratrix, that the agreement operated as a mere licence from *A.* to *B.* to take the coach if the bills were not paid; that it was not transferable, and that the coach having vested in the administratrix by operation of law, the defendant was not justified in detaining it.‖

(E) When it shall be said to be determined and revoked.

Vide 2 Roll. Abr. 9. Co. Lit. 52. b. and note 17. (14th edit.) Perk. 188. Dy. 92. 177. 270.

THE authority given by letter of attorney must be executed during the life of the person that gives it; because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me that am to be represented; and hence it is, that if *J. S.* make a letter of attorney to deliver seisin after my death, it is void, because he cannot deliver seisin during my life, for that were plainly without any authority from me; nor can he do it after my death, for the former reason.

14 H. 8. 3. 11 H. 7. 19. Co. Lit. 52. 2 Roll. Abr. 12. ‖But it seems that livery cannot be made till the new mayor is made. Co. Litt. 52. b. note (9).‖

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean; but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney: but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good.

Co. Lit. 52. b. (*a*) So if the lessor grants over his estate, yet the lessee may alien. Cro. Jac. 105.

If the lessor by deed licenses his lessee for years or life to alien, who is restrained by condition not to alien without licence, and the lessor dies before the lessee aliens (*a*); yet this is no countermand of the licence, for the licence exempts the lessee out of the penalty of the condition, and it was executed on the part of the lessor, as much as could be.

Co. Lit. 52. b.

If the king gives licence to alien in mortmain, and dies, yet it may be executed after.

So

So if the king licenses *J. S.* to sell wines, and dies. Sid. 6, 7. [In both these cases an interest passeth with the authority, and therefore it is that it doth not determine by the death of the king. But where a bare authority passeth, and no more, it seemeth to be otherwise. Pl. Com. 457. Hardr. 444. 1 Freem. 85. 115. 137.]

‖A warrant to enter up judgment is revoked by the death of the giver: and a warrant of attorney to enter up judgment given by two, is revoked by the death of one, and judgment cannot be entered up against the survivor; for the authority must be strictly pursued. 1 Anst. 225. Gee v. Lane, 15 East, 592. Raw v. Alderson, 7 Taunt. 455.

But if a warrant is given to enter up judgment at suit of two, and one dies, judgment may be entered up by the survivor.‖ Fendall v. May, 2 Maule & S. 76.; and see 1 Younge & J. 206. Tidd, 551. (9th ed.)

BAIL IN CIVIL CAUSES.

BAIL and mainprise, words often used in our law books as synonymous, agree (*a*) in this, that they save a man from imprisonment in the common gaol, his friends undertaking for him before certain persons, for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 Hawk. P.C. 140. (*a*) But in what they differ, *vide* 4 Inst. 180. Godb. 539. and 2 Hawk. P.C. 140. That the chief difference is, that a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him up upon a *Sunday*, and confine him till the next day, and then render him. 6 Mod. 231. *per cur.* 7 Mod. 77. 85. 98. Ld. Raym. 706. 12 Mod. 275. 348. 606, 607. 667. [So they may justify the breaking and entering the house, (the outer door being open,) in which the principal resides, (whether he is solely possessed of such house, or reside in it by the consent of another,) in order to seek for him, for the purpose of rendering him. Sheers v. Brooks, 2 H. Black. R. 120.] ‖Though a soldier cannot be taken out of his majesty's service, except on a criminal charge, he may be surrendered by his bail. 1 Stra. 2. And the same rule holds as to seamen and marines, 7 East, 405. 4 Taunt. 557. And witnesses and parties attending courts may be taken by their bail. 1 Dow. & Ry. N.P.C. 50. And a bankrupt may be taken by his bail during his examination. 1 Atk. 238. 3 East, 145.; and see tit. *Bankrupt, post.*‖ Against him that is mainprised *de die in diem* no bill can be filed; otherwise against him that is bailed. 4 Inst. 180. — Also it seems that before the 23 H. 6. c. 10. the sheriff was not upon an arrest obliged to take bail, unless the party sued out a writ of *mainprize*; but for this *vide* 2 Roll. Abr. 113, tit. Mainprize.

The putting in bail in personal actions seems to be in imitation of the civil law, which requires that cautions should be put in either by *pignora* or *fidejussores*, and the *idoneus fidejussor* was *ex arbitrio judicis approbatus, vel litigantium consensu acceptus*; for formerly in these actions, if the defendant did not appear on the summons, the process was an *attachment*, and the sheriff might attach him either by his goods or by pledges; and if he attached him by his goods, by his nonappearance his goods were forfeited; if by pledges, and the party did not appear, they were amerced. Vin. 839. *Digest*, lib. 2. tit. 8. Booth, 9, 10.

Under

Under this head I shall consider,

(A) What Persons are authorized to take Bail; ‖and from whom and in what Form.‖

(B) In what Cases Special or Common Bail is required. And herein,

1. *What the Debt must amount to for which there must be Special Bail.*
2. *Where the Demand is uncertain, and founds only in Damages.*
[3. *Whether a Defendant can be holden to Bail twice for the same Cause of Action.*]
4. *Whether Bail be required in Actions on Penal Statutes.*
5. *Of Persons that are not required to put in Special Bail.*
6. *Where Special Bail is required on removing a Cause out of an inferior Jurisdiction before Judgment.*
7. *Of putting in Bail on bringing a Writ of* Error.
8. *Common Bail in what Cases necessary.*

(C) Where Bail shall be said to be put in regularly: And herein,

1. *Of the Manner of putting in, excepting to, and justifying Bail.*
2. *To what Time it shall have Relation.*
3. *Where a different Action is prosecuted from that to which Bail was given.*
4. *What Defect or Irregularity may be amended.*

(D) Of the Proceedings against the Bail, and what they may plead in their Discharge.

[(D 2.) Of the Proceedings on the Bail-Bond.]

(A) What Persons are authorized to take Bail; ‖and from whom and in what Form.‖

2 Sand. 59. Vent. 55. 85. Mod. 33. Salk. 99. pl. 6. Ld. Raym. 425. 6 Mod. 122. [This, it is now settled, is a public act, of course, need

WHEN the sheriff arrests any one, he is not only authorized, but obliged to take bail, otherwise an action on the case lies against him.

This the sheriff is obliged to do by the 23 H. 6. c. 9. which enacts, "that sheriffs, coroners, *&c.* shall let to bail persons by "them arrested, or in their custody, by force of any writ, bill, "or warrant, in any personal action, or because of any indict- "ment of trespass, upon reasonable sureties (having sufficient "within

" within the county) to keep their days in such place, *&c.* as the " writ, *&c.* require, (such as are in ward by condemnation, exe- " cution, *capias utlagatum*, or excommunication, surety of peace, " or committed by command of the justices; and vagabonds " refusing to serve according to the statute of labourers only ex- " cepted.)

not be pleaded. Samuel v. Evans, 2 Term R. 569.] ‖Lovell v. Sheriffs of London, 15 East, 520.; but the defendant, to avoid the bond, must plead such facts as shew it void. *Sed vide* 4 Maule & S. 338.; and see *post* (D), 2.‖

But though the sheriff is obliged to take bail, yet if the plaintiff dislike the security, and does not take an assignment of the bail-bond, he may have the defendant brought up; for the sheriff having arrested him (*a*), must return a *cepi corpus*, on which return it is a breach of duty in him not to bring him up, for which the court amerces him as one of their officers.

(*a*) 1 Vent. 85. Mod. 33. 57. 244.

But if the writ be not returned, and the court make an order that the sheriff shall return his writ in four days, as is usual, there the disobedience is to the pronounced order of the court, and consequently a contempt of the court, for which an attachment lies.

Vide tit. *Sheriff.*

If the sheriff returns *cepi* on a mesne process, *et paratum habeo*, he shall be only amerced if he does not bring in the body, though he shall be attached if he does not return his writ (*b*); and the reason is, because the sheriff is bound to bail the party; and therefore if the sheriff is mistaken in his sureties, he is not to suffer in his liberty; and the returning his writ is in his own power; but it may not be in his power to bring in the body which he was obliged to bail.

Roll. Abr. 807, 808. Cro. Eliz. 852. Noy, 39.

(*b*) That it is usual at this day to serve the sheriff with a rule to bring in the body before you move to amerce him. Salk. 99. —— If the sheriff returns a *cepi corpus* and *paratum habeo*, or *languidus*, where the defendant is at large, without any bail taken, he is not aided by the statute, but an action for a false return lies against him. Noy, 39. Roll. Abr. 807.*

* After the sheriff has returned a *cepi corpus*, plaintiff may sue out a rule to bring in the body: The intent of this rule is, to compel the sheriff to put in good bail above, which if not done in due time, the court, on motion, will grant an attachment against the sheriff, the consequence of which is, generally, payment, by the sheriff, of the debt and costs, who seeks his remedy over against the officer, by whom the defendant was arrested, or his sureties; or, in *London*, against that secondary, or officer who took the bail-bond, if any, or his sureties. 1 Wils. 262. Wolfe v. Collingwood.

And if the plaintiff takes an assignment of the bail-bond, the sheriff is not amercable (*c*); for by accepting the bond, the plaintiff has waved the benefit of the amercement, and he may now sue it in his own name, though formerly he could only sue in the sheriff's name; and if the sheriff released the action, his remedy was in a court of equity.

[(*c*) For he is not obliged to do so. Rex v. Dawes, 1 Ld. Raym. 722.] Salk. 99. pl. 6. 6 Mod. 122. Gilb. H. C. P. 21. ‖3 Bos. & Pull. 564. Tidd's Practice, 307.‖

But now, by 4 Ann, c. 16. § 20. for amendment of the law, it is enacted, " that if any person shall be arrested by any writ, " bill, or process, out of any of her majesty's courts of record " at *Westminster*, at the suit of any common person, and the " sheriff or other officer takes bail from such person against " whom such process is, the sheriff or officer, at the request and " costs of the plaintiff in such action or suit, or his lawful attor- " ney,

4 Ann. c. 16. § 20. ‖See *post* (D), 2.‖

" ney, shall assign to the plaintiff in such action the bail-bond " or other security taken from such bail, by indorsing the same, " and attesting it under his hand and seal, in the presence of " two or more credible witnesses, which may be done without " any stamp, provided the assignment so indorsed be duly " stamped before any action be brought thereon; and if the said " bail-bond, or other security taken for bail, be forfeited, the " plaintiff in such action, after such assignment made, may bring " an action and suit thereupon, in his own name; and the court " where the action is brought may, by rule or rules of the same " court, give such relief to the plaintiff and defendant in the " original action, and to the bail upon the said bond or other " security taken from such bail, as is agreeable to justice and " reason; and that such rule or rules of the said court shall " have the nature and effect of a defeasance to such bail-bond " or other security for bail."

4 W. & M. c. 4. ‖One bail may be taken before a commissioner in town, and the other before a commissioner in the country. Mandorfe's Bail, 2 Chitt. R. 90.‖

By the 4 W. & M. c. 4. " the judges in each court, or any " two of them, whereof the chief to be one, may, by commissions " under the seals of their respective courts, appoint commissioners " to take recognizances of bail in suits depending before " them; and upon affidavit of the true taking of them, such " recognizances shall be as effectual as if they were taken *de* " *bene esse* before themselves: § 2. The cognizors, unless they " live in *London* or *Westminster*, or within ten miles, may justify " before the commissioners in the country."

‖See Tidd's Prac. 250.‖

[And by the last section, " any judge of assize, in his circuit, " shall and may take and receive all and every such recogni- " zance and recognizances of bail or bails, as any person shall " be willing and desirous to make and acknowledge before " them, *&c.*"]

[But in C. B. a copy of the writ whereon bail is required must be written on parchment, and upon that the recognizance of bail engrossed. Rules and Orders of C. B. 108.]

Before this statute, bail was always taken *de bene esse* before a judge, as it may, and must be still, if the cognizors live within ten miles of *London* or *Westminster*; the commissioners are obliged by rule of court to keep a book wherein are the names of the plaintiff and defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognizance was duly acknowledged in his presence; on such affidavit the judges make a conditional *allocatur*, and the bail are to stand absolute, unless the plaintiff except against them within twenty days; and if he except, the bail may justify by affidavit taken before the commissioners in the country.

Cro. Car. 196. Roll. Abr. 561. S. C. Jones, 226. S. C.

If one is arrested in *London* by a serjeant of the mace, upon a plaint of debt entered in any of the counters, the serjeant cannot take bail (*a*), but the judge in court must. (*b*)

(*a*) Cro. Eliz. 77. S. P. agreed, and like point agreed, where an arrest was upon a plaint in the court of *Nottingham*, and the defendant in gaol under custody of the mayor, and not of the serjeant; and Cro. Eliz. 168. it is said, that in all corporation courts the mayor, who is judge, is gaoler also. —— Bail being a matter of record cannot be taken before any but the judge of the court, and not before the serjeant, though alleged *secundum consuetudinem villæ*; but bail for appearance only may be taken by the serjeant. Cro. Jac. 94. (*b*) *Qu.* If the secondaries, in *London*, and their deputies, are not the proper officers for this purpose.

[The

[The sheriff cannot bail on an attachment, though a judge at his chambers may.] (a) Anon. 1 Stra. 479.

(a) It is now decided, that on an attachment out of chancery, the sheriff is neither compelled nor prohibited to take bail, the statute not applying to such case; but a bail-bond in such case is good at common law, and the sheriff may sue on it. Studd v. Acton, 1 H. Black. 468. Morris v. Hayward, 6 Taunt. 569. And though it was held in the Exchequer that the sheriff could not take bail on attachments for nonpayment of costs, Phelps v. Barrett, 4 Price, 23., it seems now settled otherwise, since such attachments are in nature of mesne and not final process. Lewis v. Morland, 2 Barn. & Ald. 63. Tidd. 222. (9th ed.)

The statute hath two branches; first, as to the persons to be let to bail; and secondly, as to the form of the security. On the first branch, it has been determined that the sheriff has no authority to take bond for the appearance of persons arrested by him under process issuing on an indictment at the sessions for misdemeanor, but can only take a recognizance for their appearance. (a) Bengough v. Rossiter, 4 Term R. 505. 2 H. Black. 418. (a) It has been doubted whether the sheriff can take bail on an attachment for contempt issuing out of a court of law. See 4 Price, 23. Tidd. 222. *sed vide* (9th edit.). *Sed vide* 6 Taunt. 569. 2 Barn. & A. 63.

Where the defendant is in actual custody, it is the duty of the sheriff to take bail if required; and therefore, if a bail-bond be tendered with sufficient sureties, and the sheriff refuse to accept it, he is liable to a special action on the case; but the sureties must have sufficient within the county where the arrest was made. 2 Will. Saund. 61. b. Lovell v. Plumer, 15 East, 320. Tidd, 223. (9th ed.)

A bond with five sureties, three of whom are respectively worth more than the penalty, is sufficient, though the other two are worth less than the penalty. Matson v. Booth, 5 Maule & S. 225.

The clause which requires reasonable sureties is for the benefit of the sheriff; and therefore, though he may insist on two sureties, he may take a bond with one only. 10 Co. R. 100. b. Cro. Eliz. 624. 808. 852. 862. 9 Moo. 422. 2 Bing. 227., and so also it is as to replevin bonds, see 7 Taunt. 28. 2 Marsh. 352. S.C.; and see Tidd's Prac. 223. (9th edit.)

The second branch of the statute requires a security by bond; therefore an agreement in writing, made by a third person, with a sheriff's officer, to put in good bail for the defendant at the return of the writ, or surrender his body to the officer, or pay the debt and costs, or an attorney's undertaking to the officer, for the appearance of the defendant, or to give a bail-bond to the sheriff in due time, has been holden to be void by the statute; and an action will not lie on such agreement. (c) 2 Will. Saund. 59. b. Rogers v. Reeves, 1 Term R. 418. Fuller v. Prest, 7 Term R. 109. Sedgworth v. Spicer, 4 East R. 568. (c) The statute applies only to obligations to the sheriff, and not to the plaintiff; therefore a bond or undertaking given to the plaintiff, though not according to the statute, is valid. 2 Saund. 59. b.

The bond must be made, first to the sheriff himself; secondly, it must be in his name of office; thirdly, it must be conditioned for the defendant's appearance at the return of the writ, and for that only. Therefore, if the bond be not made to the sheriff, or if it be not made to him by his name of office, or if it be single, without any condition at all, or with an impossible condition, or if the condition be not for the defendant's appearance, or for that and Cro. Eliz. 862. Tidd's Prac. 224. (9th ed.), and the cases there cited.

and something else, it is void by the statute. So also it is void if executed before the condition is filled up.

If the bond be substantially good, it cannot be avoided for any trifling informality or variance of the condition from the writ in the description of the plea, or of the time or place of appearance. Thus, where the writ was to answer the plaintiff in a plea of debt for 320*l.*, or in a plea of trespass, with an *ac etiam*, and the condition was to answer the plaintiff in a plea of debt or trespass generally, or without mentioning the plea at all, the variance was holden to be immaterial (*d*); for the statute only requires a bond conditioned for the defendant's appearance; and the description of the plea is merely surplusage. And accordingly, where the sheriff, upon an original writ in a plea of trespass on the case on promises, took a bail-bond conditioned for the defendant's appearance to answer the plaintiff in a plea of trespass, the court held it to be valid. (*b*) So, where the writ in trespass was to appear before the lord the king at *Westminster*, and the condition was to appear before the justices of the King's Bench at *Westminster*, the bond was holden good. (*c*) And where the writ by original was returnable before the lord the king, wheresoever he shall then be in *England*, and the condition was without the words 'wheresoever, *&c.*,' the court gave judgment for the plaintiff in an action upon the bond; saying, they would understand, that by appearing before the king, was meant before the king in his court, and not before the king in person. (*d*) So, where the condition of the bond in an action by original, was to appear before the king at *Westminster*, it was deemed sufficient. (*e*) And where a declaration on a bail-bond, in setting out the condition, stated, that if the defendant should appear *&c.* to answer the plaintiff, according to the custom of his majesty's Court of Common Bench here, the obligation should be void; and on the production of the bond, the latter words were omitted; the Court of Common Pleas held, that this was no variance, as it was only necessary to set out the condition of its legal effect. (*g*) But an allegation, that an action was depending in his majesty's Court of King's Bench at *Westminster*, is not sustained by proof of a *pluries* bill of *Middlesex*; for by such allegation the Common Bench must be intended. (*h*) So, where a *capias ad respondendum* was made returnable before his majesty's justices of the bench at *Westminster*; by virtue of which the sheriff issued his mandate to the bailiff of a liberty, commanding him to take the defendant, so that the sheriff might have his body before his majesty at *Westminster*, and the bailiff took a bail-bond conditioned for the defendant's appearance before his said majesty at *Westminster*, the Court of Common Pleas held, that the variance between the bail-bond and the writ was fatal; and therefore, that the bail-bond was void by the statute 23 H. 6. c. 9. (*i*) It has also been holden, that the statute 12 G. 1. c. 29. for preventing frivolous and vexatious arrests, is merely directory to the sheriff, and does not avoid the bail-bond where there is no affidavit of the cause of action (*k*), or the sum sworn to is not indorsed

(*a*) Cro. Jac. 286. Tidd. 225. (9th ed.)

(*b*) 6 Term R. 702.; and see 2 Bro. & Bing. 659.

(*c*) 2 Lev. 180. 2 Vent. 237.

(*d*) 2 Stra. 1155, 6.

(*e*) 9 East. 55.; but see 1 Chitt. R. 523.

(*g*) 3 Moo. 214.; and see 3 Stark. Ca. 76.

(*h*) 3 Maule & S. 166.; and see 7 Taunt. 271.

(*i*) 6 Taunt. 551. 2 Marsh. 258. S. C.

(*k*) 1 Burr. 550.; but see 2 New R. 202. *semb. contrà.*

indorsed on the writ; or even where the bond is taken in, a penalty being more than double the amount of the sum sworn to. (*l*)

(*l*) 2 Wils. 69. 1 Burr. 331.; and see Tidd, 225. (9th ed.)

It sometimes happens, that persons arrested on *mesne* process, may not be able to find sureties for their appearance at the return of the writ, and yet may be able to deposit the money for which they are arrested, together with a competent sum for costs; and therefore, by the 43 G. 3. c. 46. § 2. it is enacted, that all persons who shall be arrested on mesne process, may, in lieu of giving bail to the sheriff, deposit in his hands the sum indorsed on the writ, together with 10*l.* to answer the costs to be incurred up to the time of the return, and also such further sum, if any, as shall have been paid for the king's fine on any original writ; and shall thereupon be discharged from such arrest, and that the sheriff shall pay such deposit into court. And in case the defendant shall afterwards duly put in and perfect bail in such action, the sum deposited shall, on motion, be repaid to the defendant. But in case the defendant shall not perfect bail, then the sum deposited may, on motion, be paid to the plaintiff, who may thereupon file common bail for the defendant.

43 G. 3. c. 46. § 2. For the cases on the construction of this act, see Tidd's Prac. (9th edit.) 227.

And now, by the 7 & 8 G. 4. c. 71. § 2. it is enacted, that in all cases in which the defendant shall have been discharged from arrest upon making the above deposit, and the said sum shall have been paid into court, the defendant, instead of putting in bail, may allow the sum paid in to remain in court, to abide the event of the suit; and in cases where the defendant has given bail to the sheriff, or remains in custody, the defendant may, instead of putting in and perfecting special bail, deposit the sum indorsed on the writ, together with the king's fine, and 20*l.* for costs, to abide the event of the suit; and the defendant shall thereupon file common bail; or in default thereof, the plaintiff may do so, and the cause shall proceed as if the defendant had perfected special bail. And if judgment in the said action shall be given for the plaintiff, he may, on motion, receive the money so deposited, or so much as will satisfy the judgment and costs of the application. And if judgment be for the defendant, or the plaintiff discontinue, or be otherwise barred, the money deposited shall be paid to the defendant.

7 & 8 G. 4. c. 71. § 2.

And by § 3. it is provided, that any defendant who has made his election to make the deposit, may, before issue joined, or interlocutory judgment signed, receive it out of court on perfecting special bail.

§ 3.

And by § 4. any defendant who has perfected bail, may, if the court think fit, make such deposit; and thereupon the court may direct a common appearance or common bail, and an *exoneretur* to be entered on the bail-piece. ‖

§ 4. See Tidd, 244.

(B) In what Cases Special or Common Bail is required.

HERE it must be first observed, that regularly, after judgment, no bail is to be taken; for the plaintiff having ascertained

Vide head of *Sheriff*, and

vide post, where upon bringing a writ of *error*, and where upon reversing an outlawry, title *Outlawry*, and Carth. 459.

tained his right, and proved his demand, the defendant must pay the condemnation money; for which purpose a writ of execution issues, to which the sheriff can take no bail.

F. N. B. 106. 2 Roll. Abr. 112. (*a*) Cro. Eliz. 5. *per Wray*, — the court doth not usually bail, for the verdict is intended true till reversed; but in some cases upon good consideration they will bail. (*b*) Reg. 125. a. (*c*) Dyer, 193. pl. 29. though at first it was doubted whether it lay to the justices *de B.*, and a case cited *cont.* where it was commanded to the Warden of the Fleet to have the body in court *quolibet die, &c.* [See the form of this writ, and that C. P. may send to the marshal of *B. R.* for such a prisoner, and in what form it shall be. Dyer, 364. b.]

But if one in execution brings an attaint (*a*), he may have (*b*) a writ to the justices (*c*), commanding them to let him to mainprize.

Dyer, 365. pl. 31. Roll. Rep. 152. said *per Coke*, S. C., but such bail must be taken in open court. Bulstr. 140. Latch. 113.

If an *audita querela* is founded upon a release or record, the plaintiff may be bailed.

Roll. Rep. 152. *per Coke* C. J. Roll. Rep. 384. S. P. *per Coke*, who said that in the time of *Dyer* and *Wray*, and all his time, the practice had been never to bail, where grounded on a matter of fact only; but where upon a matter of writing in discharge the plaintiff had used to be bailed, the defendant being called to know whether he could deny it. *Vide Sid.* 286. Dyer, 285. pl. 41. 359. pl. 46.; and *vide* 11 H. 6. c. 10. 2 Roll. Abr. 113. (*d*) Yet *vide* in such cases where the plaintiff was bailed. Cro. Jac. 29. 67.

But if upon (*d*) a surmise of a matter of fact only, it is otherwise.

Raym. 475. Sid. 210. [(*e*) The doctrine here laid down is objected to in the case of Moor v. Watts, 2 Salk. 582. where it is ruled that a defendant taken upon a *withernam* may, if he plead *non cepit*, be admitted to bail. Wife v. Lawrence, Barnes, 59. S. P.]

If in an *homine replegando* an *elongatus* is returned, and the defendant taken upon a *withernam*; though this is no execution, yet the defendant shall not be bailed unless he will confess the taking and having the party in custody. (*e*)

Raym. 475.

But, if in an action for a false return of an *elongatus* against the sheriff it is found for the plaintiff, he may be bailed.

As to the cases in which special or common bail are required, I shall consider,

1. *What the Debt must amount to for which there must be Special Bail.*

Comp. Attor. printed 1667. fol. 45. (*g*) The *ne recipiatur* is entered by the attorneys as officers of the court, after which no appearance is to be received till bail is filed with the judge.

The old rule in the *Complete Attorney* is, that if the defendant be arrested by mesne process, as *capias*, *alias*, or *pluries*, and the plaintiff hold him not sufficient to answer to debt or damages contained in the writ, the same amounting to 20*l.* or upwards, that in this case the plaintiff, upon the return of the writ, by entering a *ne recipiatur* (*g*) with the filazer, out of whose office the *capias* did issue, may have special bail to be put in to this action, which the defendant must put in before some judge of the court where the cause depends, who will accept of such bail as the validity or weight of the cause doth require, or in his discretion shall be thought fit.

This was the rule that both the Courts of King's Bench and Common Pleas went by, but it was afterwards sunk to 10*l.*, which has long been the standing rule of the courts.

And

And now by the 12 G. 1. c. 29. it is enacted, "that where "the cause of action shall not amount to the sum of 10*l.* in a "superior court, or 40*s.* in an inferior court, the plaintiff shall "only serve the defendant with a copy of the process, and shall "not arrest his person; and that in all cases where the plaintiff's "cause of action shall amount to the above sums or upwards, "affidavit shall be made and filed of such cause of action, and "the sum or sums specified in such affidavit shall be indorsed on "the back of such writ or process; for which sum or sums so "indorsed the sheriff or other officer shall take bail, and for no "more."

12 G. 1. c. 29. *Vide* the statute, and 21 G. 2. c. 3. whereby it is made perpetual, and 5 G. 2. c. 27. whereby it is explained and amended, and 6 G. 2. c. 14. whereby it is extended to *Wales*, [and 19 G. 3. by which the cause of action in inferior courts is raised from 40*s.* to 10*l.* But a debt of 20*l.* must be sworn to, to hold to bail in the counties palatine, or in *Wales*, on process from Westminster-Hall; for this statute being in the affirmative, without negative words, is not a repeal of the 11 & 12 W. 3. c. 9. which requires a debt to that amount in order to hold to bail in those places. Smith v. Dudley, 2 Stra. 1102. Rayner v. Brough, Barnes, 89. *Vide* tit. *Soldiers* (B).]

¶ And by the 7 & 8 G. 4. c. 71. § 1. (reciting the above act, and the 5 G. 2. c. 27., the 19 G. 3. c. 70. and 43 G. 3. c. 46., and that it is expedient to extend and render them more effectual), it is enacted, that after the 1st of *August* 1827, "no person shall be held to "special bail upon any process issuing out of any court, where the "cause of action shall not have originally amounted to the sum "of 20*l.* or upwards, over and above and exclusive of any costs, "charges, and expenses that may have been incurred, recover-"ed, or become chargeable in or about the suing for or "recovering the same, or any part thereof: and that in all "cases where the cause of action shall not amount to 20*l.* or "upwards, exclusive of such costs, charges, and expenses as "aforesaid, and the plaintiff or plaintiffs shall proceed by the "way of process against the person, he, she, or they shall not "arrest, or cause to be arrested, the body of the defendant or "defendants, but shall serve him, her, or them personally within "the jurisdiction of the court with a copy of the process and "proceedings thereupon, in such manner as by the said act of "the twelfth year of the reign of his late majesty King *George* "the First is provided in cases where the cause of action shall "not amount to 10*l.* or upwards in any superior court, or to "40*s.* and upwards in any inferior court; and that where the "cause of action in any court shall not amount to the sum of "20*l.*, exclusive of such costs, charges, and expenses as afore-"said, no special writ or writs, nor any process specially therein "expressing the cause or causes of action, shall, from and after "the first day of *August*, be sued forth or issued from any "court in order to compel any person or persons to appear "thereon in such court; and all proceedings and judgments that "shall from and after the said first day of *August* be had on "any such writ or process shall be, and are hereby declared to "be, void and of no effect."

7 & 8 G. 4. c. 71. § 1.; see Tidd. 165. 178. (9th ed.)

¶ An affidavit of a debt due for goods sold and delivered not stating "by the plaintiff to the defendant," or stating "by the plaintiff," without "to the defendant," or goods sold and delivered *for* without stating *to* the defendant, or for goods bargained and

Cathrow v. Hagger, 8 East, 106. Fenton v. Ellis, 6 Taunt. 192. Taylor v.

and sold without alleging them to be delivered, has been held bad.

Forbes, 11 East, 315. Young v. Gatien, 2 Maule & S. 603. Bell v. Thrupp, 2 Barn. & A. 596. Hopkins v. Vaughan, 12 East, 398.

But an affidavit of a debt due from defendant to plaintiff for hire of carriages of plaintiff to and for the use of defendant is sufficient, as "hired to defendant" is the same as "let to hire," which implies a mutual contract.

Brown v. Garnier, 6 Taunt. 589.; and see Symonds v. Andrews, 5 Taunt. 751.

The affidavit must state the money to be lent, or goods to be sold, or work to be done *at the request* of the defendant, or it is bad: and money paid must be stated to be *for* the defendant.

Durnford v. Messiter, 5 Maule & S. 446.; but see, in C. P. Eyre v. Hulton, 5 Taunt. 704. Bliss v. Atkins, *Ibid.* 756. Fricke v. Poole. 9 Barn. & C. 543.

An affidavit that defendant is indebted to plaintiff on a written agreement to marry plaintiff or pay 1000*l.*, is bad, unless it state the consideration for such promise; for the court can intend nothing in an affidavit which is to deprive a party of his liberty.

Macpherson v. Lovie, 1 Barn. & C. 108.; and see Brooke v. Trist, 10 East, 358. Jacks v. Pemberton, 5 Term R. 552. Wildey v. Thornton, 2 East R. 409. Edwards v. Williams, 5 Taunt. 247.

In affidavits on bills and notes it must appear in what character the defendant became party to the bill, whether as drawer, indorser, acceptor, *&c.*

Humphries v. W[illegible]w 6 Taunt. 531. Machu v. Fraser, 7 Taunt. 172.

And it is usual, though not absolutely essential, for the plaintiff's character on the bill to be stated in the affidavit.

Bradshaw v. Saddington, 7 East, 94. Lamb v. Newcomb, 2 Bro. & B. 345. Balbi v. Batley, 1 Marsh. 424.

And the affidavit must show the bill to be due.

Jackson v. Yate, 2 Maule & S. 149. Edwards v. Dick, 3 Barn. & A. 495. Holcombe v. Lambkin, 2 Maule & S. 475.

And must not state the defendant's Christian name merely by initials, although he may have so signed the bill.

Reynolds v. Hawkins, 4 Barn. & A. 536.

The affidavit on a bond should describe the date, parties, amount of penalty, and sum due: but an affidavit of debt for so much for principal and interest due on a bond made by the defendant to plaintiff is sufficient. If it merely state so much to be due on a bond in the penal sum of 10,000*l.* it is insufficient; for though penal sum implies that there is a condition, it may be a condition for performance of covenants, in which case breaches must be assigned.

Byland v. King, 1 Moo. 24. Bosanquet v. Fillis, 4 Maule & S. 330.

Where the debt is foreign money, the value in English currency must be shewn.‖

Stone v. Ball, 2 Chitt. R. 16.

[The affidavit to hold to bail under this statute must shew how the debt arose; and that plainly and distinctly, neither in general terms, nor in terms of art.]

Jacks v. Pemberton, 5 Term R. 552. Cooke v. Dobree, 1 H. Black. R. 10. Hubbard v. Pacheco, *Id.* 218. Cope and another v. Cooke, Dougl. 467.

It must be a *positive* oath of the debt, made at the time of suing out the process. It must not be argumentative, point to any further evidence, refer to any thing *dehors*, or leave any thing to be collected

Heathcote v. Goslin, 2 Stra. 1157. Jennings v. Martin,

collected by inference, or rest only in *belief*; but must be expressed in terms of direct absolute assertion. 3 Burr. 1437. Bright v. Purrier, *Id.* 1687. Anon. 1 Wils. 121. Champion v. Gilbert, 4 Burr. 2126. Wheeler v. Copeland, 5 Term R. 364. Mackenzie v. Mackenzie, 1 Term R. 716. Powell v. Portherch, 2 Term R. 55. Williams v. Jackson, 3 Term R. 575. Collier v. Hague, 2 Stra. 1270. See the case of Moultby v. Richardson, 2 Burr, 1032., where the words "as he computes it," added to a positive oath of the debt were holden by *Foster* and *Wilmot*, (the only judges then in court,) not to invalidate the affidavit: and the case of Chater v. Jaques, Cowp. 529., where in trover against several, an affidavit that "*all* the defendants had possessed themselves of the goods, and "had refused to deliver them up, and that *some or one of them* had converted them," was allowed to be sufficient, the cause of action being expressed with precision in the preceding parts of the sentence, and those parts being independent on the subsequent words, "*some or* "*one of them*," which are merely surplusage. In the case of Loveland v. Basset, Tr. 16 G. 2. cited in 1 Wils. 232.; an affidavit by the assignee of a bond that went only to *belief* of the existence of the debt was admitted, the bond itself being considered as some evidence of the debt; a presumption that it was not paid, arising from its neither being cancelled, nor given up to the obligor.

Nor is this strictness required only where it is made by the plaintiff himself: for it must be equally direct and substantive when it comes from a third person. And a defective affidavit by such person cannot be helped by one made by the plaintiff himself in another country; for the oath *abroad* is no ground for process *here*. Claphamson v. Bowman, 2 Stra. 1226, Rollin v. Mills, 1 Wils. 279. Van Morsell v. Julian, *Id.* 231. Rios v. Belisante, 2 Stra. 1209. Pomp v. Ludvidgson, 2 Burr. 655.

But it is sufficient if assignees of bankrupt, executors, *&c.* swear that they *believe* the debt to be due, because from their situation *belief* is the highest degree of certainty which they can be expected to attain. But it must not be forgotten, that, in these cases, the insertion of the *belief* of the deponent is essential, and can on no account be dispensed with. And this exception, it seemeth, is not confined to persons suing in this representative character, but wherever from the nature of the question the party can have but a ground of belief, an affidavit to that extent only will be admitted. Walrond v. Fransham, 2 Stra. 1219. Barclay v. Hunt, 4 Burr. 1992. Tonna v. Edwards, *Id.* 2283. Sheldon v. Baker, 1 Term R. 83. *Id.* 717. Hobson v. Campbell, 1 H. Black. R. 245. ‖Mayor of London v. Dias, 1 East, 237. Cass v. Levy, 8 Term R. 520. Knight v. Keyte, 1 East R. 415. King v. Turner, 1 Chitt. R. 58. Lee v. Selwood, 9 Price, 323. Molling v. Buckholz, 2 Maule & S. 565. Lowe v. Farley, 1 Chitt. R. 92. Rowney v. Deane, 1 Price R. 402. Tidd, 182. (8th edit.)‖

A still looser form of affidavit is allowed in actions upon penal statutes. It is enough in those if the plaintiff state in general terms the nature of the offence, and shew the amount of the penalty: he need not specify the particular acts which constitute the offence, or charge in words directly that the defendant hath committed it; nor need he swear that the defendant is *indebted to him* in the sum forfeited, or that the debt is still due; because it is possible that the right of action may have previously attached in another person; and besides, as no one is entitled to the penalty until process is actually sued out, it is not a debt due to him at the time of making the affidavit. Davis v. Mazzinghi, 1 Term R. 705. Rex v. Baptist Rebord, 3 Burr. 1569. Watson v. Shaw, 2 Term R. 654. A misrecital of the year in which the statute passed, is fatal; though the insertion of it be unnecessary. *Ibid.*

It is to be observed that there is a difference between the practice of the Court of King's Bench, and that of the Court of Common Pleas, with respect to the affidavits to hold to bail. In 1 Term R. 717. 1 Black. R. 249. Emerson v. Hawkins,

1 Wils. 335. Roche v. Carey, 2 Black. R. 850. Cope v. Cooke, Dougl. 467. Jacks v. Pemberton, 5 Term R. 552. ‖(a) *Sed vide* 5 Barn. & A. 904. 2 Chitt. R. 20. 13 Price, 8. 6 Dow. & Ry. 24. Tidd, 189. (9th edit.)‖ (b) Nichols v. Dalyhanty, Barnes, 79. Reeks v. Groneman, 2 Wils. 224.

the latter, the defendant is suffered to file a cross affidavit, and the plaintiff may afterwards file an additional one in order to supply the defects of the first. In the former court, the plaintiff can file only one affidavit, which nothing can be received from the defendant to explain or contradict, or from the plaintiff to strengthen or even impeach. (a) In this court therefore it is absolutely necessary that the affidavit should have all that positiveness and precision above stated. In the other the same necessity doth not exist, as that court will resort to other media of proof, and allow the plaintiff to explain himself more fully in a subsequent affidavit. Not that that court, though less strict in the first affidavit, is wholly inattentive to it, or will in all events permit a supplemental one to be filed: for if the first be not a sufficient one to found the process, as, if it be made by a person infamous; if it be so drawn, though by a mere slip of the pen, as that perjury cannot be assigned upon it; if it wholly omit to state the consideration of the debt, a supplemental one cannot be received. (b)

Cooke v. Dobree, 1 H. Black. R. 10. ‖The Court of C. P. will only receive a supplemental affidavit to supply something which is ambiguous in the original. Green v. Redshaw, 1 Bos. & Pull. 227.; and the discretion of that court in receiving them is very sparingly exercised. Armstrong v. Stratton, 1 Moo. 112.‖

R. E. 15 G. 2. *B. R.* Howard v. Nolder, Barn. 60.

It is no objection to the affidavit that it was sworn before a commissioner, who is concerned as attorney for the plaintiff.

2 Stra. 1148. 2 Wils. 225. Barnes, 79.

It is inadmissible, if made by a person convicted of felony, or other infamous crime.

5 Burr. 2690. Dougl. 217. 5 Term R. 254.

In every action there must be a separate affidavit; as one will not serve for different actions against one, or several defendants. And if there be only one in such case, it is a fatal irregularity, and cannot be waved by any act of the defendant.

Hussey v. Baskerville, cited in 2 Wils. 225. 1 Burr. 332.

If there be *no* affidavit, or if it be defective or not duly filed, or if the sum sworn to be not indorsed on the writ, the court will discharge the defendant on common bail.]

‖See 2 Taunt. 165. 1 Maule & S. 230. 2 Moo. 192. 8 Taunt. 242.‖

However the above stat. 12 G. 1. c. 29. hath superseded this doctrine, and at this day an attorney cannot, any more than any other person, hold defendant to bail unless the demand be 10*l.* or upwards; ‖and now 20*l.* by 7 & 8 G. 4. c. 71. § 1.‖

In an attachment of privilege, which is a *capias* in the first process, the defendant is held to bail for any sum though never so small; for this being a *capias* in the first process without summons, does not arise from a supposition of a *nihil* returned, but arises from a debt due to the officers of the court, by the acts of the court; and therefore another officer ought not to appear without seeing a security given for such debt.

2. Where the Demand is uncertain, and sounds only in Damages.

Vide 13 Car. 2. st. 2. c. 2. ‖Brook v. Trist, 10 East, 358.

Where the action is only for damages, there regularly the party is not to be holden to special bail; for there is no certain sum for which bail can be ascertained.

Edwards v. Williams, 5 Taunt. 247. Dutton v. Solomonson, 3 Bos. & Pull. 582. Mus-

sen

sen v. Price, 4 East, 147. Lear v. Heath, 5 Taunt. 201. Fry v. Malcolm, 4 Taunt. 705. Tidd's Prac. 171. (9th edit.)‖

But in actions of *assault* and *battery*, *scandalum magnatum*, and for other personal wrongs, in which it is apparent the damages will exceed the sum of 10*l.*, the court, or any judge of the court, may and do, on good cause shewn, give leave to the plaintiff to sue out a writ with the clause of *ac etiam billæ*, to hold the defendant to special bail. (*a*)

Sid. 307. Roll. Abr. 335. Lev. 39. Brownl. 90. Sid. 183. Raym. 74.

(*a*) But this must be on an affidavit of the facts. ‖See O'Mealy v. Newell, 8 East, 564. Imlay v. Ellefsen, 2 East R. 453.‖

So upon an affidavit of a great *maihem*, and that he intended to declare in *trespass*, the court ordered a special *latitat*, with an *ac etiam*, and that so there should be special bail.

Sid. 276. Special bail ordered *per cur.* in case of a notorious battery. Sid. 307. — So in case of a foul battery against a man and his servants. Comb. 57. See too 1 Black. R. 192. — But this seems to be discretionary in the court; therefore *vide* Mod. 2.; special bail denied for putting an arm out of joint; and *vide* Roll. Abr. 335. pl. 14.

In debt upon a bond for performance of covenants (*b*), the court will order bail according to the (*c*) breaches assigned. (*d*) *

Sid. 63. (*b*) So special bail in *account*, *secus* in debt upon an account. 2 Roll. R. 55. Lev. 300. (*c*) And the measure of that shall be taken from the plaintiff's oath. Salk. 100. pl. 11. Barnes, 109. Say. R. 109. Dougl. 449. [(*d*) But a defendant may be arrested for the penalty of a bond conditioned for the performance of a promise of marriage, &c., where the penalty is the real debt, or rather in nature of stated damages. 1 Wils. 59. 3 Burr. 1551. Dougl. 449.]; ‖and see Stinton v. Hughes, 6 Term R. 13. Wilday v. Thornton, 2 East, 409. Holt's N. P. Ca. 45. n.‖ * This must mean according to breaches stated in plaintiff's affidavit.

[So in debt upon bond, conditioned for the *payment of money*, though the penalty is, strictly speaking, the legal debt; yet, as it is now considered upon the statute of 3 & 4 Ann. c. 16. § 13. to be merely a security for principal, interest, and costs, the defendant cannot be holden to bail for more than the sum really due by the condition.

Tidd's Prac. ‖185. (9th edit.)‖

In *trover*, the defendant may be arrested of course, though the action be brought for uncertain damages; for this is more an action of property than a *tort*.]

6 Mod. 14. 2 Stra. 1192. 1 Wils. 23. S.C. *Ibid.* 335.

Say R. 255. S.C. Cowp. 529. But it is said, that where the defendant, being a custom-house officer, was arrested in an action of trover brought against him for seizing goods, and it appeared by affidavit that there was a reasonable foundation for the seizure, that the goods were deposited in the king's warehouse, and that the defendant had used due diligence in proceeding towards a condemnation in the Exchequer, the court ordered common bail to be accepted. 2 Black. R. 1018. 1 Wils. 335. Say. 53. *semb. cont.*

‖But by the rule of court of *Hilary* term, 48 G. 3. no person can be held to special bail in an action of trover or detinue, without an order made for that purpose by the Lord Chief Justice or one of the Judges of the Court.

9 East, 325. For form of an affidavit in trover since the rule, see Tidd, Append. x. § 85. (9th edit.)

An affidavit by the assignees of a bankrupt for goods of which the defendant had possessed himself, and which he refused to deliver to the bankrupt before his bankruptcy, and to the assignees since the bankruptcy, and had converted them to his use, as appeared by documents as deponent believed, was held defective.

Molliny v. Ruckholz, 2 Maule & S. 563.

Clarke v. Cawthorne, 7 Term R. 321.

An affidavit in trover for a bill of exchange should state the value, and that the bill remained due and unpaid.‖

Tidd's Prac. 35. 4 Burr. 1996.

[Where there have been mutual dealings between the parties, the *balance* is considered as the debt at law as well as in equity.]

Dronefield v. Archer, 5 Barn. & A. 513. Germain v. Burrows. 5 Taunt. R,

‖Where the plaintiff holds the defendant to bail for the amount due to him, without giving credit for the items on the other side, it is an arrest without probable cause within the meaning of the 43 G. 3. c. 46. and the plaintiff is bound to pay costs; *aliter* if the defendant refuses to state the mutual account.‖

259. And in such case an action for malicious arrest may be maintained. Austin v. Debnam, 5 Barn. & C. 141.

Salk. 100. *Vide* Dougl. 449.

In an action of debt on a bond, though the defendant says it was by *duress*, or on an usurious contract, yet there shall be special bail, for the merits of the cause shall not be determined on motion; neither will the court put a slur upon the plaintiff's cause, which ought to come down fairly to trial, without prejudice.

Salk. 100. pl. 10. 12 Mod. 295. *Vide* head of *Gaming*.

So in an action for money won at play, if the contract be lawful, as being under 100*l.*, the defendant must put in special bail. (*a*)

(*a*) There are few cases now where such an action will lie; and query, if for any sum amounting to 10*l.* on games mentioned in the stat. 9 Ann. c. 14.? See that stat. and the several acts of 2 G. 2. c. 28., 12 G. 2. c. 28., 13 G. 2. c. 19., and 18 G. 2. c. 34. See too Young v. Moore, 2 Wils. 67.

[3. *Whether a Defendant can be holden to Bail twice for the same Cause of Action.*

(*b*) Almanzor v. Davilack, 1 Ld. Raym. 679. Com. R. 94. S. C. (*c*) Turton v. Hayes, Stra. 439.; ‖but see Archer v. Champreys, 1 Bro. & B. 283.‖

Regularly, a man cannot be twice arrested for the same cause: and this rule was formerly so rigidly adhered to, that, where the plaintiff was non-prossed for want of a declaration, he could not afterwards arrest the defendant in a second action. (*b*) But a different doctrine now prevails; for the plaintiff is said to suffer enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. (*c*)]

Kearney v. King, 1 Chitt. R. 273.

‖Where the plaintiff is nonsuited for a variance, or for not being able to prove an instrument, he may bring a second action and arrest, though the defendant was arrested in the first.

Salisbury v. Whitehall, Tidd, 178.

So also where defendant after being arrested pleads in abatement the nonjoinder of co-contractors, he may be afterwards arrested jointly with them.

Tuckford v. Maxwell, 6 Term R. 52.

And where the defendant on being arrested gives a draft or new security for the debt, if this is dishonoured he may be re-arrested.

Maule v. Murray, 7 Term R. 470. Imlay v. Ellefsen, 2 East, 453.

And after arrest in a foreign country the defendant may be arrested here, unless it appear that the plaintiff might proceed as beneficially abroad.

And

And so also after an arrest on a *ne exeat regno* in this country, or on a foreign attachment in the Lord Mayor's Court, the defendant may be arrested on process out of other courts. Musgrave v. Medex, 8 Taunt. 24. Wood v. Thomson, 5 Taunt. 851.

If the defendant is arrested by mistake on two separate writs, in separate counties, for the same cause of action, the courts will enter an *exoneretur* on one of the bail-pieces. Powell v. Henderson, 1 Chitt. R. 592; and see Bullock v. Morris, 2 Taunt. 67. Barnes v. Maton, 15 East, 631.

If the plaintiff becomes bankrupt after arresting the defendant, the defendant may be arrested again at suit of the assignees for the same cause of action, unless the former suit were brought by the assignees in the name of the bankrupt. Carter v. Hart, 1 Chitt. R. 276.

After judgment is reversed in error, a party may be legally arrested for the same cause of action. Cartwright v. Keely, 7 Taunt. 192.

And if the defendant is discharged from the first arrest in consequence of an act over which the plaintiff has no control, (as the alteration of the warrant by the sheriff's officer,) he may be arrested again.‖ Housin v. Barrow, 6 Term R. 218.; and see Woodmeston v. Scott, 1 New R. 13. Tidd, 175, 176. (9th edit.)

[Where the bail in the first action are forsworn and insufficient, the court will permit the plaintiff to arrest the defendant again in a second action, even without discontinuing. Olmius v. Delany, 2 Stra. 1216.

Where the plaintiff, having misconceived his action, moves to discontinue upon payment of costs, he may after the costs are taxed and paid (*a*) take out a new writ for the same cause, and arrest the defendant *de novo*. (*b*) (*a*) Belifante v. Levy, 2 Stra. 1209. (*b*) Bates v. Barry, 2 Wils. 381.

‖Molling v. Buckholz, 3 Maule & S. 153. But not if the first arrest is grossly negligent or vexatious. Wheelwright v. Joseph, 5 Maule & S. 93. Archer v. Champneys, 1 Bro. & B. 289. Tidd, 174.‖

But where the plaintiff, not liking the bail in the former action, obtained a side-bar rule for leave to discontinue upon payment of costs, and afterwards proceeded to charge the defendant in custody; the court, conceiving this to be a trick, discharged the side-bar rule; so that the bail still continued liable. Belchier v. Gansell, 4 Burr. 2502.

And wherever the second action appears to be *vexatious* (*c*), or the defendant is arrested or detained in custody therein, after being *superseded* or *supersedable* in a former action by the *laches* (*d*) of the plaintiff, the court will discharge the defendant on common bail. Nor will a promise to pay the debt (*e*) *subsequent* to the *supersedeas* entitle the plaintiff to require special bail.] (*c*) Cox v. Chubb, 2 Black. R. 809. (*d*) Chambers v. Robinson, 2 Stra. 782. Maud v. Branthwaite, *Ibid.* 943. Hall v. Howes, *Ibid.* 1039. Ca. temp. Hardw. 244. S. C. Cratchfield v. Seward, 2 Wils. 93. Blandford v. Foot, Cowp. 72. (*e*) Taylor v. Wasteneyes, 2 Stra. 1218.] ‖Daniel v. Dodd, 8 East, 334.‖

‖And a variation in the form of action (as money had and received, and trover,) will not entitle the plaintiff to a second arrest, if the substance of the cause of action is the same.‖ Imlay v. Ellefsen, 3 East, 309.

[In an action of debt on a judgment, whether after verdict or by default, the defendant cannot be arrested, if he was previously arrested in the original action; even though the bail in 2 Stra. 782. Newton v. Swynmer, Say. R. 43;

that action have since become insolvent (*a*), or the plaintiff has released them by declaring in a different county (*b*), or the defendant has surrendered in their discharge, or obtained a *supersedeas*. (*c*)

(*a*) Bowen v. Barnett, *Ibid.* 160. (*b*) 2 Wils. 95.; but see *contr.* De la Cour v. Read, 2 H. Black. R. 278. (*c*) 2 Strа. 1039. R. H. 8 G. 2. C. B.; but see Cas. pr. C. B. 34.

Nightingale v. Nightingale, 2 Black. R. 1274. Lewis v. Pottle, 4 Term R. 570.

It is now the settled practice as well of the Court of K.B. as of that of C. P., to hold to bail in an action on a judgment, where the damages and costs amount to 10*l.* or upwards, though the original debt or demand were under that sum.

‖This was altered by the 43 G. 3. c. 46. § 1. and now by 7 & 8 G. 4. c. 71. no person shall be held to special bail where the original cause of action does not amount to 20*l.* exclusive of any costs.‖

Sellon's Pr. 49.

So it is now said to be the practice of both courts to hold to bail in an action of debt upon a judgment, notwithstanding error brought, provided no bail was given in the original action.

De Balf v. Mackensie, 2 Strа. 1243.

In an action on a recovery in a foreign court, there shall be only common bail.]

Melan v. Duke de Fitzjames, 1 Bos. & Pull. 138. 2 East, 455. De la Vega v. Vianna, 1 Barn. & Adol. 284. The case *suprà*, in 2 Strа. 1243. was decided on the ground of the recovery abroad being for unliquidated damages, and the affidavit stating it as a judgment *or decree*, and the court did not say how it might be in case of a money *debt*. See the 55 G. 3. c. 54. § 28. as to exemption from arrest of aliens abiding in this country, who quitted their country by reason of the revolution or troubles in *France*.

‖Where the defendant was arrested in this country on an instrument made in *France*, and which, according to the French law, did not subject his person to arrest, it was held by *Eyre* C. J. and *Rooke* J. that he was not liable to be arrested upon it in *England*; *Heath* J. *dissentiente*, on the ground that though a foreign contract was to be construed according to the law of the country where it was made, yet the *remedies* upon it must follow according to the law of the country where the defendant is sued; and this doctrine of *Heath* J. is now confirmed, and the case in 1 Bos. & Pull. 455. overruled.‖

Davies v. Leckie, 1 Barnard. K. B. 94.

[In an action on a judgment of an inferior court, though bail were given in the original action below, yet defendant may be holden to special bail, because no bail has been given in the superior court before.]

Salkeld v. Lands, 2 Bos. & Pull. 416.

‖But it is otherwise if bail were given before in another superior court.‖

Collins v. Powell, 2 Term R. 756. ‖Daniel v. Dodd, 8 East, R. 335.‖

[Where a cause in which the defendant has been arrested is referred to *arbitration*, and the arbitrator awards to the plaintiff a sum exceeding 10*l.* ‖now 20*l.*‖ the defendant may be arrested again in an action upon the award.]

4. *Whether Bail be required in Actions on Penal Statutes.*

Yelv. 55. 2 Brownl. 293.

On a penal statute the defendant is not holden to bail, because the penalty on a statute is in the nature of a *fine* or *amercement* set

set on the party for an offence committed; and therefore no person ought to suffer any inconvenience by reason of such law, till he is convicted of the offence. Comyns, 75. Cas. 48. 12 Mod. 231. Gilb. Hist.C.P.

37. [Several modern statutes expressly require bail. 3 Burr. 1569. 1 Term R. 705.] [And where an action is brought on a *remedial* statute, as on the statute of 9 Ann. c. 14., by the loser for money won at play, the defendant may be holden to bail. Turner v. Warren, 2 Stra. 1079. Andr. 70. S. C.] ‖So also on the stat. 4 G. 2. c. 28. for double value of lands held over. Wheeler v. Copeland, 5 Term R. 364.‖

5. Of Persons who are not required to put in Special Bail.

An heir, executor, or administrator (*a*), shall not be holden to special bail; for the demand is not on the persons, but on the assets of the deceased; and it would be unreasonable to subject their persons to an execution for the debt of another. 2 Brownl. 295. 3 Bulst. 316. (*a*) So though an attorney was plaintiff, and it was pretended he was entitled to have special bail by his privilege- Sid. 62. S. P. *per curiam.*

So if there be a judgment against an executor for the debt *de bonis testatoris*, and for the damages only *de bonis propriis*, he may bring *error*, and have a *supersedeas*, without giving sureties according to 3 Jac. 1. c. 8.; for though the words of the statute are general, yet it must be intended where judgment is against the defendant himself, upon his own bond, or where the judgment is general against the executors; for it would be unreasonable they should find sureties to pay the whole out of their own estate. Cro. Jac. 352. Cro. Car. 59. Lit. R. 2, 3.

Neither is an executor, administrator, or heir, upon the removal of a cause out of an inferior court, obliged to put in bail. 2 Lev. 204. Sid. 418. Lev. 245. 268.

2 Jones, 82. Salk. 98. pl. 4. S. P. *cont.* Lit. R. 81.

[If an heir, executor, or administrator, personally promise and undertake, in writing, to pay any debt or legacy, he is liable to be arrested upon it.] Mackenzie v. Mackenzie, 1 Term R. 716.

So if there be a *devastavit* suggested (*b*), which can only be on an action of debt on a judgment, executors and administrators must find special bail. Lev. 145. Sid. 63. Salk. 98. pl. 4. [(*b*) But it should be an actual *devastavit* returned by the sheriff, or at least grounded on an affidavit. Duprett v. Testard, Carth. 264. A mere suggestion of a *devastavit* is not sufficient. *Ibid.*] *Vide* head of *Executors and Administrators.*

An attorney or other officer, whose attendance is required in the court to which he belongs, shall not be holden to special bail. Mod. 10.

If baron and feme are sued, the husband must put in bail for both; but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged; for otherwise the plaintiff could not proceed to obtain judgment. *Vide* tit. *Baron and Feme*, and Golds. 127. Cro. Eliz. 570. Cro. Jac. 445. Stile, 475. Mod. 8. 6 Mod. 17. Ld. Raym. 73. Salk. 115. pl. 4. 2 Stra. 1272. [Barnes, 96. 1 Term R. 486. 1 H. Black. 235. 1 Wils. 264.] ‖1 Barn. & A. 165.‖ [If the coverture be doubtful, or the defendant have committed any fraud in order to procure credit, she shall not be discharged upon motion; but she must plead her coverture, which plea must be in abatement, not in bar.] ‖Milner v. Milnes, 3 Term R. 631. But it may be in bar if the feme was married at the time the cause of action accrued, or may be given in evidence on the general issue. 1 Camp. 62. 2 Camp. 113.‖ [Pearson v. Mary Meadon, 2 Black. R. 903. Partridge v. Clarke, 5 Term R. 194. Holland v. Ereskine, Barn. 100. 6 Mod. 105. 7 Mod. 10.] —— And where one partner must put in bail for another. Mod. 45.

‖Though

Cooke v. Fry, 1 Barn. & A. 165.; *sed vide* Roberts v. Mason in C. P., 1 Taunt. 254.

‖Though the debt be a liability of the wife before marriage, and the husband has absconded, still the wife, if arrested, is entitled to discharge.

Marshal v. Rutton, 8 Term R. 545. Wardell v. Gooch, 7 East, 582. Wilson v. Serres, 5 Taunt. 307.

And it is the same though she is living separate from her husband, with a separate maintenance.

Hookham v. Chambers, 3 Bro. & Bing. 92.; and see 3 Barn. & C. 291.

Or though she is divorced *a mensâ et thoro*.

Marsh v. Hutchinson, 2 Bos. & Pull. 231. Sparrow v. Carruthers, 2 Black. R. 1197.

But if the husband is civilly dead, or has abjured the realm, or is transported for life or term of years, or has not returned to *England* after the period of transportation, or is an alien resident abroad, the wife may be sued and held to bail as a feme sole.

Carrol v. Blencow, 4 Esp. 27. De Gaillon v. L'Aigle, 1 Bos. & Pull. 357. Franks v. De la Pienne, 2 Esp. Ca. 587. Kay v. Same, 3 Campb. 122.

However, if the alien husband has ever lived with his wife in this country, she cannot be sued alone when he goes to the continent.

Pitt v. Thompson, 1 East, 16. Collins v. Rowed, 1 New R. 54.

If the feme has wilfully deceived the plaintiff by misrepresenting herself as a feme sole, the courts will leave her to plead coverture, and not summarily discharge her; but if the misrepresentation is undesigned, they will discharge her.

Pritchard v. Cowlan, 2 Marsh. 40. Jones v. Lewis, *Ibid.* 585. Holloway v. Lee, 2 Moo. R. 211.

The drawing or acceptance of a bill, is such a representation of herself as a feme sole, as induces the court not to discharge her summarily, unless the party suing knew of her coverture at the time of taking the bill.

Jones v. Lewis, *suprà*.; and see Tidd, 195. (9th ed.)

She must apply for her discharge on *her own* affidavit of coverture.‖

Bailey v. Dillon, 2 Burr. 736. But where the commission, 2 Black. R. 725. Cowp. 824., or certificate, Dougl. 228., appear to be fraudulent, he may be arrested.

[If a bankrupt, having obtained his certificate, conscientiously promise to pay a debt contracted previously to his bankruptcy, he cannot be arrested thereon; for that would be taking advantage of his conscientiousness to use it against conscience. (*a*)

‖(*a*) This reason is unsatisfactory, and would equally shew it to be unconscientious to *sue* upon the new promise. The case in 2 Burr. is, however, confirmed by the case of Peers v. Gadderer, 1 Barn. & C. 116.; but see Blackbourne v. Ogle, 8 Price, 526. Horton v. Moggridge, 6 Taunt. 564. *cont.*, the court there considering that the cause of action being in the new promise, arose subsequent to the discharge. By the late Bankrupt Act, 6 G. 4. c. 16. § 131., the promise must be in writing, signed by the bankrupt, or by some person authorized in writing by him.‖

Turner v. Schomberg, 2 Stra. 1233. ‖Wilson v. Kemp, 3 Maule & S. 595. *acc.*; and see Peers v. Gadderer, 1 Barn. & C. 116.; but see Horton v. Moggridge, 6 Taunt. 563. *cont.*‖

Insolvent debtors and fugitives, discharged under insolvent acts, cannot be holden to bail upon *subsequent* promises to pay debts contracted *before* the time prescribed by the acts; but they may for debts contracted afterwards (*b*), and before they were actually discharged.]

(*b*) Cowp. 527. The sheriff, however, is not bound to take notice of their privilege, Dougl. 671. Nor do the clauses respecting fugitives extend to persons who have constantly resided abroad. 1 Wils. 85.; or who have been abroad, merely in the course of their trade, and not for the purpose of avoiding their creditors. Say. R. 308.

6. *Where*

6. *Where Special Bail is required on removing a Cause out of an inferior Jurisdiction before Judgment.*

Upon the removal of a cause by *habeas corpus* out of any inferior court into the courts above, though the sum be under 10*l.* (*a*), the party must file special bail (*b*), so that the plaintiff may not be in a worse condition than he was in the court below; and the reason hereof is, that those inferior jurisdictions being confined, they cannot follow the debt out of their own jurisdiction; and therefore it is requisite that they should be bail who live within their precincts. (*c*)

Salk. 98. pl. 4. *Vide* title *Courts, and their Jurisdiction in general.* (*a*) *Vide* 19 G. 3. c. 70. ‖ 7 & 8 G. 4. c. 71. raising it to 20*l.*‖ (*b*) But if the cause appears to be vexatious, the court above will consider the *quantum* of the sum in which bail ought to be taken. Salk. 101. pl. 15. 102. 2 Ld. Raym. 767. 7 Mod. 9. 6 Mod. 242. S. P. (*c*) If bail is not in within due time, a *procedendo* issues, and carries the cause back to the inferior court.

If a cause be removed by *habeas corpus* out of the *Marshalsea*, or any other inferior court, and the bail there offer to be bail to the action in the court above, the plaintiff is compellable to take them; because he might, but did not except to them below.

Salk. 97. pl. 1. *per Holt* C. J.

But it is otherwise where the cause comes out of *London*; for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in *London*.

Comb. 1. Skin. 244. pl. 9. Salk. 97. pl. 1. *per Holt* C. J. ‖3 Maul. & S. 328. Tidd's Prac. 403. (8th edit.)‖

If a cause is removed out of an inferior court by *habeas corpus*, and new bail found, and after in the same term it is remanded by *procedendo*, the old bail shall stand; for when a cause is remanded the same term in which it was removed, no record is made thereof.

Cro. Jac. 363. Beston and Buller adjudged, and there said, that Brook, Mainprize, 96., and Procedendo, 16., is so to be understood. Moor, 836. S. C. adjudged. 2 Bulst. 286, 287. S. C. adjudged. Roll. R. 64. S. C. adjudged, notwithstanding the old bail was discharged, and new put in; the new bail being taken off the file and made void the same term, while the record was in the breast and power of the court. *Vide* Cro. Jac. 205. and Yelv. 120. adjudged *cont.* But *per curiam*, it is there said, if the *procedendo* were delivered, &c. before bail given to the superior court, it should be a *supersedeas* to the *habeas corpus*, and the old bail should stand.

Otherwise where it is remanded in another term.

Cro. Jac. 363. Moor, 836. pl. 1128. Roll. R. 64. 2 Bulst. 286. S. C. and S. P. *per cur.*, and Skin. 244. pl. 9. S. P., where it seems agreed generally, that upon such removal the bail below are discharged, for they declare *de novo*.

But where a replevin by plaint was sued in the sheriff's court of *London*, and pledges were found *de retorno habend. si*, &c., and this plaint was removed according to their custom into the mayor's court, and after into the King's Bench by *certiorari*; and there *oyer* of the *certiorari* being demanded, the party declared in *B. R.*, and upon this a return awarded; and upon an *elongat.* returned a *scire facias* went against the pledges in the sheriff's court of *London*: the question was, whether this cause being removed by *certiorari*, the pledges in the inferior court were discharged? and it was held that they were not.

Skin. 244. pl. 9. Dorrington and Edwin adjudged. 2 Show. 421. 485. S. C. adjudged. Mulso v. Shere, Fortesc. 330. S. P.

[By stat. 19 G. 3. c. 70. § 6. no cause under 10*l.* shall be removed into any superior court, unless the defendant who shall be

19 G. 3. c. 70. § 6.

be desirous of removing it, shall enter into a recognizance with two sufficient sureties, for payment of debt and costs, in case judgment shall pass against him.]

7 & 8 G 4. c. 71.

‖By 7 & 8 G. 4. c. 71. all the provisions of 19 G. 3. c. 70. § 6. are extended to actions in inferior courts, under 20*l.* and all acts authorizing arrest in such courts for causes under 20*l.*, are repealed.‖

7. *Of putting in Bail on bringing a Writ of Error.*

3 Jac. 1. c. 8. (*a*) Made perpetual by 3 Car. 1. c. 4. § 4., and the 15 Car. 2. st. 2. c. 2. par. 9. enacts in like manner, That no execution shall be stayed after verdict and judgment in actions for not setting out tithes, actions on the case on any promise for payment of money, trover, covenant, detinue, and trespass.* The 16 & 17 Car. 2. c. 8. par. 3. extends to writs of error on judgments after verdict in dower and ejectment. ‖See 1 G. 4. c. 87. § 3.‖

By the 3 Jac. 1. c. 8. (*a*) it is enacted, "that no execution "shall be stayed or delayed, upon or by any writ of error, or "*supersedeas* thereupon, to be sued for the reversal of any judg- "ment given, or to be given, in any action or bill of debt, upon "any single bond for debt, or upon any obligation with condi- "tion for the payment of money only (*b*), or upon any action or "bill of debt for rent, or upon any contract sued in any of the "courts of *Westminster* (*c*), counties palatine, or great sessions in "*Wales*; unless such person or persons in whose name or names "such writ shall be brought, with two sufficient sureties, such "as the court (wherein such judgment is or shall be given) shall "allow of, shall first, before such stay made, or *supersedeas* "awarded, be bound unto the party for whom any such judg- "ment is or shall be given, by recognizance, to be acknowledged "in the same court, in double the sum adjudged to be recovered "by the said former judgment (*d*), to prosecute the said writ of "error with effect; and also to satisfy and pay (if the said judg- "ment be affirmed) all and singular the debts, damages, and "costs adjudged, or to be adjudged upon the former judgment; "and all costs and damages to be also awarded for the same "delaying of execution."

‖See 1 G. 4. c. 87. § 3.‖ Carth. 121. 3 Lev. 275. [(*b*) The 19 G. 3. c. 70. § 5. enacts, that no writ of error shall be brought on any judgment in any inferior court of record where the damages are under 10*l.*, unless the party bringing it shall be first bound with two sufficient sureties (such as the court wherein such judgment is given shall allow of) unto the party for whom such judgment is given in double the sum adjudged by the former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay, if the said judgment be affirmed, or writ of error be *non-pros'd*, all and singular the debt, damages, and costs adjudged, and all the costs and charges awarded for the delay of execution.] ‖And by 7 & 8 G. 4. c. 71. § 6. the provisions of this statute are extended to all actions in inferior courts for causes of action under 20*l.* exclusive of costs. The expression "causes of action," removes the doubt as to the word "*damages*" in the former statute. 2 Saund. 101. i.‖ (*c*) [A bond given by a third person as a security for the payment of a sum of money by instalments, is a bond conditioned for the payment of money only within this act. Chauvet v. Alfray, 2 Burr. 746. So a bond conditioned for the payment of money according to the true intent and meaning of an indenture, or for the payment of money at such a day, being the same sum mentioned in a certain indenture, is a bond within this act. Littleton v. Hanson, Barnes, 98. Desbordes v. Horsey, 2 Stra. 959. But a bond conditioned for the performance of covenants in an indenture, in which there are other covenants besides that for the payment of money, is not within the act. Gerrard v. Danby, Carth. 28. Show. 14. S. C. Comb. 105. S. C. A bottomry bond, after the contingency hath happened, is in every respect a bond for the payment of money only. Pitt v. Coney, Stra. 476. A bond to pay so much money as *J. S.* shall declare to be due on account

* This statute does not extend to judgment by *default* in any of the actions specified, nor doth either of the others. ‖But the 6 G. 4. c. 96. *supra*, extends to all judgments.‖

account, is within the act; for though the sum be uncertain at the time when the bond was entered into, it is ascertained at the time of bringing the action. Dean and Chapter of St. Paul v. Capell, 1 Lev. 117. 1 Keb. 613. 690. S. C. But a bond to pay for so much beer as shall be delivered to *J. S.*, not exceeding 100*l.* is not so, for here the sum is uncertain, and rests upon a *quantum meruit*. Thrale v. Vaughan, 2 Stra. 1190. Where a defendant had confessed judgment in an action upon a bond conditioned for payment of money only, and afterwards debt was brought upon that judgment, and judgment obtained thereon, it was ruled that, in a writ of error upon this second judgment, bail was not requisite; that this was *casus omissus* out of the act, which was to be taken literally, and not extended by construction. Bidleson v. Whytel, 3 Burr. 1545. 1 Black. R. 506. S. C. So it seemeth that bail is not requisite on a writ of error in parliament upon a judgment in *B. R.* in an action of debt on a recognizance in error. Trinder v. Watson, 3 Burr. 1566. See the case of Christy v. Manucaptors of Anstruther, 8 Mod. 237.] (*c*) On this statute it hath been adjudged, that judgment on an *insimul computasset* was not an action founded on such a contract as comes within it. 2 Bulst. 53. Yelv. 227. So of a debt due by arbitration. *Ibid. per cur.* ‖See the cases on the statutes collected, Petersdorf on Bail, 454. But it is needless to pursue them, since the 6 G. 4. c. 96. has rendered bail in error necessary in all judgments in personal actions.‖ [(*d*) In error on a judgment upon debt on *bond*, the bail need be bound only in the sum recovered, for that is double the sum due. Moor v. Lynch, 1 Wils. 213. It is obvious from the nature of this recognizance, that the bail in error have not the alternative of surrendering the principal; and therefore though the principal become a bankrupt, and be discharged by his bankruptcy, yet the plaintiff may have recourse to them. Southcote v. Braithwaite, 1 Term R. 624.] ‖And so also, though the principal be taken on a *ca. sa.* and in custody, the bail may be proceeded against on their recognizance. Perkins v. Petit, 2 Bos. & Pull. 440. And if the plaintiff in error *non pros* his own writ of error, the recognizance will be forfeited. Dickenson v. Heseltine, 2 Maule & S. 210.‖

‖And now by 6 G. 4. c. 96. intituled "An act for preventing frivolous writs of error," it is enacted, that on *any* judgment hereafter to be given in any of the said courts in *any personal* action, execution shall not be stayed or delayed by writ of error or *supersedeas* thereupon, without the special order of the court or some judge, unless a recognizance with condition, according to the statute 3 Jac. 1. c. 8. be first acknowledged in the same court. 6 G. 4. c. 96.

It is settled that the statutes as to bail in error, only apply to writs of error brought by defendants below, and not to error brought by a plaintiff below on a judgment for the defendant. A person who is plaintiff both below and above need not give bail in error.‖ Baring v. Christie, 5 East, 545.; and see Golding v. Diss, 10 East, 2. 1 Dow. & Ry. 184.

If *A.* becomes bail for *B.* in an inferior court (*a*), and there judgment is given for *B.*, and thereupon the plaintiff brings a writ of error, and that judgment is reversed, and judgment given for the plaintiff against *B.*, the bail is liable; for when the first judgment is reversed, it is as if that judgment had never been, and as if at the first the principal had been condemned in the inferior court. Cro. Jac. 94. *per cur.* (*a*) *A.* became bail for *B.* in the Portmote court of the city of *Chester*, and judgment was there given for *B.*, and upon a writ of error before the justices of the great sessions of the county of *Chester*, that judgment was reversed; and after, upon a writ of error in *B. R.* both judgments were reversed; and it was adjudged, that the plaintiff should recover 50*l.* damages, &c., and it was urged, that *A.* was not liable; for by the reversal there is no judgment in the inferior court against *B.*, and took a difference where the judgment of the inferior court is affirmed, and where reversed. 2 Jones, 96. *adjornatur.*

If *A.* brings a writ of error upon a judgment obtained against him, and according to the 3 Jac. 1. c. 8., *B.* enters into a recognizance, conditioned that *A.* shall prosecute his writ of error with effect, and if judgment shall be affirmed that he shall pay the Cro. Jac. 402. Austen and Monk, adjudged without argument.

Moor, 853. pl. 1165. S.C. and S.P. adjudged *per totam curiam.*

the condemnation, &c. after the judgment is affirmed, *B.* cannot render *A.* the principal, for this manucaption is not to render the body but to pay the debt.

It is now the known and established doctrine.

Roll. Abr. 335. Cro. Jac. 656. S.P. adjudged. Noy, 18. Cro. Eliz. 587. (*a*) In a *scire facias* upon a recognizance against bail, the defendant pleaded a writ of error brought by the principal; and *per cur.*—This is no plea, for the writ of error upon the principal judgment doth not affect the recognizance. But *per Holt* C. J.—I have known an attachment against a town-clerk for proceeding in an inferior court after a writ of error here; but I never took it to be right. Comb. 295.*

If judgment be affirmed upon a writ of error in the Exchequer-chamber (*a*), no execution shall go against the bail in the original action for the costs *occasione dilationis executionis*, and the party might have compelled the defendant in error to put in bail, pursuant to the statute 3 Jac. 1. c. 8.

* Where error is brought, the court, on motion, will stay proceedings against the bail, on terms, according to the nature of the case; *i. e.* if they are in time to surrender the principal, on engaging to pay debt and costs, or surrender within a specific time after affirmance. If too late to surrender, then on engaging to pay debt and costs within a limited time after affirmance, if the judgment shall be affirmed. ‖And the costs of the writ of error, where there are no bail in error. Buchanan v. Alders, 3 East, 546. Copous v. Blyton, 1 New R. 67. Sprang v. Monprivatt, 11 East, 516. Kershaw v. Cartwright, 5 Burr. R. 2819.‖

Salk. 97. pl. 2. Tully and Richardson. 2 Ld. Raym. 840. 7 Mod. 120. 8 Mod. 79. (*b*) *Vide* 2 Bulst. 162. That one in execution is not to be bailed on bringing a writ of error in parliament, because of the uncertainty how long the parliament may continue.

In debt on a bond in C. B. and judgment for the plaintiff, error was brought in *B. R.*, and bail put in according to the statute, and judgment affirmed thereupon, error was brought in parliament (*b*), and the clerk of the errors refused to allow the writ, unless the party would give a new recognizance. It was objected, that it was not required by 3 Jac. 1. c. 8. But *per cur.*—The first recognizance does not include payment of costs to be assessed in the House of Lords, and these costs ought to be paid, and therefore a new recognizance ought to be given within the intent of the statute; and it is not the business of this court to examine whether bail was put in upon the first writ, for the want of that does not hinder the process of the writ of error, but only makes it no *supersedeas.*

Cro. Jac. 108. Cro. Eliz. 731. (*c*) By a rule of *B. R.* every attorney who shall sue out any writ of error on any judgment of this court, returnable in the Exchequer-chamber, shall forthwith allow such writ of error with the clerk of the errors of this court for the time being; and in case where special bail shall be required, if the plaintiff upon such writ of error do not, within four days after allowance thereof, put in special bail thereon, the plaintiff in the action may proceed to take out execution notwithstanding such writ of error; and where special bail is put in, the plaintiff or his attorney must forthwith give notice thereof to the defendant in error, or his attorney; and if the defendant in error do not except against such bail within twenty days after such notice given, such bail shall be allowed. By a rule in C. B., Mich. 6 G. 2., in all cases where bail shall be filed on writs of error, such bail shall be perfected within four days after exception taken thereto; or in default thereof the clerk of the errors of this court shall *non-pros* such writ of error.*

If there is a judgment in *B. R.*, and the defendant is taken in execution, and after brings error in the Exchequer-chamber, and the record is removed, he cannot be bailed in *B. R.* (*c*), because there is no record there; nor can he be bailed in the Exchequer-chamber, for they have authority only to affirm or reverse the judgment.

* The allowance of a writ of error before execution, is of itself a *supersedeas* to execution; and I conceive the court would set aside the execution, if executed after allowance of a writ

a writ of error, though there was not any notice given. The intent of notice is, to subject the attorney for the defendant in error to an attachment, if he should dare, after notice, to levy an execution.

Upon a writ of error of a judgment in *Ireland*, the record being removed in *B. R.*, the court took bail here, and sent directions to have the defendant set at liberty there. Palm. 286. ‖The writ of error from the K. B. in *Ireland* to the K. B. in *England* is abolished. 23 G. 3. c. 28. § 2.‖

‖The words "*with sureties*," in the 3 Jac. 1. c. 8. are construed to mean *by* sureties; and therefore the plaintiff in error need not join in the recognizance. Dixon v. Dixon, 2 Bos. & Pull. 443.

A recognizance of bail in error for less than double the amount, does not operate as a *supersedeas*; and the court will not permit the bail-piece to be amended by enlarging the penalty in order to defeat an execution sued out. Read v. Cooper, 5 Taunt. 320. Phillipson v. Browne, Chitt. R. 105.; and see Petersdorf on Bail, 462.

In ejectment, the plaintiff in error may enter into the recognizance himself, pursuant to 16 & 17 Car. 2. c. 8. § 3.; or, according to a reasonable construction of the act, he may procure two responsible persons to become bail for him. And the sum is in K. B. generally double the improved rent, and the single costs of the ejectment; but in C. P. the recognizance is taken in two years' rent or profits, and double costs. Keene v. Deardon, 8 East, 298. Barnes, 103. 7 Taunt. 427. As to putting in and justifying bail in error, see Petersdorf on Bail, 464., and the cases there collected.

Bail in error in ejectment are not chargeable with *mesne* profits, unless the amount has first been ascertained on a writ of enquiry pursuant to the 16 & 17 Car. 2. c. 1. § 4.‖ Doe v. Reynolds, 1 Maule & S. 247.

8. *Common Bail, in what Cases necessary.*

The filing of common bail is necessary, that it may appear that the court had conusance of the cause. But where the want of it is error, *vide* title *Error*, and Hob. 264.

[Common bail in K. B. is entered on a piece of parchment, called a bail-piece, with a triple sixpenny stamp, and filed with the clerk of the common bails; who, by a rule of *Easter*, 30 G. 3. 3 Term R. 660., is to mark the bail-pieces numerically as they are received.]

If a prisoner be discharged for want of being declared against within two terms (*a*), or upon *nonprossing* the plaintiff, or if he surrender himself in discharge of his bail, and is not charged within two terms; in all these cases he must file common bail, that it may appear by the acts of the court that he was actually in court when discharged. *Vide* Salk. 98. pl. 5. and the stat. 4 & 5 W. & M. c. 21. ‖Tidd's Prac. 375. (8th ed.)‖ (*a*) Formerly three terms. Cro. Jac. 620.

By the rules of *B. R.* no attorney shall be compelled to appear or file common bail for any defendant, unless such attorney hath by a note in writing under his hand undertaken so to do (*b*), and such note produced by the plaintiff's attorney; but if any attorney hath accepted a warrant to appear for the defendant, (which warrant be in nowise revoked,) or hath subscribed the same, and do not cause bail to be filed accordingly, such attorney shall be compelled R. M. 1654. § 10. (*b*) *Sed qu.* If the court, on motion, will not compel an appearance on a parol undertaking, unless

in particular cases? ‖2 Chit. R. 36.‖ And see 1 Stra. 114. *acc.*

compelled to file common bail of the proper term (*c*), and take a declaration and plead to the same; or, in default of pleading, judgment may be entered by default, if rules for pleading have been given; for that the default of the defendant or his attorney shall not tend to the plaintiff's prejudice.

(*c*) By the 5 W. & M. c. 21. § 3. the defendant shall cause an appearance or common bail to be entered or filed within eight days after the return of the process, or penalty of 5*l.* to be paid to the plaintiff, for which the court shall immediately award judgment, and the plaintiff may take out execution. 5 Mod. 392. 2 Stra. 737.

12 G. 1. c. 29. But common bail thus filed is not such a general bringing the defendant into court as to warrant delivering a declaration by the bye; and therefore to prevent mistakes, these words are

[Before the statute of 12 G. 1. c. 29. common bail could only have been filed, or a common appearance entered by the defendant, or his attorney. But now, by that statute, as altered by 5 G. 2. c. 27., "if the defendant, having been served with process, shall not appear at the return thereof, or within eight "days after such return, the plaintiff, upon affidavit of the service of such process, made before a judge, or commissioner of "the court for taking affidavits, or before the proper officer for "entering common appearances, or his deputy, (which affidavit "shall be filed *gratis*,) may enter a common appearance, or file "common bail for the defendant; and proceed thereon, as if "such defendant had entered his appearance, or filed common "bail."]

written on the bail-piece, "filed according to the statute." 2 Stra. 1027. Cas. temp. Hardw. 207. Bail filed under this act must be filed *of the term* in which the writ is returnable; if of a *subsequent term*, the cause is out of court. Edgar v. Farmer, Ca. temp. Hardw. 138. Smith v. Painter, 2 Term R. 719. Common bail may be filed, or a common appearance entered, by the plaintiff's attorney, without his entering or filing of record a memorandum, or minute of his warrant, pursuant to the 25 G. 3. c. 80. § 22. But the defendant's attorney must not plead or carry on any further proceedings in the action until such *memorandum* or *minute* shall have been delivered to the proper officer to be entered or filed of record according to the directions of the 23d section of that act. ‖Tidd's Prac. 243. (8th edit.)‖

7 & G. 4. c. 71. § 5.

‖And now, by the statute 7 & 8 G. 4. c. 71. § 5. reciting that the provisions of the said acts authorizing plaintiffs in default of appearance of defendants to enter a common appearance or file common bail as therein directed, are not deemed to extend to proceedings by original and other writs, whereupon no *capias* is issued, and that it is expedient to extend the provisions of the said former acts to such proceedings, it is enacted, that in all cases where the plaintiff or plaintiffs shall proceed by original or other writ, and summons or attachment thereupon, or by *subpœna* and attachment thereupon, in any action at law against any person or persons not having privilege of parliament, no writ of *distringas* shall issue, for default of appearance, but the defendant or defendants shall be served personally with the summons or attachment, at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service, to the effect following: —

"*C. D.* [*naming the defendant,*] you are served with this "process at the suit of *A. B.*, [*naming the plaintiff or plaintiffs,*] "to the intent that you may appear by your attorney in his "majesty's court of ————, at *Westminster*, at the return "hereof, being the —— day of ————, in order to your "defence

" defence in this action: and take notice, that in default of your " appearance, the said *A. B.* will cause an appearance to be " entered for you, and proceed thereon as if you had yourself " appeared by your attorney." But in case it shall be made to appear to the satisfaction of the court, or, in the vacation, of any judge of the court from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant or defendants, that then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the court, or order of such judge as aforesaid, to sue out a writ of *distringas* to compel the appearance of such defendant or defendants, and that at the time of the execution of such writ of *distringas*, there shall be served on the defendant or defendants, by the officer executing such writ, if he, she, or they can be met with; or if he, she, or they cannot then be met with, there shall be left at his, her, or their dwelling-house, or other place where such *distringas* shall be executed, a written notice, in the following form: —

" In the court of ————, [*specifying the court in which* " *the cause shall be depending,*] between *A. B.* plaintiff, and " *C. D.* [*naming the parties.*] Take notice, that I have this day " distrained upon your goods and chattels, for the sum of forty " shillings, in consequence of your not having appeared by your " attorney in the said court at the return of a writ of ———, " returnable there on the —— day of ————; and that in " default of your appearing to the present writ of *distringas*, at " the return thereof, being the —— day of ————, the said " *A. B.* will cause an appearance to be entered for you, and pro- " ceed thereon as if you had yourself appeared by your attorney. " *E. F.* [*the name of the sheriff's officer.*]"

" To *C. D.*, [*the above-named defendant.*]"

And if such defendant or defendants shall not appear at the return of such original or other writ, or of such *distringas*, as the case may be, or within eight days after the return thereof, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made, and filed in the proper court, of the personal service of such summons or attachment, and notice written on the foot thereof as aforesaid, or of the due execution of such *distringas*, and of the service of such notice, as is thereby directed on the execution of such *distringas*, as the case may be, to enter a common appearance for the defendant or defendants, and to proceed thereon as if such defendant or defendants had entered his, her, or their appearance, any law or usage to the contrary notwithstanding; and that such affidavit or affidavits may be made before any judge or commissioner of the court out of or into which such writs shall issue or be returnable, authorized to take affidavits in such court, or else before the proper officer for entering common appearances in such court, or his lawful deputy; and which affidavit is thereby directed to be filed gratis.‖

See Tidd, 114. (9th ed.)

Salk. 99. pl. 8. Carth. 519. Holt, 127. pl. 1. 12 Mod. 320. 380. R. M. 8 Ann.

In an action upon a recognizance of bail, or upon a bail or replevin bond, common bail only shall be filed.

2 Show. 249. pl. 253., and such a judgment actually set aside.

A judgment in ejectment against the casual ejector is erroneous, unless a *latitat* was sued out, and common bail filed for him. (*a*)

(*a*) This is not now law. If judgment goes against the casual ejector there is not any defendant in court to bring error. If the tenant or landlord appears, he enters into the common rule to confess lease, entry, and ouster, and instantly pleads the general issue. The declaration in ejectments is in the nature of process only. ‖Adams on Ejectment, 221.‖

R. H. 1 W. & M. R. T. 4 W. & M.

[It is necessary to authorize judgments by warrant of attorney, default, or *non sum informatus*.]

(C) Where Bail shall be said to be put in regularly: and herein,

1. *Of the Manner of putting in, excepting to, and justifying Bail.*

Salk. 98. 6 Mod. 24, 25.

BY the printed rules of the courts, every attorney who shall appear for any defendant in any action in which special bail is not required, shall duly file common bail for such defendant, of the term of which he appears (*b*), and give notice thereof to the plaintiff or his attorney; and where special is required and put in *be bene esse* (*c*), before any judge or commissioner on a *capi corpus*, the defendant's attorney shall forthwith give notice (*d*) thereof in writing to the plaintiff or his attorney, and of the names of such bail, with their additions and places of habitation; and if no exception be taken to such bail, and entered in the judge's book within twenty days after such notice (*e*), then upon oath thereof made, for which no fee is to be taken, such bail shall be filed; and if special bail shall be put in before any judge *de bene esse*, on any writ of *habeas corpus* or *certiorari*, and no rule for better bail, or exception taken, or entered in the judge's book, against the bail so put in, within twenty-eight days after putting in such bail, then such bail shall be filed by the defendant's attorney after the end of the said twenty-eight days.

[(*b*) *Vide suprà*.

(*c*) The origin of bail *de bene esse* is thus related by *Glynn* C. J. "A bishop," says he, "having arrested a man for a large debt, he tendered bail to Justice *Richardson*, who took it in his chamber, and the bail being insufficient, the bishop represented the matter to parliament, and prayed their remedy for it; upon which it was enacted, that no bail taken before a judge in his chamber should bind the plaintiff without his assent thereto, or the confirmation of such bail taken, by all the court." 2 Sid. 91. R. M. 1654. § 7, 8.

(*d*) The notice of bail is, either that they are put in, or, if taken before a commissioner, that the bail-piece is *filed*, with an affidavit of the due taking thereof, at a judge's chambers. Imp. 124. The notice in either case should be properly entitled. Lofft. 257. The *parish*, or *town* wherein they live, without the *street*, or other certain place of their residence, is too vague a description. *Id.* 72. 194. *Per cur.* M. 25 G. 3. If the bail above are the same persons who were bail to the sheriff, it is usually so expressed in the notice. Imp. 118.] ‖As to the requisites of the notice, see Petersdorf, 294. Tidd's Prac. 265., (8th edit.)‖

(*e*) At the expiration of twenty days, without any exception, the bail is filed in court: but if the defendant except and give notice thereof, the defendant's attorney must bring up the bail-piece, and the bail must justify in court; and *note*, That in the Common Pleas the bail-piece remains with the filazer till the twenty days are expired; but in the King's Bench it is left with the judge, because judges of that court determine all matters relating to their prisoners. And for the difference of the manner of taking bail, and the form of the recognizance in each court, *vide* Cro. Jac. 449. 645. Cro. Car. 481. 2 Bulstr. 232. Roll. Rep. 387. 2 Show. 335. 2 Salk. 564. The like time to except where the plaintiff puts in bail upon bringing a writ of error. Salk. 98. [No notice necessary in C. P. if bail put in, *in due time*; otherwise it is so. Dawkins v. Reid, 1 H. Black. R. 529.] ‖But now by Rule E. 49 G. 3. C. P. 1 Taunt. 616. notice is necessary.‖

[When

[When the bail already put in do not mean to justify, others should be *added*, before a judge, on the bail-piece by bill, or in the filazer's book by *original*, within the time allowed for their justification: and if there be not time enough, the defendant's attorney may take out a summons, and obtain an order for further time; and they must actually become bail before the notice of justification is given. When other bail are added, the court will order the names of those who were excepted to, and did not justify, to be struck out of the bail-piece. But until this be done, they are liable to be proceeded against, and may also surrender the principal. And if it be not done till after proceedings have been had against them, they must pay the costs of such proceedings.

Tidd's Prac. 264. (8th ed.) Imp. 119. 1 H. Black. R. 291. Say. R. 58. 1 Wils. 337. S. C. Say. R. 338. 5 Term R. 633. 1 Black. R. 462. 4 Burr 2107.

The bail justify either in *person*, or by *affidavit*. If they live in *London* or *Westminster*, they must justify in *person*, and in *open* court, ‖now in the Bail Court, pursuant to 57 G. 3. c. 11.‖ unless the plaintiff consent to their justifying before a judge at his chambers. If they live at a greater distance, they may be justified, without their personal attendance, by affidavit duly taken before a commissioner. In both cases, they must swear that they are housekeepers, and respectively worth double the sum sworn to, after all their debts are paid.

6 Mod. 24. 2 Black. R. 1064. R. T. 8 W. 3. Reg. 3. 5. R. E. 5 G. 2. Reg. 1.; ‖and see, as to opposing and justifying bail, Tidd's Prac. 256., *et seq.* (9th edit.) Petersdorf, 326.‖

The notice of justification should set forth, that the bail already put in will, on a certain day, justify themselves in open court, or that others will be added, and justify themselves, as good bail for the defendant. And if the bail were put in before a commissioner, the notice should express that they will justify themselves by *affidavit*.

Imp. 124. *Id.* 119.

Notice of justification by *three* bail has been holden good: ‖in the K. B. but it is otherwise in C. B.‖ but notice that *A.*, *B.*, and *C.*, or *two* of them, will justify, is irregular.

Imp. Lofft. 26. Tidd, 266. (9th ed.)

Where the bail already put in intend to justify, *one* day's previous notice of justification, or notice for the next day, is deemed sufficient; unless *Sunday* intervene, and then notice must be given on *Saturday* for *Monday*. But where other bail are added to those already put in, there must be *two* days' previous notice of justification; one *inclusive*, and the other *exclusive*, as *Monday* for *Wednesday*, *&c.* And *Sunday* is not reckoned as a day for this purpose; therefore notice of added bail on *Saturday* for *Monday* is not sufficient.

Imp. 119. *Ibid. per cur.* M. 21 G. 3. Imp. 125. Case of Overton's bail, M. 26 G. 3.

Bail may be put in on a *dies non juridicus*.

Baddeley v. Adams, 5 Term R. 170.

One ground of opposing bail is, some defect in the *form*, or irregularity in the *service* of the notice of justification.

Vide suprà. ‖Tidd's Prac. 265, 266. (9th edit.)‖

Another ground is, that they have assumed names that are either feigned, or belong to other persons. If they assume feigned names, the court will order them, and the attorney, to be set on the pillory.

1 Stra. 384. And by stat. 21 J. 1. c. 26. § 2. "If any person shall acknowledge or procure to be acknowledged, any recognizance of bail, in the name of another person not privy or consenting to the same;" or (by stat. 4 & 5 W. & M. c. 4. § 4.) before a commissioner

" commissioner shall represent or personate another person, whereby he may be liable to the " payment of any debt or damages, he shall, on conviction, suffer death as a felon, without " benefit of clergy." ‖27 G. 3. c. 43. extends these provisions to taking bail in *Chester*.‖ But the court will not vacate the proceedings against the party personated until the offender be convicted. 1 Ld. Raym. 475. Nor can a conviction take place until the bail-piece be filed. 2 Sid. 90. ‖And the mere personating bail before a judge in chambers, which is not filed of record, appears only a misdemeanor. 1 Hale, 696.‖

Lofft. 148. *Id.* 528. ‖See 1 Chitt. R. 6. 502. 1 B. Moo. 529. 2 Price, 8. Tidd's Prac., 268. (9th edit.)‖

A third ground is, that they are not housekeepers: but if they are, the rent of their houses is immaterial, though under ten pounds: nor is it necessary that they should have been assessed to the poor's rate.

Tidd's Prac. ‖269. (9th ed.)‖ Mountain v. Wilkins, M. 21 G. 3. M. 26 G. 3. Lofft. 72. 194. 3 Black. Com. 956. Cro. Car. 146. ‖2 Chitt. R. 80. 95. 1 Chitt. R. 573.‖

A fourth ground is, that they are not worth double the sum sworn to, after payment of all their debts. Under this head may be ranked bankrupts who have not obtained their certificates; or such as have been twice bankrupts, and not paid fifteen shillings in the pound. And bail have been rejected, who did not know the defendant; or had been bail before, but did not know in how many actions, or for what sums. But it seems, that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away. Their living within the verge of the court is an objection, but not sufficient without other suspicious circumstances. If they forswear themselves, they are liable to the punishment of wilful and corrupt perjury.

4 Burr. 2526. Lofft. 34. 147. 1 Black. R. 444.; and see 2 Black. R. 1325. ‖8 Taunt. 148.

Fifthly, Foreigners are not admitted to be bail, merely in respect of property *abroad*, which is not liable to the process of our courts. Though it has been said, that merely having no property in *England*, is not of itself a sufficient objection, without other auxiliary circumstances. 4 Maule & S. 173. 371. 1 Chitt. R. 285. n.‖

K. B. R. M. 1654. J. 1. C. B. M. 6 G. 2. Dougl. 466. 1 H. Black. R. 76. Tidd's Prac. 140, 141. ‖Petersdorf on Bail, 271, 272.‖

Sixthly, No attorney, or his clerk, can be bail: neither can any sheriff's officer, or person concerned in the execution of process, keeper of the *Poultry* Compter, or *Marshalsea* Court officers. But if a person who, by the rules of the court, is not permitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in. Thomson v. Roubell, *B. R.*, E. 22 G. 3. cited in Dougl. 466. ‖And the exclusion is confined to attorneys who practise. Anon. 1 Chitt. R. 714.; and see Petersdorf, 270.‖

4 Term R. 440.

Seventhly, Persons outlawed after judgment, or convicted of perjury, cannot be bail.

1 Dow. & Ry. 127. 2 Marsh. R. 232. 4 Taunt. 228.

‖Servants of the king, peers of the realm, members of the House of Commons, officers of the courts of justice, persons living within the verge of the palace, being respectively exempt from the ordinary process of the law, are not competent to justify as bail.‖

Tidd's Prac. ‖c. 13. (9th ed.)‖

Lastly, The court will not permit a justification of bail, after the expiration of the rule to bring in the body.

R. 3 & 4 G. 2. C. B. Barnes,

If special bail put in by defendant be excepted to, the defendant shall perfect his bail within four days after such exception

tion taken, in default whereof the plaintiff may proceed upon the bail-bond. In *B. R.*, if notice of exception is in term, bail must justify in four days, or add others that will justify. If exception and notice be in vacation, justification to be the first day of next term. E. 5 G. 2. If notice of exception in vacation, justification to be on first day of term, as in *B. R.* [Of the four days allowed to perfect bail after exception, the first is reckoned exclusively, and the last inclusively. So that where the exception was on a *Wednesday*, an attachment against the sheriff could not regularly issue till the *Tuesday* following (*Sunday* being no day). But though the attachment did issue on the *Monday*, the court would not set it aside, because the bail were not perfected.

74. 82. ‖Tidd, 257. (9th ed.)‖

2 H. Black. R. 55. ‖*Sed vide* 1 New R. 139. *contrà*.‖

Where the bail do not attend, or are not permitted to justify on account of a defect in the notice of bail, or justification, the court will, in general, allow them further time to justify. But where they are rejected on account of some personal insufficiency, the court will seldom allow further time to add and justify others. And if the bail do not justify at the time appointed, and no further time is given, they are out of court.]

Lofft. 72. 187. *Per cur.* M. 25. G. 3. Tidd's Prac. 272. (9th ed.) *Ibid. et Per cur.* 24 G. 3. 1 Crompt. 66. 7 Mod. 50.

If the plaintiff accepts the bail, he may take away the bail-piece from the judge's chamber, and file it for his own expedition, but after twenty days it becomes absolute, and the defendant takes it away and files it.

2. *To what Time it shall have Relation.*

In *B. R.* though the bail of the defendant be taken and entered the last day of the term, and the bill be put in at any time the same term, this is well enough by the course of that court; though in strictness of law the defendant is answerable but from the time of putting in bail as *in custodiâ mareschalli*, and not before.

Roll. Abr. 333. Hob. 70. S. C. adjudged. Cro. Jac. 384. S. C. adjudged; because the bill, whensoever filed, hath relation to the first day of the term.

If in trover commenced in *Hilary* term, the conversion is alleged to be the 3d of *February* in the same term, and bail is filed the last day of the term, yet this is well enough, for the action shall not be said to be depending until the bill is filed. (*a*)

Vent. 135. adjudged. (*a*) But the bill should be of a particular day, subsequent to the 3d of *February*.

Bail was put in one term, and new bail added the next term after; and the question was, If this should be bail of the first term, or only of the term when added? About which the clerks differed; but the court was of opinion, that it was only bail of that term when the additional bail was put in, for they said it was not bail till completed and accepted (*b*), and making the additional bail to be bail of the first term, might do a wrong to a third person (*c*), who might be a purchaser after the first, and before the additional bail was put in.

R. E. 5 G. 2. Reg. 1. b. Salk. 100. pl. 12. (*b*) It seems now to be the established practice, that every bail taken before or upon the continuance-day shall be a bail, and filed of the precedent term; and every bail taken after the continuance-day shall be a bail, and filed of the subsequent term, and not otherwise: but where any new bail is added to any other, but so as aforesaid taken on or before the continuance-day, the same shall be taken and filed as of that term in which the bail was first put in. [As to the continuance-day, see R. E. 11 W. 3. Reg. 2. 2 Stra. 1215.] (*c*) For this *vide* Cro. Jac. 449. 2 Salk. 564.

3. *Where a different Action is prosecuted from that in which the Bail was given.*

3 Lev. 235. Yates and Plaintain adjudged, and agreed by the prothonotaries,

If there be an original and *capias* in one county, and bail thereupon filed, and the plaintiff after declares in another county, and thereupon obtains judgment, by this variation the bail are discharged, and not liable to the damages upon this declaration, though by the course of the court the plaintiff might declare in another account and the judgment would be good.*

* This relates to proceedings in C. P. or *B. R.* by original. ‖In the K. B. the bail are in such case discharged, but not in C. B. nor in K. B. by *bill*. 1 B. Moo. 115. Tidd's Prac. 294. (9th edit.)‖ But if the proceedings be in *B. R.* by bill of *Middlesex* or *latitat*, the bail will not be discharged for such variation. [Nor will they be discharged for a variance between the *capias* and count in C. P., the *ac etiam* being *in case on promises*, but the declaration *in debt, if the sum sworn to be under 40l.* Lockwood v. Hill, 1 H. Black. R. 510. ‖Unless the amount for which bail must be taken exceeds 40*l.*, in which case they will be discharged. Mayfield v. Davison, 10 Barn. & C. 225.‖ Nor for a variance between the sum in the *ac etiam* part of the *latitat* and the declaration. Turing v. Jones, 5 Term R. 402. But where the writ was in plaintiff's *own right*, and the defendant holden to bail for 120*l.* due *in that right*, but the declaration was *as executor*, a common appearance was ordered. Hally v. Tipping, 3 Wils. 61. ‖See 3 Term R. 416. 6 B. Moo. 66. 5 Bro. & B. 4. But it is now settled not to be a ground for exonerating the bail. Ashworth v. Ryal, 1 Barn. & Adol. 19. And a variance between the *ac etiam* part of the writ and the declaration, as to the cause of action where the amount is above 40*l.*, will discharge the bail, as if the writ be in *case* and the declaration in *debt*. Levett v. Kibblewhite, 6 Taunt. 483., or *vice versâ*, *ibid.* or the writ in *assumpsit*, and the declaration in *trover*. Fetherington v. Goulding, 7 Term R. 80. Delacour v. Read, 2 H. Black. 278. If no sum whatever be inserted in the *ac etiam* of the writ, the proceedings will be irregular. Davison v. Frost, 2 East. 305.‖

Gunn v. Mackhenry, 1 Wils. 277.

[Although the plaintiff declare in an inferior court in debt upon a *concessit solvere*, and the cause being removed into *B. R.* he declare there in case, yet by this variance he doth not lose the bail, for it is the very same cause of action; for if he declare in the superior court in the former way, the defendant may wage his law, which he cannot do in the court below.]

2 Show. 335. pl. 345. Resolved on motion; but how

If *A.* arrests *B.* in an action of 20*l.*, and bail is put in thereto, and afterwards *A.* delivers two declarations, one for 200*l.* and another for 500*l.*, the bail shall be only liable for the 200*l.*

far the bail on a *latitat* have been holden liable in other actions at the suit of the same or other persons, *vide* Cro. Jac. 449. 451. Stile, 464. 2 Sid. 163. 2 Jones, 188. Mod. 16. Comyns, 556. pl. 335. 2 Stra. 922. 2 Barnard. K. B. 44. [It is now settled by rule of E. 5 G. 2. that "where the plaintiff declares for or recovers a *greater* sum than is expressed in the pro- "cess upon which he declares, the bail shall not be discharged; but be liable for so much as "is sworn to, and indorsed on the process, or for any *less* sum which the plaintiff in such "action shall recover;" and also, by subsequent determinations, for the costs of the original action. Jackson v. Hassel, Dougl. 530. Peterken v. Sampson, *B. R.* M. 24 G. 3. Sheddon v. Curnes, *B. R.* E. 29 G. 3. See Tidd's Prac.]‖ 294. (9th edit.)‖

Salk. 102. pl. 16. now otherwise, *vide suprà*.

A. brought a bill of *Middlesex*, with an *ac etiam* for 40*l.*, and recovered 100*l.*; and the court held, that the bail should not be liable for more than the *ac etiam*, which was the measure of his undertaking: and per *Holt* C. J. — he is not liable at all; for his recognizance is to answer the condemnation, and since that cannot be, he is bound to nothing; and *Clerk*, secondary, affirmed, that there was a rule of court, that where the plaintiff recovers a greater sum than is laid in the action, the bail shall not be chargeable in *ista actione*.

4. *What*

4. *What Defect or Irregularity may be amended.*

If bail in debt is entered in this manner, *viz. sub pœnâ executionis in adjudicatione executionis*, where it ought to have been *sub pœnâ condemnationis* (*a*), yet it shall stand as well for the judgment as for the execution: adjudged upon a writ of error; and it was ordered to be amended, and made *sub pœnâ executionis judicii*, as well as for the execution.

Cro. Jac. 272.

(*a*) For bail cannot be taken for part, *viz.* the execution and not the judgment, no more than for part of the debt. Bulstr. 107.

If two are arrested on a *latitat*, and one puts in bail in *Michaelmas* term, and the other of the term subsequent, the court will allow the bail put in of the *Michaelmas* term to be filed as put in of the subsequent term; for otherwise it would be error to proceed in a joint action on bail put in at different terms.

Latch. 182. So ruled on motion. *Vide* Cro. Eliz. 459.

If a writ be taken out in the name of *A.*, and the officer takes a bail-bond to appear at the suit of *B.*, and after there is a *reddidit se*, by the same name; though this be *vitium scriptoris* in not making the bail-bond according to the writ, yet it cannot be amended, for the bail must be according to the bail-bond, and not according to the writ.

6 Mod. 309. *per cur.* Barnardiston and *Vic. Middlesex*, *vide* tit. *Amendment.*

(D) Of the Proceedings against the Bail, and what Matters they may plead in their Discharge.

THE act of the court in delivering the defendant to bail being of record, entitles the plaintiff to a *scire facias*, when it appears that the defendant has not satisfied the judgment; a *capias* (*b*) must therefore be returned against the principal, before the *scire facias* is to issue against the bail.

(*b*) Roll. Abr. 308. 333. Moor. 432. Cro. Eliz. 597. Goldsb. 174. But this is resolved and admitted in so many books, that it seems needless to cite them. *Vide* 1 Lev. 225. That it must issue and be returned, but may be filed at any time after; — and that it must be awarded within the year, else not till a *scire facias* against the principal. — 2 Jones, 96. (Adjoined.) —— And *note*, that every *capias ad satisfaciendum* to warrant a *scire facias* against bail, must have seven days at the least exclusive betwixt the *teste* and the return thereof; and every such *capias* is to be delivered and left with the sheriff to whom it is directed, four days exclusive at least before the return, ‖and they must be the last four days before the return, Cock v. Brockhurst, 13 East, 588.; and Sunday is not reckoned, though the last day. Howard v. Smith, 1 Barn. & Ald. 528. Furnell v. Smith, 7 Barn. & C. 693.; and see 2 Chitt. R. 102. 5 Maule & S. 323.‖ *Vide* 2 Salk. 602. pl. 12. 2 Ld. Raym. 1176. That there ought to be eight days between the *teste* and return. [A *capias* tested the term prior to that in which judgment is signed against the principal, will not warrant proceedings against the bail. 1 H. Black. R. 74. The *capias* against the principal is now considered as little more than matter of form, and chiefly intended to intimate to the bail in what species of execution the plaintiff means to proceed; and the leaving it in the sheriff's office, being a notice to the bail that the plaintiff will proceed against the person of the defendant, it is incumbent on the bail to search there for it: and the court will not enter into an examination by affidavit, whether the *ca. sa.* was actually returned, or such return actually filed, *before* the issuing of the *scire facias* against the bail: for though the bail plead to the *scire facias* that no *ca. sa.* was returned and filed *before* the teste of the *scire facias*, such return may be filed at any time before putting in a replication. 3 Burr. 1360.] ‖The sheriff may return *non est inventus*, though he knows where the defendant is; but not if he has him in actual custody at another suit, or on a criminal charge. Burks v. Main, 16 East, 2. Forsyth v. Marriot, 1 New R. 251. Ward v. Brunfit, 2 Maule & S. 238.; and see Dudlow v. Watchorn, 16 East, 39.‖

Thackray v. Harris, 1 Barn. & Ald. 212.

‖And where a *capias ad sat.* was lodged, and returned *non est inventus*, and proceedings were had against the bail, bu they surrendered in time, and the defendant was then bailed again and discharged, the court held, that a fresh *ca. sa.* was necessary, in order to proceed against the last bail.

Dudley v. Stokes, 2 Black. R. 1183. Miller v. Newbald, 1 East, 662.

As a writ of error is a stay of all further proceedings, the plaintiff below cannot afterwards sue out a *ca. sa.* in order to proceed against the bail.

Sprang v. Monprivatt, 11 East, 316.

And the bail may plead that a writ of error was sued out after the isuing and before the return of the *ca. sa.*

Sampson v. Brown, 2 East, 459.

1 Anstr. 176. Forr. 25.

Where the writ of error is not allowed till after the return of the *ca. sa.*, the bail may be sued pending the writ, unless an order of court to the contrary has been obtained.‖

Salk. 101. pl. 13. [It was anciently the course of the court not to allow a render after the return of *non est inventus* to a *capias ad satisfaciendum*.

But though on the return of the *capias* the plaintiff is entitled to a *scire facias*, and the recognizance in strictness is forfeited, yet if the defendant render himself at any time before, or on the day of the return of the second *scire facias* against the bail, where two *nihils* are returned, or on or before the day of the return of the first *scire facias* (*a*), where a *scire feci* is returned, *sedente curiâ*, and notice of such render be given to the plaintiff or his attorney, the bail shall be discharged.

Cro. Eliz. 738. But a great mischief resulted from this practice; for the plaintiff would sue out a *capias*, returnable the next day, so that the bail had little or no time to bring in the body. 1 Ld. Raym. 157. To remedy this, the judges indulged the bail so far as to permit them to render the body, upon the return of the first *scire facias*, if the *capias* were returnable *de die in diem*; Cro. Eliz. 618. 738.; but if it were returnable the next term, the bail were strictly holden to render the principal by the return of it. *Ibid.* *Popham* C. J. extended this indulgence still farther; and permitted the bail to render any time before the return of the second *scire facias*, or upon the return, *sedente curiâ*. Cro. Jac. 109. This practice, however, appears to have been disallowed by Lord *Coke*. Mo. 850. 3 Bulstr. 182. S. C. But it was soon after revived by *Croke J.*, and is now fully established. W. Jon. 139. Sty. Rep. 324. 8 Mod. 32. Before the return of the *capias ad satisfaciendum*, the render is a matter of right, and may be pleaded. 1 Ld. Raym. 156. But afterwards it is allowed by the grace and favour of the court, and not *ex debito justitiæ*; for the condition of the recognizance is broken upon the return of *non est inventus* to the *capias*. R. T. 1 Ann. Reg. 2 Ld. Raym. 721., and therefore a subsequent render cannot be pleaded. Kreley v. Medley, M. 24 G. 3. Barnes, 106.; though, if made in time, the bail may be relieved by motion. But if the plaintiff, upon the return of *non est inventus* to the *ca. sa.*, proceed against the bail, and deliver a declaration conditionally; the court will not stay proceedings against the bail on their paying the debt and costs in the original action *only*, but will oblige them to pay the costs of the second action, although they have tendered the original damages and costs before the end of eight days from the return of the *ca. sa.*, within which time, by the practice of the court, they might have discharged themselves by surrendering the principal. Perigal v. Mellish, 5 Term R. 363.] (*a*) How it is to be returned, and how many days there must be between the *teste* and return, *vide* Cro. Eliz. 738. 2 Salk. 599. pl. 7., and tit. *Scire Facias*. ‖Petersdorf on Bail, 356. Tidd, 283. (9th edit.)‖

2 Roll. Abr. 600. 897. Jones, 29. Winch. 61, 62. Godb. 354.

If an action of debt be brought on the recognizance, and the defendant render himself in custody within eight days in full term after the day of the return of the process against the bail, they shall be discharged.

Raym. 14. 2 Show. 77. Salk. 101. pl. 13. 2 Salk. 600. pl. 10. Carth. 515. 6 Mod. 132 8 Mod. 340. Ld. Raym. 721. 3 Salk. 56. pl. 8. ‖An intervening Sunday is reckoned a day. 14 East, 537.‖

If

If the defendant dies (*a*) *before* the return (*b*) of a *capias ad satisfaciendum* against him, his bail pleading the same may be discharged. Roll. Abr. 336. Jones, 29. Cro. Jac. 97. Moor, 432. pl. 607.

775. pl. 1075. Poph. 186. Hut. 47. Stile, 324. (*a*) They may plead that the principal died before any judgment against him, because they cannot have a writ of error to reverse that judgment. Cro. Eliz. 199. adjudged. But 2 Leon. 101., the whole court, except *Wray*, inclined otherwise. And *vide* Godb. 377. Roll. Abr. 742. (*b*) But if he dies after the return of the *capias*, this will not excuse the bail. Roll. Abr. 336. Barnes, 106. 2 Wils. 67. 5 Term R. 363. ‖6 Term R. 284.‖ And where the defendant pleaded that the principal died before the *scire facias* brought, and without more, it was adjudged no good plea. Cro. Jac. 165. Hutt. 47.

‖As the courts will not discharge a defendant on the ground of insanity, so they will not exonerate the bail on that ground.‖ Ibbotson v. Lord Galway, 6 Term R. 133.

If *A.*, as bail, enters into a recognizance that *B.* upon eight days' warning *comparebit* to any action that shall be brought by *C.*, *necnon* that if *B.* shall be condemned in the said action, and does not pay, *&c.* that then he will answer the condemnation, and *C.* does bring an action against *B.*, and he is condemned, and does not pay, *&c.*; in debt upon this recognizance, it must be averred that he gave *B.* eight days' warning to appear, *&c.* for *A.* is bound only to answer the condemnation in such action upon which eight days' warning was given, for that is the foundation of the whole; and there is no reason that *B.*, by his voluntary appearance without warning, should prejudice his bail. Cro. Jac. 45. and Yelv. 52. S. C. by three judges against two in both books, and the plaintiff accordingly discontinued his action.

If a defendant gives judgment with a stay of execution until a certain day, the plaintiff may, notwithstanding such stay of execution, sue forth a *capias ad satisfaciendum* to the sheriff of the county where the action is laid, and returnable before the day, to make out a *testatum* against the defendant; but no such *capias ad satisfaciendum* shall be sued forth to warrant a *scire facias* against the bail (*c*), because it is to the prejudice of a third person. (*c*) Where there was a contrivance between the plaintiff and the principal to free and discharge the principal, and to charge the bail, *vide* Bulstr. 43.

If the plaintiff ‖in C. B.‖ does not declare against the principal within two terms after bail put in, the bail will be discharged, as likewise the principal on filing common bail. Cro. Jac. 620. Salk. 98. pl. 5. 99. Comb. 295. ‖Sykes v. Bauwens, 2 New R. 404. In K. B. though a *non pros* may be signed if the plaintiff do not declare in two terms, yet if it is not signed, the plaintiff has a year to declare in. 2 Term R. 112. 3 Barn. & A. 272.‖

But if after bail put in, and before the plaintiff hath declared, the defendant obtains an injunction, and this is continued for several terms, and after dissolved, and the plaintiff soon after declares and gets judgment, and brings a *scire facias* against the bail, they cannot plead that no declaration was delivered or filed against the principal within two terms after the action commenced and bail entered, for there was no default in the plaintiff that he did not declare sooner. 3 Mod. 274. adjudged between Doe and Dawson. 3 Mod. 315, 316. 3 Will. R. 36.

They are also discharged where the defendant is made a peer of the realm (*d*), or member of the House of Commons (*e*); or where he becomes bankrupt (*g*), and obtains his certificate at any time pending the action, and before the bail are fixed: *secùs*, if not till after they are fixed. And in any of these cases, the court, (*d*) Trinder v. Shirley, Dougl. 45. (*e*) Langridge v. Flood, H. 26 G. 3. (*g*) Woolley v

Cobbe, 1 Burr. 244. Cockerill v. Ouston, *Id.* 436. Martin v. O'Hara, Cowp. 823. ‖Mannin v. Partridge, 14 East, 598. Harmer v. Hagger, 1 Barn. & A. 352. Stapleton v. Macbar, 7 Taunt. 589. Johnson v. Lindsay, 1 Barn. & C. 247. It seems that the bankruptcy and certificate of the principal cannot be pleaded by the bail, but relief will be had on motion, since the bail may surrender. Donelly v. Dunn, 1 Bos. & Pull. 448.‖

court, on motion, will order an *exoneretur* to be entered on the bail-piece.

Linging v. Comyn, 2 Taunt. 246.

‖If a creditor having obtained judgment proves his debt under the commission, and then proceeds against the bail, they are entitled to be discharged, for he could not in such case take the bankrupt in execution.

—— v. Bruce, 2 Chitt. R. 106.; and see 8 East, 433.

And if the defendant is discharged under the Insolvent Act, before the time when the bail are fixed, the bail are entitled to an *exoneretur*, in the same way as if their principal is bankrupt.

Meyrick v. Vaucher, 6 Term R. 50.

If the defendant is sent abroad under an alien act, the bail are entitled to their discharge, since it has become impossible to render him, and this without fault of the bail.

Folkien v. Critico, 13 East, 457.

But an *exoneretur* will not be entered while the defendant continues in this country, on the ground that he is in custody, and on the eve of being sent away under the alien act.‖

Wood v. Mitchell, 6 Term R. 247. Fowler v. Dunn, 4 Burr. 2034.

[Where the defendant is under sentence of transportation, the court will permit an *exoneretur* to be entered on the bail-piece. An application for a *habeas corpus* to bring up a defendant under sentence of transportation who was on board a ship in the river *Thames* just ready to sail, in order that he might be surrendered in discharge of his bail, has indeed been rejected; but that was merely on account of the inconvenience of bringing up the defendant at that period: and where a defendant was confined under a charge of felony, the court felt no difficulty in granting a *habeas corpus* to bring him up for this purpose, though it was urged that the bail were indemnified. But the bail are not at liberty to make such an application till they have justified.]

Sharp v. Sheriff, 7 Term R. 226. Daniel v. Thompson, 15 East, 78.

Robertson v. Patterson, 7 East R. 405.

‖And where a seaman was arrested and gave bail, and afterwards, without collusion, was impressed into his majesty's service under the 32 G. 3. c. 33. § 22. the court held, that under the equity of that statute the bail were entitled to an *exoneretur*, on an affidavit that they were not indemnified. But if the bail in such case permit the plaintiff to proceed to judgment against them, they will not be relieved.

Bryan v. Woodward, 4 Taunt. 557.

Hodgson v. Temple, 5 Taunt. 505. 1 Marsh. 166. S. C.

The fact of the defendant being in custody under an extent at the suit of the crown, and therefore incapable of being rendered without consent of the crown, is not a ground for an *exoneretur* of the bail, since he may pay the crown debt and be discharged; and the court will only allow an *exoneretur* where the principal is placed irrevocably out of the reach of the bail, so that there is no possibility of their rendering him.‖

Salk. 89. pl. 11.

J. S. acted as attorney for the plaintiff in the original action, and after judgment in that action took out a *scire facias*, and proceeded to judgment against the bail without any new or second warrant; on a writ of error, as well of the principal judgment as upon that against the bail, the court held, that any body might

might have taken out the *scire facias*; but as to the further proceedings they were irregular, the attorney's authority determining with the first judgment; and therefore they reversed the judgment.

If judgment be given against the principal, and after, upon a *scire facias* against the bail, judgment be also given against them, these judgments are several, and they shall not join in a writ of error no more than tenant for life, and he in reversion, or the tenant and vouchee, may join.

Cro. Car. 300. Jones, 325. Godb. 440. S. C. adjudged between Lancaster and Keyleigh. Hob. 72. Cro. Jac. 384. Roll. Rep. 294. Cro. Car. 408. 574. Jones, 360. Bulstr. 125. Lit. Rep. 93. Lev. 137.

If the condition of a recognizance be, that the principal shall surrender himself, or pay the money; and the breach assigned be, that he hath not surrendered himself; this is naught, for he might have paid the money (*a*), and then the condition is not broken.

Skin. 100. pl. 16. adjudged. (*a*) Where the bail may plead payment by the principal, and how such plea is to be pleaded, *vide* Roll. Abr. 335, 536. 2 Lev. 212. Cro. Eliz. 233. Stile, 324. 2 Leon. 215. Cro. Eliz. 132.* Where a release to the principal discharges the bail. Roll. Abr. 536.

* The bail pleaded in *scire facias*, upon the recognizance, payment by the principal, before the return of the second *scire facias*; and the plead held bad; for in strictness of law the recognizance was forfeited, by suing out the first *scire facias*. 1 Ld. Raym. 157. In such case, if the payment had been really made, the bail should have moved to stay proceedings, on payment of costs incurred against them before the payment. ‖But see 4 Ann. c. 16. § 12. enacted since the above case.‖

‖So, where in *scire facias* to have execution against *J. B.* and *G. K.* for damages and costs recovered against *J. B.* on a recognizance conditioned, if *J. B.* and *G. K.* should be condemned, that *J. B.* and *G. K.* should pay, *&c.* or render, the plaintiffs alleged that *J. B.* and *G. K.* had not paid or rendered themselves according to the form and effect of the recognizance, the breach was held ill assigned on demurrer; for *non constat* but that *J. B.*, the party condemned, had paid or rendered.

Wilkinson v. Thorley, 4 Maule & S. 33.

The recognizance must be set forth with certainty and precision, and if there be a material variance, it will be fatal on the plea of *nul tiel record*, and the breach must be stated according to the effect of the obligation of the recognizance.‖

2 Salk. 564. 1 Taunt. 221. 8 Taunt. 171. 4 Maule & S. 33.

But if in a joint action against two, *J. S.* is bail for one of them, and there is judgment against the principals, in a *scire facias* against *J. S.* the bail, it is sufficient to allege that the defendant for whom he was bound did not pay the money, and if the other had paid it, he should have pleaded it.

2 Show. 147. pl. 128. Crealey and Darling adjudged *nisi*.

A. and *B.* are bail to an action in *B. R.*, where judgment is given against the principal, who brings a writ of error in the Exchequer-chamber, pending which the bail bring in the principal, or the principal renders himself to prison; though the recoverer cannot pray him in execution, nor can the court put him in execution, because the writ of error is a *supersedeas* to it, yet this is a good discharge of the bail, for the marshal ought to keep him in prison as a pledge till the judgment be affirmed or disaffirmed, as he does upon mesne process for want of bail.

Roll. Abr. 334, 335. Moor, 853. pl. 1165. Cro. Jac. 402. S. C. 3 Bulstr. 192. S. C. Roll. Rep. 392. S. C. 7 Mod. 97. S. P. Raym. 100. 3 Mod. 87.

If the principal surrenders himself, or the bail render him up, this will discharge the bail, and may be pleaded to the *scire facias*:

Roll. Abr. 337. Moor, 888.

Leon. 58. 2 Bulstr. 260. (a) Where the principal was in actual execution, and a *committitur* entered, yet after two *scire facias's* returned, and judgment thereupon, the court would not set it aside on motion, for the bail ought to have pleaded it. Skin. 120.——So where the principal surrendered himself before the return of the *capias*, yet the plaintiff having had no notice, and there being no discharge of the bail-piece, or *exoneretur* entered, and the plaintiff having proceeded to judgment against the bail, the court would not relieve them on motion, but put them to their *audita querela*. Salk. 101. pl. 14. (b) But if through want of notice he is at further charge against the bail, that shall not vitiate the surrender; but yet the bail shall not be delivered till they pay such charges. 6 Mod. 238. ‖As to the notice, see Tidd's Prac. 291. (8th edit.)‖ [Say. R. 7. 1 Burr. 409. Where the bail-piece had been previously delivered out to be filed to the plaintiff's attorney, who neglected to file it, proceedings against the bail for want of an *exoneretur* were stayed. 8 Mod. 280. 1 Burr. 409. Upon what terms, and at what time the court will stay proceedings against the bail, pending a writ of error, see 1 Stra. 419. 443. 526. 2 Str. 717. 781. 872. 1270. 1 Burr. 340.]

facias (*a*): but such surrender or render are not sufficient, unless the plaintiff or his attorney have notice of it (*b*); and this is required, that the plaintiff may, if he pleases, charge him in execution; also, that he may not be at any further trouble or charge in proceeding against the bail.

R.K.B. Tr. 33 G. 3. 5 Term R. 368. The like liberty after an assignment of the bail-bond. Edwin v. Allen, 5 Term R. 401.

The bail are at liberty to render the defendant before they justify, notwithstanding a rule has been obtained against the sheriff to bring in the body, at any time before the expiration of such rule; the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, and making affidavit thereof.

Meysey v. Carnell, *Id.* 534. S.P.

Tidd's Prac. 281. (9th ed.)

‖It is not necessary in either court, for the bail to justify in order to render, even after they have been excepted to. And on exception to bail, if notice be given of other bail, only one of whom justifies, and the names of the former still remain on the bail-piece, the first bail may render in the K. B. Even bail who have been rejected, have in that court been holden, so long as they are on the bail-piece, competent to surrender the defendant. And where one bail only had justified, and time had been refused by the court to justify another, the court held the render sufficient. In the Common Pleas, when bail above were excepted to, and could not justify themselves, they were formerly considered as no bail, and could not have rendered the defendant to prison; but other fresh bail might have been put in; and before any exception taken to them, they might have surrendered him in discharge of themselves; and it is now holden, that bail who have been rejected, may enter into a new recognizance, for the purpose of rendering the defendant. But bail, surreptitiously put in, are not allowed to render him.‖

Salk. 98. pl. 3. *per cur.* (c) Where after a surrender at a judge's chamber the principal escaped from the tipstaff, [it was holden not to be a good render. 6 Mod. 238. And a render is not complete till the bail have paid the gaoler's fees. Com. Rep. 554. In K. B. it is necessary to make an entry of the render in the marshal's book, which is kept in the King's Bench Office; it being holden, that until such entry be made, the defendant is not in custody, so as to charge the marshal in an action of escape. 1 Salk. 272. 2 Stra. 1226. 2 Burr. 1049.]

If

If the bail plead a render of the principal, they must conclude their plea *prout patet per recordum* (*a*); for this is not to be tried *per pais*, but by the record. Latch. 149. Noy, 82. Poph. 185. S.C. Hob. 210. Moor, 888. pl. 1249. Keb. 761. 815. S.P. adjudged. Sid. 216. *dubitatur*, and said there were precedents both ways; but *vide* Lev. 211. 2 Keb. 189. 206. Like point adjudged. (*a*) So if in a *scire facias* against bail upon writ of error, according to the statute of 3 Jac. 1. c. 8. they plead the plaintiff prosecuted the writ of error with effect, and thereupon the judgment was reversed, they must conclude *prout patet per recordum*. Raym. 50.

Also in pleading a render of the principal, the bail must say *quod venit hic in curiâ* (*b*) *et in eâdem curiâ* (*c*) *reddidit se et per eandem curiam commissus fuit*; but it being here laid to be done the 2d of *February*, (being *Candlemas-day*, and so *dies non juridicus*,) it judicially appears there could be no court that day, and so the render and commitment void. 3 Bulst. 192. Poph. 186. Roll. R. 392, 393. S.C. and S.P. admitted *per cur.* though it is said *quod adhuc remanet in custod.*, &c. for if in prison without render or commitment, it is not material. (*b*) *Vide* Stile, 330, 331. (*c*) The render must be made in that court where the record is at the time. Cro. Jac. 98. Roll. Abr. 534.

In a *scire facias* against bail, they cannot plead that the plaintiff hath arrested the principal in the *Stannary-court*, *per quod* they could not have his body, for they might have removed him by *habeas corpus*. Moor, 400. pl. 524. adjudged. [A principal convicted of felony and under sentence of transportation may, in proper circumstances, be removed by *habeas corpus*, and surrendered in discharge of his bail. Case of the bail of Peter Vergun, 2 Stra. 1217. Fowler v. Dunn. 4 Burr. 2034. How a soldier may be surrendred by his bail, see Bond v. Isaac, 1 Burr. 339.] ‖See 5 Taunt. 516.‖

‖Where the crown is concerned, the courts will not in general change the custody without the express consent of its officers. Currie v. Kinnear, 1 Bro. & Bing. 23. 5 Mo. 259. S.C.; and see West on Extents, 90. Tidd. 287.

Though, where a defendant being charged in custody upon an extent or information, or for a contempt in not paying the king's debt, is brought up in the Court of King's Bench on a *habeas corpus*, to be surrendered in discharge of his bail, and it appears that the civil action in which he was bailed was commenced before the other proceedings, and the court are satisfied that it is for a just debt, and the application really made by the bail, they will commit him, as their prisoner, to the custody of the marshal; for, by the 25 E. 3. stat. 5. c. 19. "the king's debtors shall not be protected from the proceedings of the other creditors against them." The attorney-general may, however, have a *habeas corpus* to remand the defendant. But in the Common Pleas, where *A.* was arrested and held to bail in a civil action, after which an extent issued against him at suit of the crown, and he was thereupon committed to the custody of the sheriffs of *London*, on an application to the court by the bail, it was holden; first, that the bail were not entitled to enter an *exoneretur* on the bail-piece; secondly, the crown having refused its consent to the defendant's being surrendered, unless he should be immediately remanded to the custody of the marshal, that the Common Pleas would have no authority so to remand him after he had been surrendered to the Warden of the Fleet; and thirdly, that the bail could not surrender the defendant by *habeas corpus*, as a matter of right, without the consent of the crown. But the court Boise & Setter's Ca. 1 Stra. 641. French's Ca. 1 Salk. 355. Chitty's Ca. 1 Wils. 248. See the principle of these cases much questioned by *Gibbs* C. J. and the Court of Common Pleas in 5 Taunt. 516. Hodgson v. Temple, 5 Taunt. 503. 1 Marsh. 166. S.C.

court expressed their readiness to give the bail time for surrendering the defendant.‖

2 Jones, 75. 2 Mod. 312. S. C. 2 Lev. 195. S. C. Ventr. 314. S. C. Cro. Jac. 320. Roll. Abr. 897. *Vide* tit. *Audita Querela*, letter (B).

So in a *scire facias* against bail, they cannot plead that before the return of the second *scire facias* the plaintiff prosecuted a *testatum capias* against the principal, directed to the sheriff of, *&c.*, who took the principal in execution upon the said judgment, *et adhuc habet et detinet*; for the recognizance was forfeited before. (*a*)

(*a*) This is strictness of law, yet the court, *ex gratiâ*, would have permitted the bail to have surrendered the principal before the return of the *scire facias*. See *antè*.

2 Saund. R. 72. b.; and see Hayward v. Ribbans, 4 East, 309.

‖Where the cause is referred to arbitration the bail are discharged, unless a verdict is taken for the plaintiff: and therefore, in that case, an enquiry should always be made, whether there are bail or not; or a verdict should be taken, subject to the arbitrator's award as to the damages.

Horsley v. Walstab, 7 Taunt. 255.

Where the plaintiff, after proceeding at law and obtaining bail, filed a bill in equity for the same cause of action, and elected to proceed in equity, and a perpetual injunction was granted against his proceeding at law, the court still refused to discharge the recognizance of the bail; saying, the bail might apply when any step was taken against them.‖

Hodson v. Nugent, 5 Term R. 277.

[A *cognovit* by the principal, without notice to the bail, will not discharge them.]

Bowsfield v. Tower, 4 Taunt. 456.

‖Unless time be given to the principal beyond the time when the plaintiff might have had judgment and execution in the original action.

Croft v. Johnson, 5 Taunt. 319. Thomas v. Young, 15 East, 617.; and see 5 Barn. & C. 269.

Brickwood v. Annis, 5 Taunt. 614. Melvill v. Glendinning, 7 Taunt. 126.; and see 8 Price, 467.

And taking a composition from the defendant, does not discharge the bail if the plaintiff expressly reserve a right at any time to proceed against the defendant.

Willison v. Whitaker, 7 Taunt. 53.

But it is otherwise if the plaintiff is tied up from proceeding.‖

(D 2.) Of the Proceedings on the Bail-bond.

Tidd's Prac. 297. (8th ed.) Gilb. C. P. 20.

[IF bail above be not put in and perfected in due time, the bail-bond is forfeited; and the plaintiff may either take an assignment of it, or proceed against the sheriff for not bringing in the body.

1 Salk. 99. 1 Wils. 223. 1 Salk. 97. 7 Mod. 62. 117. 6 Mod. 122. Tidd's Prac. 154, 155. 153.

If he be dissatisfied with the bail below, he should not take an assignment of the bail-bond; for by so doing, he not only discharges the sheriff, but if the same bail be put in above, he cannot afterwards except against them.

1 Mod. 228. *Vide suprà.* 1 Sid. 23. 2 Mod. 84.

Before the statute for the amendment of the law, ‖4 & 5 Ann. c. 16. § 20. *antè*, p. 443.‖ the sheriff was not compellable to assign the bail-bond; though if he had not assigned it, the court would have amerced him.]

‖By

‖By 48 G. 3. c. 58. it is declared that bail-bonds taken in actions at the suit of the king, shall be assigned to his majesty.‖ 48 G. 3. c. 58.

[It hath been said *arguendo*, that the bail-bond may be assigned *before* it is forfeited; though it cannot be put in suit till afterwards.] Paradice v. Holiday, Barnes, 77. ‖*Sed vide* Dent v. Weston, 8 Term R. 4.‖

‖If the sheriff refuse to assign the bond, he is liable to an action on the case; but as the legislature only intended that the sheriff should be compelled to assign bonds that were valid at the time of the application for an assignment, it has been held, that an allowance of bail above, subsequent to the commencement of an action against the sheriff for not assigning, is a sufficient answer to the action, provided the bail is put in and allowed, as of the term in which the writ is returnable.‖ Stamper v. Milbourne, 7 Term R. 122. 2 Saund. 61. a. Pariente v. Plumbtree, 2 Bos. & Pull. 38.; and see How v. Lacy, 1 Taunt. 119. Mendez v. Bridges, 5 Taunt. 325.

[Where the defendant has neglected to put in and perfect bail above, the plaintiff is not out of court by omitting to declare in the original action, within two terms after the return of the writ; but he may still take an assignment of the bail-bond; for he is not bound to declare *de bene esse*, within the time limited for the defendant's appearance; and after that time he cannot declare, until the defendant has actually appeared. Tidd, 299. (8th ed.) Stra. 1262. See 2 Black. R. 876. ‖4 Taunt. 715. that he cannot take an assignment after a year from the return in K. B. or after the end of vacation after the second term in C. B.‖

By a rule of the Court of Common Pleas, Hil. 9 Ann. no bail-bond, taken in *London* or *Middlesex*, can be put in suit till after four days, exclusive of the appearance-day, of the return of the writ; and, taken any where else, till after eight days, exclusive of the appearance-day of such return, upon pain of having all proceedings thereon set aside with costs upon motion. The like rule was in *B. R.* M. 8 Ann, except that in country causes, the time is limited to six days instead of eight. Sty. Prac. Reg. 257. Bellis v. Mitford, 2 Black. R. 1009. ‖See the Rule T. 30 G. 3. C. P. 1 H. Black. 525.‖

If the last of the four days happen on a *Sunday*, the defendant has the whole of the *Monday* to put in his bail.] Studley v. Sturt, 2 Stra. 782.

‖In the King's Bench, if the fourth day for perfecting bail be the last day of term, and bail be not perfected before the rising of the court on that day, an assignment of the bond in the evening of that day is regular. Dent v. Weston, 8 Term R. 4.

After default made in putting in bail in time, it is not enough that bail are afterwards put in; but the plaintiff may take an assignment of the bail-bond, and proceed thereon, unless bail be also justified, though not before excepted to. Turner v. Cary, 7 East, 607.

If the original action is pending when the assignment of the bail-bond is taken, the proceedings cannot be set aside, because the plaintiff has proceeded after the original action is out of court; but the proceedings may be stayed, if the plaintiff has been guilty of *laches*.‖ Pigott v. Truste, 3 Bos. & Pull. 221.; and see 4 Taunt. 715. 3 Price, 257.

[The court will not order the bail-bond to be delivered up to be cancelled, on the ground of a misnomer.] 3 Term R. 572. ‖2 Bos. & Pull. 109. *Sed vide* 4 Maule & S. 360. 1 Chitt. R. 282. and note *contrà*.; and see 2 Barn. & C. 565.‖

‖Nor can it be cancelled in the King's Bench on the ground of

of the plaintiff's attorney having neglected to take out his certificate (*a*); nor in the Common Pleas, because the defendant has been arrested on a special *capias*, in which, as well as in the affidavit to hold to bail, the initials only of his Christian name were inserted (*b*); though it is otherwise in the King's Bench (*c*); or because the place where the affidavit to hold to bail was sworn is not mentioned in the jurat. (*d*) So, if a noncommissioned officer has been arrested and given bail, the Common Pleas will not, after judgment recovered against the bail, set aside the proceedings and cancel the bail-bond. (*e*) And in that court, if the plaintiff sue out writs into two counties, and arrest the defendant, who gives bail in both, the plaintiff may regularly proceed on the first bail-bond. (*g*)‖

(*a*) 1 Dowl. & Ry. 215.
(*b*) 2 Bos. & Pull. 466.
(*c*) 4 Barn. & Ald. 556.; and see 1 Bing. 424.
(*d*) 1 Bos. & Pull. 105.
(*e*) 4 Taunt. 557.
(*g*) 2 Taunt. 67.

R. M. 8 Ann. Reg. 1. Cowp. 71. ‖1 Bos. & Pull. 334.‖

[Where the plaintiff has *not* lost a trial, the court or a judge will stay the proceedings on the bail-bond, upon putting in and perfecting bail above; paying the costs incurred by the assignment of the bail-bond, to be taxed by the proper officer; receiving a declaration in the original action; pleading issuably; and taking short notice of trial, so that the cause may be tried the same term.

Cowp. 769.

And wherever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail, in order to stay proceedings on the bail-bond,) should be, that he will put in and *perfect* bail on such a day; when the plaintiff may oppose them in court, without its being a waver of the bail-bond.

R. M. 8 Ann. Reg. 1. 2 Stra. 1252. Carmichael v. Troutbeck, Trin. 24 G. 3. Tidd's Pr. 304. Whitehead v. Phillips, 2 Barn. & A. 585.

But if the plaintiff have *lost* a trial, the court will further require that the bail consent that judgment be entered against them on the bail-bond for the plaintiff's security; after which they are liable to immediate execution, if the defendant should fail in the action; and they cannot discharge themselves by a surrender.]

‖The bail-bond in such case must stand as security, even though the defendant has been surrendered by his bail.

1 Chitt. R. 270. a. 357. a.; and see 1 Dow. & Ry. 450. 8 *Id.* 140. 2 Bing. 227.

By losing a trial is meant that the plaintiff has been prevented, by the neglect of the defendant to put in or perfect bail in due time, from trying his cause in, and obtaining judgment of the same term in which the writ was returnable.

1 Chitt. R. 357. a. Tidd's Prac. 304. (8th edit.)

This of course can only happen in town causes, or where the *venue* is laid in *London* or *Middlesex* (*a*), and depends on the state of the proceedings, as when the writ was returnable, and declaration delivered, and whether the defendant lives more than forty miles from *London*, for if he do, he is entitled to fourteen days' notice of trial.

(*a*) In country causes it has not been usual on staying proceedings on the bail-bond when a trial has been lost, to require the bail to consent that the bond shall stand as a security, though there seems the same reason for it as in town causes. See Tidd's Prac. 304. 7 Price, 555.

2 Barn. & A.

By the rule of the Court of King's Bench, *Mich.* 59 Geo. 3. proceedings

proceedings *regularly* commenced on the bail-bond cannot be stayed, unless the application, if by the defendant, is on an affidavit of *merits*, and if on the part of the sheriff, bail, or officer, on an affidavit shewing that the application is on his part, and at his expense, and for his indemnity, and without collusion with the defendant. 240. Tidd, 302. (9th ed.)

The rule only applies to proceeding *regularly* commenced on the bail-bond.

The affidavit, if on the part of the defendant, must state that he has a good defence on *the merits*, not merely that he has a good defence. 5 Barn. & Ald. 703.

In the Common Pleas the bail on such an application are not required to swear to merits, whether a trial has been lost or not. 1 New R. 123.

Nor are they in the Exchequer, where a trial has not been lost.‖ 3 Price, 52.; and see 8 Price, 610. 13 Price, 114.

[The sheriff's bail are liable to pay what is really due to the plaintiff, though beyond the sum sworn to, and costs, to the full extent of the penalty of the bond: and the court will not relieve them on the death of the defendant in the original action, where the plaintiff might have had judgment against him (*a*), if bail above had been put in and perfected in time. But where the defendant dies, before the plaintiff could have had judgment (*b*), if there has been no delay in putting in and perfecting bail, the court will stay the proceedings upon payment of costs only.] Savage v. West, 9 G. 3. cited in Cowp. 71. 1 H. Black. R. 76. S. P. ‖8 Term R. 28. 1 East, 91. *in notis.*‖ (*a*) R. M. 8 Ann. reg. 1. (*b*) Gilb. K. B. 362. Cowp. 71. Barnes, 112. Barnes, 61. 70.

‖Where several actions are brought upon the bail-bond, it is usual, in suing out execution, to apportion the debt and costs in the original action amongst the different defendants, so as to levy a part on each, together with his own costs. (*c*) But the bail it seems are not liable beyond the penalty of the bond, where they are let in upon terms to try the cause, the bail-bond standing as a security, although the debt and costs exceed the penalty after the trial.‖ Tidd's Pr. 305. (9th edit.) (*c*) It is not in general necessary to bring several actions, and if brought without sufficient reason the Court of K. B. will only allow the costs of one action. 2 Barn. & A. 598. 1 Chitt. R. 337. S.C.

[If after the death of the plaintiff, his attorney take an assignment of the bond, the proceedings thereon will be set aside.] Hutchinson v. Smith, 8 Mod. 240.

‖The bail cannot avail themselves of the bankruptcy of the defendant. Tidd, 305. Cowp. 25.

But if the defendant or his bail become bankrupt after the bond is forfeited, the plaintiff's demand, being provable under the commission, is barred by the certificate. 4 Moor. 350. 2 Bro. & Bing. 8. S. C.

Bail to the sheriff are discharged by the defendants giving a *cognovit*, without knowledge of the bail, for payment of debt and costs. 4 Barn. & Ald. 91.

Where they have knowledge of the *cognovit* they remain liable, but the plaintiff must give them notice that the *cognovit* is unsatisfied before he can proceed against them. 9 Barn. & C. 422.

Tidd's Prac. 305. (9th ed.) And in case of render in discharge of bail, the courts will stay the proceedings, if the notice of render be given before the assignment of the bail-bond, otherwise not.‖

Swayne v. Crammond, 4 Term R. 176. [If the plaintiff take an assignment of the bond during the pendency of a rule to set aside proceedings for irregularity, and *to stay proceedings in the mean time*, such assignment will be set aside, for the rule is a suspension of proceedings to *all purposes*.]

4 Barn. & Ald. 91. ‖And the proceedings will be set aside, if the plaintiff take an assignment after the defendant has given a *cognovit*, without knowledge of the bail, for payment of debt and costs.‖

Francis v. Taylor, Barn. 92. Walton v. Bent, 3 Burr. 1923. Morris [The action upon the bail-bond must be brought in the same court where the bail is given, even though an attorney of another court happen to be one of the bail; for the statute empowers no other court to do equitable justice between the parties.

v. Rees, 2 Black. R. 838. How v. Bridgwater, Barn. 117. ‖And this though the action is by the sheriff in the K. B., 8 Term R. 152.; *aliter* in C. P. and Exchequer. 1 H. Black. 631. 8 Price, 374., those courts holding the statute not to apply to an action by the sheriff, who may sue on the bond at common law. The bail cannot take advantage of the action being brought in a different court on *non est factum*, but should apply to the court by motion. 2 Camp. 396. *Qu.* Whether it could be pleaded specially?‖

Kitson v. Fagg, Stra. 60. The under-sheriff may assign the bond, but his clerk cannot. ‖*Sed vide* 4 Camp. 36. 5 Barn. & A. 243. Tidd. 300. *contrà*.‖

Gregson v. Heather, 2 Ld. Raym. 1455. 2 Stra. 727. The sheriff may assign the bond out of the county; and the action upon it may be brought either in the county where the assignment was made, or in that where the bond was taken.

Neat v. Mills, Fortesc. 371. (*a*) Lease v. Box, 1 Wils. 121. Miftlin v. Morgan, 2 Ld. Raym. 1564. There must be two witnesses to the assignment, else the bond is void. But (*a*) it is not necessary to set forth this or any other circumstance of the assignment in a declaration on the bond, or to make a *profert* of the assignment.

Whiskard v. Wilder, 1 Burr. 330. ‖But if there is an averment of an affidavit it must be produced and proved. Webb v. Herne, 1 Bos. & Pull. 231.‖ Neither is it necessary to state that the debt was sworn to, or writ marked; for these omissions do not avoid the bond; though the sheriff, or perhaps the plaintiff, may be punishable for them. Nor need it be shewn that the defendant in the original action was arrested (*b*); for the arrest is not traversable.]

(*b*) Watkins v. Parry, 1 Stra. 444. Haley v. Fitzgerald, 1 Stra. 645.

Thompson v. Rock, 4 Maule & S. 338.; but see Whelpdale's case, 5 Coke R. 242. *cont.*, ‖If the bail-bond be dated and made after the return of the writ, it has been held that advantage may be taken of it, on the plea of *non est factum;* for the court said, that if the matter were specially pleaded, the plea must conclude *et sic non est factum*, and that such special *non est factum* is never now necessary.

and the learned note of the editor of the last edition, and the authorities cited by him, from which it appears that the conclusion of the special plea in such case would not have been *sic non est factum*, but "so the said bond is void;" and that as the defence does not impeach the *execution*, but shews the bond, though well executed, to be void by the operation of the statute, the plea should be special as in cases of usury, gaming, &c. 3 Coke R. 243. note (*c*), Fraser's edit.; and see 2 Camp. 396.

Moody v. Pheasant, 2 Bos. & P. 446. Final judgment may be entered in an action on a bail-bond without a writ of enquiry.‖

BAIL IN CRIMINAL CASES.

IN all criminal cases, in which it seems doubtful, whether the accused be guilty of the offence or not, bail is regularly to be allowed: and it is a general rule, that *whosoever is judge of the offence, may bail the offender.* 2 Inst. 189. 2 Hawk. P. C. 148. ‖See *post*, p. 488.‖

(A) In what Cases it is grantable by a Sheriff.
(B) Where by a Justice of the Peace, ‖and a Constable in the Metropolis.‖
(C) Where by Justices of Gaol Delivery.
(D) Where by the Court of King's Bench.
(E) Where by the other Courts of Westminster.
[(E 2.) Where by the House of Lords.]
(F) What shall be said to be sufficient Bail.
(G) The Offence of taking insufficient Bail.
(H) The Offence of granting it where it ought to be denied.
(I) The Offence of denying, delaying, or obstructing it, where it ought to be granted.
(K) In what Form it is to be taken.
(L) What shall forfeit the Recognizance.

(A) In what Cases it is grantable by a Sheriff.

BY the common law, according to some opinions, the sheriff without any writ might *ex officio*, as principal conservator of the peace (*a*), bail any person arrested on suspicion of felony; and it is certain, that by the common law, he might bail any person who was indicted before him at his torn for felony, or any other crime that is bailable. (*b*) *Vide* 2 Hawk. P. C. 147. (*a*) That a constable had the like power, *vide* 2 Hawk. P. C. 147. And how far this power is taken away by those statutes which empower justices of the peace to admit persons to bail on an accusation of felony, and particularly prescribe in what manner they shall do it, *vide ibid.* (*b*) But this power is now taken away by 1 E. 4. c. 2., by which it is enacted, that the sheriff shall not proceed on such indictment, but shall remove it to the next sessions of the peace. Hawk. P. C. 106. 2 Hawk. P. C. 148.

Also bail is grantable by a sheriff by virtue of the following writs. 1. By that of *odio et atia*, by which a person committed for the death of a man, might on an inquest taken by the sheriff, if he were found to have done the fact by misadventure, or *se defendendo*, be mainprized by twelve men, upon the writ *de ponendo in ballium*; but this writ seems obsolete at this day. Co. Bail and Mainprize, c. 10. 2 Hawk. P. C. 148. Hawk. P. C. 114.

Register, 269. Hawk. P. C. 103, 104. 2 Hawk. P. C. 148.

2dly, By writ of mainprize, which of late has been disused, but seems still in force, and may be brought by persons bailable, as those who are imprisoned for a slight suspicion of felony, or indicted of larceny, before the steward of a leet, or of a trespass before justices of the peace, *&c.*

F. N. B. 68. C. Register, 78, 79. 3 Black. Comm. 129. *Vide* head of *Writs.*

3dly, That of *homine replegiando*, whereon if he return that the plaintiff is essoigned, he may by *capias* of *withernam* imprison the defendant, whether he be a peer or commoner, till the plaintiff shall be replevied.

West. 1. c. 15. (*a*) This statute beginning with inferior officers, extends not to judges of superior courts. 2 Inst. 185, 186. But though the superior courts are not strictly within the purview of the statute, yet they will always in their discretion pay a due regard to the rules prescribed by it, and not admit a person to bail who is expressly declared by it to be irreplevisable, without some particular circumstances in his favour. 2 Hawk. P. C. 175.—And by the 1 & 2 Ph. & M. c. 13. justices of the peace shall not

By *Westm.* 1. cap. 15. it is enacted as followeth: "Forasmuch as sheriffs and others (*a*), who have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of one party and grieve the other; and forasmuch as before this time it was not determined which persons were replevisable and which not, but only those that were taken for the death of a man (*b*), or by commandment of the king (*c*), or of the justices (*d*) for the forest (*e*); it is provided, and by the king commanded, that such prisoners as before were outlawed (*g*), and they which have abjured the realm (*h*), provers, and such as be taken with the manner (*i*), and those which have broken the king's prison (*k*), thieves openly defamed and known (*l*), and such as be appealed by provers, so long as the provers be living (if they be not of good name) and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the king's seal (*m*), or persons excommunicate (*n*), taken at the request of the bishop, or for manifest offences (*o*), or for treason touching the king himself, shall be no wise replevisable by the common writ, nor without writ; but such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or of petit larceny that amounteth not above the value of twelve pence, if they were not accused of some other larceny afore-time (*p*), or accused of receipt of thieves or felons, or of commandment, or force, or of aid in felony done, or accused of some other trespass, for which one ought not to lose life or member, and a man approved by a prover, after the death of the prover (if he be no common thief nor defamed) shall be henceforth let out by sufficient surety, whereof the sheriff will be answerable, and that without giving aught of his goods." (*q*)

bail any person for offences declared irreplevisable by this statute. *Vide infrà.* (*b*) For this *vide* 2 Hawk. P. C. 95., and the statutes of *Glouc.* c. 9., 3 H. 7. 1. (*c*) This exception is not to be applied generally to every command of the king, but only to such as proceed from him in person, or from his privy council. 2 Hawk. P. C. 151.* (*d*) This is not to be understood of

* With respect to the command of the king or his council, the power of *secretary of state* to commit, &c. the editor would refer the student to the cases of Entick, clerk, v. Carrington and others. 2 Wils. 275. 11 St. Tr. 317.; and the case of Money *et al.* v. Leach, in Error, in *B. R.* 3 Burr. 1742, &c.; also *vide* the King and Wilkes, 2 Wils. 151., &c.; the case of Crosby, Esq. Mayor of London, 3 Wils. 188., &c. As to a commitment by the Commons, *vide post.*

of ordinary commitments by such justices for safe custody, but of imprisonments by their absolute command, by way of punishment, as for contempts and such like matters, which lie rather in their discretion than in their ordinary power. 2 Hawk. P.C. 151. S.P.C. 73. Dalt. c. 14. F.N.B. 251. 24 E. 3. 33. pl. 25. Roll. R. 134. (*e*) They must be forests, strictly such, and not parks or chases; but it is not material whether the forest be the king's or a subject's. Register, 77. 4 Inst. 314. Co. Lit. 2. a. 233. a. F.N.B. 67. Plowd. 124. *Vide* the 1 E. 3. c. 8., and 7 R. 2. c. 4. *That no man shall be imprisoned by any officer of the forest without due indictment, or being taken with the manner, or trespassing in the forest.* For the explanation of which, *vide* 2 Hawk. P.C. 152. And for what shall be said a taking with the manner, *vide* Carth. 77, 78. (*g*) Yet the King's Bench may in discretion bail a man upon an outlawry of felony; as where an error is alleged in the proceedings, &c. 19 H. 6. 2. a. 2 Hawk. P.C. 154. *Vide* title *Outlawry*. (*h*) For this *vide* 2 Hawk. P.C. head of Approver. (*i*) Or rather Mainer; that is, with the thing stolen as it were in their hands. Hawk. P.C. 101. 2 Hawk. P.C. 154. (*k*) Also they who have broken any other prison. 2 Inst. 188. 2 Hawk. P.C. 154. (*l*) The judgment whereof must be left to the discretion of the person who hath power to bail them. 2 Hawk. P.C. 154. (*m*) Persons taken for arson, or for false money, or for falsifying the king's seal, or for treason which touches the king himself, are, in respect of the heinousness of their offence, excluded from replevin, especially if they be in actual custody; but yet such, according to the circumstances of their cases, may be bailed in the King's Bench. 2 Hawk. P.C. 156. (*n*) But if a person appear to be imprisoned for an excommunication, in a cause whereof the spiritual court hath no cognizance, he may be delivered either by *habeas corpus*, or by quashing or superseding the writ of *excommunicato capiendo*. 2 Hawk. P.C. 154. (*o*) Must be intended of inferior crimes of an enormous nature under the degree of felony; the judgment whereof seems to be left to discretion. *Vide* 2 Hawk. P.C. 155. (*p*) But how far it must appear that those excepted out of the statute are of good reputation, and innocent of the fact, *vide* 2 Hawk. P.C. 159. And that it must be left to the discretion of the person who has the power of bailing them. (*q*) This is to be understood of accessories before and after to capital offences, with these restraints, that the persons so accused are of good reputation, and under no violent presumptions of guilt. 2 Hawk. P.C. 159., and 31 Car. 2. c. 2. par. 21.

‖But by the 7 G. 4. c. 64. § 1., "An Act for improving the "Administration of Criminal Justice in England," the above provisions are repealed (as well as those respecting bailing persons on criminal charges in 23 Hen. 6. c. 9. 3 Hen. 7. c. 3. § 2. 25 Hen. 8. c. 3. 32 Hen. 8. c. 3. 1 & 2 Ph. & Ma. c. 13.); and see the provisions as to bailing persons charged, made by that act, *post* (B).‖ 7 G. 4. c. 64. § 1.

(B) Where by a Justice of the Peace, ‖and a Constable in the Metropolis.‖

IT seems clear, that wherever justices of peace have power to hear and determine any offence which is bailable within the statute *Westm.* 1., any one of such justices seems consequently to have power to bail any person indicted at the sessions for such offence, because every such justice is a judge of the court which is to determine it. H.P.C. 105. Coke, Bail and Mainprize, c. 6. Lamb. 347. 2 Hawk. P.C. 160.

Also every justice of the peace has a discretionary power of admitting persons to bail who have given a dangerous wound.

But the power of justices in admitting to bail, is chiefly regulated by acts of parliament; to which purpose it is recited by 1 R. 3. cap. 3. "that divers persons had been daily arrested and "imprisoned for suspicion of felony, sometime of malice, and "sometime of a light suspicion, and so kept in prison without "bail or mainprize, to their great vexation and trouble; and "thereupon it is enacted, that every justice of the peace in 2 Hawk. P.C. 161. 1 R. 3. c. 3.

" every shire, city and town, may, by his or their discretion, " let such prisoners and persons so arrested to bail or mainprize, " in like form as though the same prisoners or persons were " indicted thereof of record, before the same justices at their " sessions."

3 H. 7. c. 5. But this statute, so far as it gives such power to a single justice, is repealed by 3 H. 7. c. 3. which enacteth, " that justices of " the peace, or two of them at the least, whereof one to be of " the *quorum*, have power to bail any person mainpernable by " law, to their next general sessions, or to the next general gaol- " delivery, as well within franchise as without; and that the " same justices, or one of them, shall certify the same to such " sessions or gaol-delivery, on pain of 10*l.*"

But these statutes having been often abused by the justices of the peace bailing persons in the name of two justices, where one only was present, and for offences not bailable;

1 & 2 Ph. & M. c. 13. It is enacted by 1 & 2 Ph. & Mar. c. 13. " that no justice " shall bail any person for offences declared to be irreple- " visable by *Westm.* 1. and that no person arrested for man- " slaughter or felony, or suspicion thereof, shall be let to bail or " mainprize by any justices of the peace, if it be not in open " sessions, except it be by two justices at the least, and one to " be of the *quorum*, and the same justices to be present together " at the time; which bailment or mainprize they shall certify in " writing, subscribed or signed by them at the next general " gaol-delivery; and such justices, before such bailment for " felony, shall take the examination of the prisoner, and the in- " formation of them that bring him, of the fact and circum- " stances thereof; and shall put in writing so much thereof as " shall be material, before they make the bailment; and shall " certify such examination and bailment to the next general " gaol-delivery; and shall have authority to bind all such by " recognizance or obligation, as do declare any thing material to " prove the said offences, to appear at the next general gaol- " delivery, and to give evidence, *&c.* and shall certify the said " evidence and bonds, *&c.* before the time of the trial; and if " any justice of quorum shall offend against this act, he shall be " fined in discretion by the justices of gaol-delivery, on proof by " examination before them," *&c.* *But it is provided*, " that justices " in *Middlesex*, and in cities, boroughs, and towns corporate, " shall have authority to bail prisoners in such manner as " was before accustomed; and also shall take examinations and " bonds as aforesaid, upon every bailment, and certify the " bailment-bond and examination at the next general gaol- " delivery."

2 Hawk. P. C. 165. The authority given to one justice of the peace by 1 R. 3. to admit persons to bail for felony, being repealed by 3 H. 7. c. 3. and 1 & 2 Ph. & Ma. c. 13., one justice of the peace cannot admit persons to bail, unless it be for an offence directly tending to a breach of the peace, the restraint whereof is the chief end of his office; or for an offence by statute put under the cognizance

cognizance of one justice; or for an offence indictable at the sessions.

But though the statute of 1 & 2 Ph. & Ma. c. 13. has prescribed the statute of *Westm.* 1. c. 15. as a pattern for justices to follow in relation to bail, and it therefore follows, that a person under an actual arrest for any crime declared to be irreplevisable by that act cannot be bailed by any justice, yet if a person at large be only accused of any such crime on a slight suspicion, before a justice of the peace, it seems that the justice ought not to commit him, but ought to take surety from him to appear before a proper court. 2 Hawk. P. C. 164.

Also the statute of 1 & 2 Ph. & Ma. c. 13. expressly mentioning the bailing of persons for manslaughter, as well as for other felonies, it is clear that justices of the peace may, by force thereof, safely bail any person imprisoned on a slight suspicion of a fact, appearing to be no higher an offence than manslaughter; and much more if it appear to amount to no more than homicide by misadventure, or in self-defence; but the justices ought to be cautious the offence does not amount to murder; also that there be no violent presumptions that the party did the fact; for if any such appear, the party ought not to be bailed, though the offence amount to no more than homicide by misadventure or self-defence. *Ibid.* 164. Roll.R. 268. H. P. C. 99. Dalt. c. 114. Lamb. 346. 2 Inst. 314.

It is settled, after elaborate argument and research, that a justice of the peace has jurisdiction to issue a warrant for the apprehension of a person charged with publishing a libel, and, in default of his finding sureties to answer for the offence, he may be committed to prison. Butt v. Conant, 1 Bro. & Bing. 548. 4 B. Moo. 195. S. C.

By 1 & 2 G. 4. c. 218., commonly called the Metropolis Police Act (§ 28.), it is enacted, that within the limits to which the jurisdiction of the justices thereby recognized extends, it shall be lawful for the constable or headborough attending at any watchhouse, between the hours of eight in the afternoon and six in the forenoon, to take bail by recognizances, without fee or reward, from any person brought into his custody, without warrant of a justice, charged with any petty misdemeanor, if such constable shall deem it prudent, for the appearance of the party at any of the public police offices at an hour specified; and that such recognizances shall be of equal obligation as if the same had been taken before any of his majesty's justices of the peace. 1 & 2 G. 4. c. 218.

By 7 G. 4. c. 64., "An Act for improving the Administration "of criminal Justice in *England*," all the statutes respecting bail on Criminal charge sare repealed; and by § 1. it is enacted as follows: — "Whereas it is expedient to define under what "circumstances persons may be admitted to bail in cases of "felony, and to make better provisions for taking examinations, "informations, bailments, and recognizances, and returning the "same to the proper tribunals: And whereas the technical "strictness of criminal proceedings might, in many instances, "be relaxed, so as to ensure the punishment of the guilty, with- 7 G. 4. c. 64.

" out depriving the accused of any just means of defence, and " the administration of justice in that part of the United King- " dom called *England* might, in other respects, be rendered " more effectual; be it therefore enacted, that where any " person shall be taken on a charge of felony, or suspicion " of felony, before one or more justice or justices of the " peace, and the charge shall be supported by positive and " credible evidence of the fact, or by such evidence as, if not " explained or contradicted, shall in the opinion of the justice " or justices raise a strong presumption of the guilt of the per- " son charged, such person shall be committed to prison by such " justice or justices, in the manner herein-after mentioned; but " if there shall be only one justice present, and the whole evi- " dence given before him shall be such as neither to raise a " strong presumption of guilt, nor to warrant a dismissal of the " charge, such justice shall order the person charged to be de- " tained in custody, until he or she shall be taken before two " justices, at the least; and where any person so taken, or any " person in the first instance taken before two justices of the " peace, shall be charged with felony, or on suspicion of felony, " and the evidence given in support of the charge shall, in their " opinion, not be such as to raise a strong presumption of the " guilt of the person charged, and to require his or her com- " mittal, or such evidence shall be adduced on behalf of the " persons charged as shall, in their opinion, weaken the pre- " sumption of his or her gullt, but there shall, notwithstanding, " appear to them in either of such cases to be sufficient ground " for judicial enquiry into his or her guilt, the person charged " shall be admitted to bail by such two justices, in the manner " hereinafter mentioned: provided always, that nothing herein " contained shall be construed to require any such justice or " justices to hear evidence on behalf of any person so charged " as aforesaid, unless it shall appear to him or them to be meet " and conducive to the ends of justice to hear the same."

2. " And whereas it is expedient to amend and extend the " provisions of two acts, the first passed in the first and second " years of King *Philip* and Queen *Mary*, intituled *An Act ap-*
§ 2. " *pointing an order to justices of peace for the bailment of pri-* " *soners*; and the second passed in the second and third years " of the same reign, intituled *An Act to take an examination* " *of prisoners suspected of manslaughter or felony*; be it there- " fore enacted, that the two justices of the peace, before " they shall admit to bail, and the justice or justices, before he " or they shall commit to prison any person arrested for felony, " or on suspicion of felony, shall take the examination of such " person, and the information upon oath of those who shall " know the facts and circumstances of the case, and shall put " the same, or as much thereof as shall be material, into writing; " and the two justices shall certify such bailment in writing; " and every such justice shall have authority to bind by recog- " nizance all such persons as shall know or declare any thing

" material

" material touching any such felony or suspicion of felony, to " appear at the next court of *oyer* and *terminer*, or gaol- " delivery, or superior criminal court of a county palatine or " great sessions, or sessions of the peace, at which the trial " thereof is intended to be, then and there to prosecute or give " evidence against the party accused; and such justices and " justice respectively shall subscribe all such examinations, in- " formations, bailments, and recognizances, and deliver or cause " the same to be delivered to the proper officer of the court " in which the trial is to be, before or at the opening of the " court."‖

(C) Where by Justices of Gaol Delivery.

JUSTICES of gaol delivery, not being within the restraint of the statute *Westm.* 1. c. 15., may bail persons convicted before them of homicide by misadventure or self-defence, the better to enable them to purchase their pardon. Crompt. 154. a. H. P. C. 101. F. N. B. 246. S. P. C. 15. 2 Hawk. P. C. 165.

Also it seems, that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances; as, if the evidence against him were slight; or, if he had purchased his pardon. H. P. C. 101. Crompt. 153. 2 Hawk. P. C. 165.

Also, if an appellee plead an excommunication in disability of the plaintiff, it seems they may bail him till the plaintiff shall be absolved; for otherwise the appellee might lie in prison for ever, without having an opportunity of coming to his trial. S. P. C. 72. 2 Hawk. P. C. 106.

And where such justices have power to admit persons to bail, it seems that they may do it after their sessions is over, as well as during their sessions. 2 Hawk. P. C. 165.

[Although the statute of 3 Hen. 7. c. 1. is express, that on an acquittal of murder within the year at the king's suit, the justices cannot discharge, but are bound *ex officio* to hold to bail, yet it has been the practice at the *Old Bailey*, and in all the circuits in *England*, not to hold the party to bail, unless an appellant appear, and apply by motion for bail.] Kelyng, 25. F. N. B. 251. G. ‖By 59 G. 3. c. 46. appeals of murder, treason, and felony are abolished, See *antè*, tit. *Appeal*.‖

(D) Where by the Court of King's Bench.

THIS court, by the plentitude of its power, may in discretion admit persons to bail, though committed by other courts, for crimes not bailable by those courts, on consideration of the nature and circumstances of the case. Vaugh. 157. 6 Mod. 73. 3 Salk. 91. pl. 1. 284. pl. 12. Holt, 590. 2 Ld. Raym. 978. 12 Mod. 102. 155, 156. Raym. 381.

But here it must be observed, that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the statute of *Westminster* 1. c. 13., yet it will in discretion pay a due regard to those rules, and not admit a person 2 Inst. 185, 186. 189. H. P. C. 104. Salk. 61. 3 Bulst. 113.

2 Hawk. P. C. 175. 5 Mod. 454.

person to bail who is expressly declared to be irreplevisable, without some particular circumstances in his favour.

Kelynge, 90. Dyer, 79. Bulst. 87. 2 Hawk P. C. 175.

And therefore, if a person be attainted of felony, or convicted thereof by verdict general or special, or be notoriously guilty of treason or manslaughter, *&c.* by his own confession, or otherwise, he is not to be admitted to bail, without some special motive to induce the court to grant it.

2 Hawk. P. C. 175. So for any other error in the outlawry, especially if it be an apparent one. *Vide* 5 H. 7. 16. pl. 7. 2 Inst. 188. H. P. C. 101. Sid. 316.

As where a person taken by a *capias utlagatum* on an appeal of felony, by the name of *J. S.* gentleman, pleads that his name is *J. S.* yeoman, and not gentleman, and so he is not the same person that was outlawed; in which case the court in discretion may bail him; for until the plea be determined, it appears not whether he were the person intended or not.

Cromp. Justice, 154. 2 Hawk. P. C. 175.

So if a man be convicted of felony upon evidence, by which it plainly appears to the court that he is not guilty of it; in which case even the justices of gaol-delivery may bail him.

5 Mod. 455. Sid. 78. Bulst. 85. Palm. 558. Keb. 505. Stra. 4. 858. Andr. 64. Latch. 12. Cro. Jac. 356. Co. Lit. 289. [The indisposition, upon which the court will bail, must be a present indisposition arising from the confinement, and not from any constitutional or family distemper, or from the act of the prisoner. R. v. Wyndham, 1 Stra. 4. See too Cowp. 333.]

Or where a prosecution is unreasonably delayed; or where the prisoner may be in danger of losing his life, either by famine, or dangerous distemper, *&c.*, unless he be bailed.

5 Mod. 78. Sid. 143. Palm. 559. Also where it hath appeared that persons have been committed by colour of an authority claimed under an illegal patent, this court hath always discharged the persons so committed without bail. Leon. 70. Andr. 297. 2 Hawk. P. C. 166.

The Court of King's Bench hath always admitted persons to bail imprisoned by the king's special command, or by order of the privy council, where the commitments expressed the crime or cause for which the party was committed, on the like circumstances, on which, in discretion, it will grant bail on other commitments.

(*a*) 33 H. 6. 28. b. Andr. 298. Roll. R. 134. 192. 219. Moor, 839. F. N. B. 66. S. P. C. 72. (*b*) See the arguments on the *habeas corpus*, concerning loans, and Rushworth's Collections, part 1. fol. 458. *Vide* Cro. Car. 507. 579. 593.

But it was formerly holden by many (*a*), and at length adjudged in *Sir John Corbet's* case (*b*), that persons committed by the special command of the king, signified by warrant from the lords of the privy council, were not bailable without the king's consent, unless there appeared some extraordinary circumstances in the case; it being to be presumed that the king would not exert his prerogative in such a manner, without some good reason for the safety of the state, not fit to be divulged; but this being thought to be a great strain of the prerogative, and to make the liberty of the subject precarious, and contrary to the purport of *magna charta*, and many other statutes, which declared that no man shall be imprisoned but by due process of law, *&c.*, occasioned the petition of right, 13 Car. 1. and the 16 Car. 1. c. 10., by which it seems now established, that where commitments by the privy council do not with convenient certainty express the crime alleged against the party, he ought to be bailed.

The

The great regard which is so justly due, and which has always been paid to the proceedings of either house of parliament, who are the guardians of the liberty of the subject, makes it somewhat doubtful in what cases the Court of King's Bench will discharge or bail a person committed by either of those houses. 2 Hawk. P. C. 170.

Hence no precedent can be found, where the Court of King's Bench has bailed a prisoner, sitting the parliament, on a commitment, which, on the return of it, stands indifferent whether it be strictly legal or not. *Id. ibid.*

And therefore, in the Lord *Shaftesbury*'s case, who, upon his *habeas corpus* in the King's Bench, was returned to have been committed by the House of Lords, for a high contempt committed against the house, the court would not take notice of any exceptions against the form of the commitment; as that it was too general, and did not express the nature of the contempt, or in what place it was committed, *&c.*; for that it shall be presumed that it was such, for which the lords might lawfully make such an order, and no other court shall prescribe to them in what form they ought to make it. Mod. 144, 145, &c. 3 Keb. 792. 1 Freem. 453. 2 St. Tr. 615. S. C. 2 Show. 336. [See confirmations of this doctrine in Murray's case, 1 Wils. 299. Brass Crosby's case, 3 Wils. 188.

2 Black. R. 755.; and part of Lord *Camden*'s argument in the case of Entick v. Carrington, 11 St. Tr. 317.;] ‖and see The King v. Flower, 8 Term R. 314.‖

But a person committed for a contempt, by the order of either house of parliament, may be discharged by the Court of King's Bench, after a dissolution or prorogation of the parliament, whether he were committed during the sessions, or afterwards; for that all the orders of parliament are determined by a dissolution or prorogation (*a*); and all matters, before either house, must be commenced a-new at the next parliament, except only in a few cases; and if the subject should be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could say when his imprisonment would end. 2 Hawk. P. C. 171. Keb. 871. 887. 889. Sid. 245. Lev. 165. Mod. 155. 157. (*a*) But *Qu.* For though the prorogation of the parliament was the chief reason why the Earl of *Danby* was bailed, yet the binding him to appear at the next sessions of parliament was an affirmance of the commitment, and a plain proof of the opinion of the court at that time, that the commitment was not avoided or discharged by the prorogation of the parliament. Carth. 132, 133. *Vide* Skin. 56. that the Earl of *Danby* was not bailed.*

* In Skin. 162, 163. there are further arguments in his favour; but in Carth. 132. it is said he was bailed when Ch. J. *Jefferies* came in. See Ch. J. *Holt*'s opinion in Salk. 503.

And though the Court of King's Bench may in their discretion bail a lord upon an impeachment of high treason, after a dissolution or prorogation of the parliament, yet may they refuse it, not as a matter out of their power, but as a thing which they are not bound to do, and improper on consideration of the whole circumstances of the affair. Raym. 381. Lord Stafford's case. [The Court of King's Bench bailed the Earl of Castelmain, whom the Commons had committed for high treason, the attorney-general not opposing. 4 St. Tr. 398.]

The Earl of *Salisbury* was impeached for being reconciled to the church of *Rome*, by the convention that was turned into a parliament 1 W. & M., and lay in the *Tower* till the next parliament, which being adjourned for two months, he moved to be discharged on the act of Oblivion, wherein neither his crime nor Carth. 131, 132. Show. 100. S. C. Earl of Salisbury's case.

nor his person were excepted, but clearly within the act of Pardon, or that he might be bailed. As to the act of Pardon, the court held, that it should be pleaded with proper averments (*a*), which could not be done here, because there was nothing before the court upon which to ground such plea (*b*); and that as to the bailing him, this being a short adjournment, the application for that purpose should be to the parliament.

(*a*) For which are cited Plow. 484. 8 Co. 68. 4 H. 7, 8. Rast. Ent. 665.

(*b*) But the reporter makes a *quære*, Whether he might not plead it in discharge of the matter returned by the *habeas corpus*, and enter it on the same roll. Carth. 152.

In former days, and particularly at the time when Sir *Edward Coke* was Chief Justice, several persons committed to the *Fleet* by the Lord Chancellor, were bailed by the Court of King's Bench, upon exceptions to the generality (*c*) of the form of the commitments.

(*c*) As not shewing the time of the commitment. Roll. R. 192. Or setting forth only the command of the Lord Chancellor as the ground of the imprisonment, without mentioning any crime at all. Moor, 839. Roll. R. 219. Or mentioning the crime in general terms; as for a contempt to the Court of Chancery, without mentioning what the contempt was. Roll. R. 192. 218.

Also one *Glanvil*, who was generally committed by the command of the Lord Chancellor, without setting forth any cause of such command, seems to have been bailed upon examination of the merits of the decree, for disobeying whereof he was in truth committed; whereby it appeared that the decree related to a matter before adjudged at the common law; which was thought contrary to the purport of 27 E. 3. c. 1., and 4 H. 4. c. 23. But this proceeding being resented by the Lord Chancellor, the said *Glanvil* was afterwards recommitted by him for the same matter, and yet was on another *habeas corpus* bailed a second time by the Court of King's Bench.

Roll. R. 111. 219. Moor, 858. 2 Bulst. 301. Cro. Jac. 343. 3 Bulst. 115. Roll. R. 277. *Vide* Dalison, 81. 3 Leon. 18.

But as there have been no such proceedings of late days, the disuse of them has certainly lessened, if not wholly removed, the force of these resolutions, especially as it is now established, that a court of equity can give relief after a judgment at law; for otherwise it would have no power of moderating the rigour of the law, it being in many cases very doubtful what the law is before it be determined; the superior courts therefore will put the most favourable construction (*d*) on another's proceedings, and not intend that they acted beyond their jurisdiction.

2 Hawk. P. C. 172. Abr. Eq. 130. (*d*) A commitment from Chancery for disobedience to a decree is good, without shewing what the decree was. 1 Mod. 155. Moor, 840. S. P.

The Court of King's Bench, having the supreme controul of all inferior courts, may in discretion admit persons to bail committed by such courts, upon consideration of the whole circumstances of the case, as the length and hardship of the imprisonment (*e*), the enormity or dangerous tendency, or notoriety, or small consequence of the offence, or obstinacy of the offender (*g*), or the dignity of the court by which he was committed (*h*), and other such like circumstances, of which the court will receive information by suggestion or affidavit, being consistent with the return of the *habeas corpus*. (*i*)

Vaugh. 157. 6 Mod. 73. 3 Salk. 91. pl. 1. 284. pl. 12. Holt, 590. 2 Ld. Raym. 978. 12 Mod. 102. 155, 156. 2 Hawk. P. C. 173. (*e*) Roll. Rep. 218. 337. 2 Bulstr. 140. Latch. 12.

(*g*) 3 Bulstr. 48 to 54. (*h*) For this *vide* 2 Hawk. P. C. 173. Vaugh. 139. 2 Bulstr. 139. Cro. Jac. 219. Cro. Car. 579. Sid. 144. 286. 320. Salk. 348. pl. 2. 5 Mod. 19. March, 52.

(*i*) That

(i) That no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it; yet a man may confess and avoid such return, by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. Sid. 287. 5 Mod. 323. 454. 2 Jones, 222. 2 Hawk. P. C. 113. [The King's Bench may bail in all cases at their discretion. Com. Dig. tit. *Bail* (F), 4. Cowp. 333.; and they will in general do so in every case not capital: in every capital case where there is any circumstance to induce a presumption of the prisoner's innocence, and in every case where the charge is not alleged with sufficient certainty. R. v. Judd, 2 Term R. 255. R. v. Remnant, 5 Term R. 169. They will, therefore, bail a person acquitted on an indictment of murder, and afterwards in custody on an appeal, unless the judge certifies a dissatisfaction with the verdict. Castell v. Bambridge, 2 Stra. 854. So a person committed for manslaughter, or even murder, if it appear to be no more than manslaughter, on the depositions before the coroner. R. v. Dalton, 2 Stra. 911. R. v. Magrath, *Id.* 1243. So in murder, and *pardon pleaded and allowed*, the defendant shall not give bail to answer the appeal, though the heir is beyond sea, for this is not within the 3 H. 7. R. v. Chetwynd, 2 Stra. 1203. In rape both principal and accessory will be bailed, if it appear they do not mean to abscond. R. v. Lord Baltimore, 4 Burr. 2179. 1 Black. R. 648. S. C. The court is bound *ex debito justitiæ* to bail an accomplice entitled to the king's pardon. R. v. Rudd, Cowp. 334. But they will not bail an appellee for murder, unless circumstances of delay appear on the part of the appellant. Castle v. Bambridge, 2 Stra. 854. Nor a person charged with a highway robbery, if the prosecutor attends and swears he is the man, notwithstanding a number of affidavits are produced to shew an *alibi*. R. v. Greenwood, 2 Stra. 1138. Or for assisting in the running of contraband goods, &c. R. v. Norton, Bunb. 143. Nor will they order, at the instance of the prisoner, a medical man to attend the person wounded, in order to state his situation for the purpose of bail. R. v. Sarah Salisbury, 1 Stra. 547. Nor will they bail after a bill for murder found, though the fact were plainly manslaughter. Case of Kirk and Case for the murder of Seymour Conway. M. 12 W. 3. See too 1 Salk. 104. Skin. 683. They have refused to bail on a special verdict on the statute of Stabbing. Sty. 467. 5 Mod. 288. It is said in some cases never to be allowed in manslaughter till clergy had. Sty. 371. Salk. 103. 5 Mod. 288. But it seems the court of K. B. may bail in this case, though justices of *oyer* and *terminer* or gaol-delivery cannot. Keilw. 70. 2 Inst. 188. Salk. 61.] ‖See Rex v. Massey, 6 Maule & S. 108.‖

‖If there appear a *corpus delicti* on the face of the warrant of commitment, the Court of King's Bench will not bail the prisoner merely on the ground of informality in the warrant, but they will remand the prisoner. The King v. Marks, 3 East, 157.

Where the court think a prisoner ought to be bailed for felony, if he be unable to defray the expense of being brought up to *Westminster* for that purpose, they will grant a rule to shew cause why he should not be bailed by a magistrate in the country, with a *certiorari* to return the depositions before them.‖ The King v. Jonas Jones, 1 Barn. & Ald. 209. The King v. Massey, 6 Maule & S. 108.

[It is to be observed, that neither this court nor any other court can bail persons in execution, or punished under any statute with imprisonment for their offence. And this is one reason why they cannot interfere where a party is committed for a contempt.] Com. Dig. tit. *Bail* (F), 2. 1 Mod. 158. 3 Wils. 199. 2 Term R. 190.; ‖and see Rex v. Waddington, 1 East, 159.‖

‖Where the House of Lords had voted the defendant guilty of a breach of privilege, and committed him to prison, the Court of King's Bench refused to discharge him out of custody.‖ Rex v. Flower, 8 Term R. 314.

(E) Where by the other Courts of *Westminster*.

THE Courts of Common Pleas and Exchequer, at any time during term, and the Chancery, either in term or vacation, may by the common law award a *habeas corpus* for any person committed 2 Inst. 53. 55. 615. 4 Inst. 290. Vaugh. 154. 2 Andr.

297. Dalison, 81. 3 Leon. 18. 2 Jones, 13, 14. 2 Mod. 198. committed for a crime under the degree of felony or treason (*a*); and thereupon discharge him, if it shall plainly appear by the return that the commitment was illegal, or bail him if it shall appear doubtful.

[The court of C. P. may, by the common law, grant a *habeas corpus* in all cases of misdemeanour. Wood's case, 3 Wils. 172. 2 Black. R. 745. S. C. Wilkes's case, 2 Wils. 151.] (*a*) That in some cases the chancery may by the common law bail persons for felony. 2 Hawk. P. C. 177.

Vide infrà, tit. *Habeas Corpus.* And by the *habeas corpus* act, any of the said courts in term-time, and any judge of the said courts, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any person liable within the intent of that act, for any crime under the degree of felony.

[(E 2.) Where by the House of Lords.

Skin. 683, 684. THE House of Lords may bail a peer committed upon an indictment for murder, if the indictment be removed before them by *certiorari*.

Dr. Sacheverell's case, *Dom. Proc.* 15th Jan. 1709. Case of Warren Hastings, *Dom Proc. die Lunæ*, 21° *Maij* 1787. Upon impeachments by the Commons for high crimes and misdemeanours, the recognizance of bail is taken by order of the House of Peers, at their lordships' bar, the bail being previously approved by a committee, to whom it is referred to consider of their sufficiency. The condition of the recognizance in such case is, that the criminal shall appear personally before the lords in parliament, and from day to day, until the further order of the house.]

(F) What shall be said to be sufficient Bail.

2 Hawk. P. C. 141. H. P. C. 97. Dalt. c. 14. That formerly none under the degree of subsidy-men were admitted to be bail for any person. Dalt. c. 70. and 114. [And, according to Crompt. Just. 194 a. subsidy-men were such NO person shall be bailed for felony by less than two, and it is said not to be usual for the King's Bench to bail a man on a *habeas corpus*, on a commitment for treason or felony, without four sureties (*b*); the sum in which the sureties are to be bound, ought to be never less than 40*l.* for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency, by him that takes the bail; and if a person be bailed by insufficient sureties, he may be required either by him who took the bail, or by any other who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none.

as had 40*s.* a year in the county. (*b*) In felony four persons are required for bail; but for any inferior offence two are sufficient. In both cases the number of the bail must be mentioned in the notice, otherwise the court will reject the whole. *Per* Lord *Mansfield*, Rex v. Bolton, M. 23 G. 3. Hawk. P. C. 141., notes, 6th edit. Sty. Pr. Reg. 110. In the case of the King v. Judd, though the commitment did not sufficiently charge a felony, and therefore the defendant was entitled to bail, yet enough appearing to shew an offence of great enormity, the court insisted upon four sureties. 2 Term R. 255. In an appeal of murder on the civil side, two bail only are required; but where it comes on the crown side by *certiorari*, there must be four. Castel v. Bambridge and Corbet, 2 Stra. 855.] ‖It is now the rule to require four bail in cases of felony. Rex v. Shaw, 6 Dow. & Ry. 154.‖

But

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as such by 1 W. & M. Sess. 2.; by which it is declared, that excessive bail ought not to be required. 2 Hawk. P.C. 141.

[The defendant's attorney may be bail for him; for the rule that no attorney or officer of the court shall be bail does not extend to criminal cases.] R. v. Bowes, Dougl. 466. notes.

‖After a defendant has been admitted to bail, the court will not increase the bail, on affidavits disclosing facts aggravating the original offence.‖ Rex v. Salter, 2 Chitt. R. 109.

(G) The Offence of taking insufficient Bail.

IF the party bailed by insufficient sureties do not appear according to the condition of the recognizance, the justice, *&c.* who bailed him is finable by the justices of assise; but if he appear, it seems that the person who bailed him is excused. S. P. C. 333. H. P. C. 97. 2 Hawk. P. C. 142. *Vide infrà*, letter (H).

And that if a justice admits a person to bail by insufficient sureties, whom he knows not to be bailable by law, corruptly for lucre or reward, the Court of King's Bench will grant an information against him, as in Rex v. Brooke, 2 Term R. 190.; and see tit. *Informations*; it is an offence too for which he may be indicted, *vide* tit. *Indictments*.

(H) The Offence of granting it where it ought to be denied.

THE bailing a person not bailable by law, is punishable at common law, as a negligent escape, or as an offence against the several following statutes. 2 Hawk. P. C. 142. S. P. C. 33. *Vide* tit. *Escape*.

By the statute of *Westm.* 1. cap. 15. it is enacted, "that if the "sheriff or any other let any go at large by surety that is not "replevisable, if he be sheriff or constable, or any other bailiff "of fee, which hath keeping of prisons, and be thereof attainted, "he shall lose his fee and office for ever; and if the under-"sheriff, constable, or bailiff of such as have fee for keeping of "prisons, do it contrary to the will of his lord, or any other "bailiff, being not of fee, they shall have three years' imprison-"ment, and make fine at the king's pleasure." *Westm.* 1. c. 15.

And it is enacted by 27 E. 1. commonly called the statute *de Finibus levatis*, cap. 3. "that the justices assigned to take assizes, "*&c.* when they deliver the gaols, *&c.* shall enquire if sheriffs, "or any other, have let out by replevin prisoners not replevis-"able, or have offended in any thing contrary to the form of the "said statute of *Westm.* 1.; and whom they shall find guilty they "shall chasten and punish in all things according to the form "of the said statute." 27 E. 1.

And it is further enacted by 4 E. 3. cap. 2. "that at the time "of the assignment of keepers of the peace, mention shall be "made, that such as shall be indicted or taken by them, shall "not be let to mainprize by the sheriffs, nor by none other "ministers, 4 E. 3. c. 2.

for not appearing as parties or witnesses, or for not prosecuting indictments, or otherwise not performing the conditions of such recognizances; many of which neglects of duty had happened by the inattention of ignorant people, it is enacted, "that it shall "be lawful for the barons of the Exchequer, upon affidavit and "petition to be presented to them by or on the behalf of the "person or persons imprisoned, or liable to be imprisoned on "the forfeiture of any such recognizances, to discharge such "person or persons, by order from the said barons, without "any *quietus* to be sued out for that purpose; for which order "no more than one pound and one shilling shall be taken by "the officer appointed to give out the same: provided that no "discharge shall be given on such petitions where any debt is "due to the crown, other than by the recognizances so prayed "to be discharged; nor in any cases of defrauding his majesty's "revenue by contraband trade, or assaulting his majesty's "officers of the customs or excise in the execution of their "duty, or any person or persons lawfully assisting them therein."

Recognizances in cases of felony are to be certified to the general gaol-delivery by 1 & 2 P. & M. c. 13. (*a*)

‖(*a*) This statute is repealed by 7 G. 4. c. 64. (see *ante*,) and see § 2. as to the returning recognizances and examinations to the court where the prisoner is to be tried.‖

Neither the defendant nor his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear (*b*): and if the defendants do not appear on that day, the court will not discharge the recognizance, although the attorney-general consent to it, but will respite it to the next term (*c*); for the judges of *oyer* and *terminer* are the proper judges whether recognizances ought to be estreated or spared. (*d*)

(*b*) Ca. temp. Hardw. 237.

(*c*) 11 Mod. 200.

(*d*) 10 Mod. 278.

1 Wils. 315.

If a defendant indicted for perjury be acquitted, the bail shall be discharged from their recognizance on motion, though the acquittal be not entered on record, for it appears on the *postea*.]

BAILIFF.

Co. Lit. 61. b. [See Lambard's Exposition of Saxon words. Dr. Johnson saith, that this word is of doubtful etymology in itself, but borrowed by us from the *French* "*bailli.*" See

BAILY or *bailiff*, saith my Lord *Coke*, is an old *Saxon* word, which signifies a keeper or protector: and though there be several officers called bailiffs, whose offices and employments seem quite different from each other, yet doth something of keeping or protection belong to them all. Hence the sheriff is considered as bailiff to the crown; and his county, of which he hath the care, and in which he is to execute the king's writs, is called his bailiwick; also his officers, who by his precept execute writs, are called bailiffs: there are likewise bailiffs of liberties, who are officers under lords who have franchises exempt from the jurisdiction of the sheriff; there are likewise bailiffs of lords of manors,

manors, who collect their rents, and levy their fines and amercements; also he is called a bailiff who hath the administration or charge of lands, goods, or chattels to make the best benefit for the owner, against whom an action of *account* doth lie for the profits which he hath raised or made, or might by his industry and care reasonably have made, his reasonable charges and expenses deducted; there are likewise those termed bailiffs to whom the king's castles are committed, as the bailiff of *Dover Castle*, &c. The chief magistrates in divers ancient corporations are called bailiffs, as in *Ipswich*, *Yarmouth*, *Colchester*, &c. There are likewise officers of the forest who are termed bailiffs; but as there is but little said of some of these in our books, and as what relates to others will more properly fall under other heads, we shall in this place only consider what we find relating to

(A) Sheriffs' Bailiffs.

(B) Bailiffs of Liberties or Franchises.

(C) Bailiffs to Lords of Manors.

too 3 Black. Com. 344. Blount's Law. Dict. tit. *Bailiff.*] By some opinions a bailiff in *Magna Charta*, c. 28., signifies any judge. *Vide* Co. Lit. 168. b. *Vide* 10 H. 4. 4 Mirror, c. 5. § 2. Bracton, 409. Fleta, lib. 2. c. 63. Glanv. lib. 1. c. 9. Kitch. Retorn. Brev. 285. 2 Inst. 455. Co. Lit. 272. Manwood, part 1. p. 113.

(A) Of Sheriffs' Bailiffs.

A SHERIFF's bailiff is an officer appointed in every hundred to execute all writs within the hundred, directed to the sheriff; he is likewise to collect the post-fines (*a*), fee farms of the king, *&c.* for the sheriff, and to attend the justices of assise and gaol-delivery, and justices of peace in their courts.

6 Co. 54. A bailiff is to take the same oath which the under-sheriff takes, prescribed by the stat. 27 Eliz. c. 12. But a special bailiff, or one employed by the sheriff for a particular time only, as to execute one writ, &c. is not obliged to take the oath. Jones, 249. 2 Lev. 151. But what he doth is considered as done by the sheriff himself; and therefore a rescue from him shall be judged a rescue from the sheriff, and his escape the escape of the sheriff, for which the sheriff shall answer. (*a*) See 32 G. 2. c. 14., whereby he is not to collect them.

If an under-sheriff takes bond from a bailiff, conditioned to save him harmless in executing all processes, *&c.* and on action brought on this bond, the sheriff assigns for breach that the bailiff had not executed a certain warrant sent to him upon a process directed to him out of the Exchequer, to levy issues upon certain lands in *D.*, and it is not alleged that *D.* is within his hundred; this is no breach of the condition, for the bailiff cannot execute a precept out of the hundred where he is bailiff. (*b*)

Stile, 18. Stoughton and Day. [Alleyn, 10. S. C. This was adjudged upon demurrer. But after verdict the objection would not avail. Weston v. Mason, 3 Burr. 1725. And *qu.* Whether for the purpose *of executing process*, the authority of these bailiffs does not extend over the whole county?] (*b*) Unless it be directed to him particularly, and he be made special bailiff for that purpose. Salk. 176.

A sworn bailiff, commonly known to be an officer, acting within his own precinct, need not shew his writ to the person he arrests; but when he has made his arrest, he is to inform him of the substance of his writ, at whose suit the action is, and out of what court the process issues; but a special bailiff is obliged to shew his warrant; ‖and *quere*, whether an ordinary bailiff must not, if required?‖

8 E. 4. 14. a. 14 H. 7. 9. b. 6 Co. 54. 9 Co. 69. Stile, 405. Cro. Jac. 485, 486. ‖8 Term R. 188.‖

A sheriff, who has a writ directed to him, may authorize others

8 E. 4. 14. a. Dalt. c. 117.

others to execute it; but the person to whom he directs it must personally execute it; yet it seems that one may lawfully assist him.

Mod. 211. ‖*Holt* C. J. formerly doubted whether an arrest by the bailiff's follower were good though in the bailiff's presence; but it is determined, that it is not necessary that the officer having the authority should be the person making the arrest, nor even in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed; it is sufficient if he be near, and acting in the arrest, and not on a different errand.

Cowp. 65. See 2 New R. 211.

6 Mod. 210. 1 Salk. 79. 2 New R. 212. It is a contempt of the court to hinder a bailiff arresting, but no rescue, unless an arrest is made; and bare words will not make an arrest.‖

Vent. 306. 6 Mod. 175. S. P. In what cases a bailiff may justify breaking open a house. A bailiff caught one by the hand (whom he had a warrant to arrest) as he held it out of a window; and the court said that it was such a taking of him that the bailiff might justify the breaking open of the house to carry him away.

Vide Cro. Jac. 280. Palm. 53. Fost. Cr. L. 136. 320. 6 Mod. 105. and the authorities there cited; and tit. *Sheriff*.

Lloyd v. Sandilands, 8 Taunt. 250. ‖And accordingly, where the officer touched the defendant through a broken window, and told him to surrender, and then further broke the window, and entered, he was held justified.

Lee v. Gansell, Cowp. 1. Ratcliffe v. Burton, 3 Bos. & Pull. 223. Johnson v. Leigh, 6 Taunt. 248.; and see Where the street door is open, the bailiff may legally break open the inner door to get at the defendant, who is a lodger; and he may break open such inner door without previous demand of admittance, though otherwise as to an outer door; but he cannot break the inner doors of the house of a stranger, on suspicion that the defendant is there.

Hutcheson v. Birch, 4 Taunt. 619. Cooke v. Birt, 5 Taunt. 765.; and see 2 Barn. & A. 592.

Hall v. Roche, 8 Term R. 187. The bailiff to whom a warrant is intended to be directed cannot arrest the party before he has it.

Boyd v. Durand, 2 Taunt. 161. A warrant to four jointly, and not severally, clearly will not authorize an arrest by one.‖

But *aliter* if the warrant be joint and several. Palm. 52. Cro. Eliz. 913.

2 Jones, 197. Lev. 214. 2 Lev. 28. But where the sheriff returned One who is arrested by a sheriff's bailiff is in the sheriff's custody, and if rescued, the sheriff may allege that he was rescued out of his custody.

virtute brevis mihi direct. feci warrant. A. and B. *ballivis meis, qui virtute inde ceperunt* the defendant, *et in custodia mea habuerunt quousque* such and such *recusserunt* him *ex custodiâ ballivorum meorum*, it was held ill; for when the bailiffs have arrested the party, he is in fact and in truth in their custody; but in law he is in the custody of the sheriff, and an answer either way is good; but to say that he was in the custody of the sheriff, and yet rescued out of the custody of the bailiffs, is repugnant. 2 Salk. 586. pl. 2.

Salk. 79. pl. 2. Genner and Sparks. 6 Mod. 173. S.C. ‖See 2 New R. 211. 6 Camp. R. 139. 6 Barn. & C. 528.‖ A bailiff having a warrant against *A.* went to him in his yard, and being at some distance told him he had a warrant, and said he arrested him; *A.* having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house; and on motion for an attachment for a contempt, the court held that bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest, and the retreat a rescous, and the bailiff might have pursued and broke open the house, or might have an attachment or rescous against him: but as this case is, the bailiff has no remedy but an action for the assault; for the holding

holding up of the fork at him, when he was within reach, is good evidence of that.

By the 29 Car. 2. c. 7. it is enacted, "That no person or persons upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, (except in cases of treason, felony, or breach of the peace) but that the service of every such writ, process, warrant, order, judgment, or decree, shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment, or decree at all. 29 C. 2. c. 7. An arrest on *Sunday* is void, and the party may have an action for false imprisonment. ‖And the arrest cannot be made good by any subsequent waver of the defendant. 3 East, 155. 8 East, 547.‖ Salk. 78. pl. 1. *A.* was taken on a *Sunday* without any warrant, and locked up all that day, and then on *Monday* morning a writ was gotten against him; the court held, that he might have an *attachment*, or an action of *false imprisonment* against those who took him on the *Sunday;* but they refused to discharge him. 6 Mod. 96. [But where the writ was returnable on a *Sunday*, and the officer arrested the defendant on the *Monday* morning, the court discharged him out of custody, notwithstanding the writ was renewed within two hours after the arrest. Loveridge v. Plaistow, 2 H. Black. R. 29.] ‖And where, by contrivance of plaintiff's attorney, a party was arrested on *Sunday* on criminal process, for the purpose of effecting his arrest on civil process, and he was detained till *Monday*, and then arrested on civil process, the court discharged him. Wells v. Gurney, 8 Barn. & C. 769.‖ Where an *attachment* was granted for arresting one on *Christmas-day*. Hetley, 19. But bail may take their principal on *Sunday*, and confine him till *Monday*, and then surrender him. 6 Mod. 231. [But see Brookes v. Warren, 2 Black. R. 1273. *contr.* in the case of bail to the sheriff. *Vide* stat. 5 Ann. c. 9. § 5. by which one may be taken on an escape warrant on a *Sunday*. And he may be taken on that day by the officer upon fresh pursuit; 2 Ld. Raym. 1028. 2 Salk. 626. 6 Mod. 95. S. C.] ‖But not at the suit of another party, though he had a detainer against him when he was discharged. 5 Term R. 25. Tidd's Prac. 216.‖ That a bailiff may arrest in the night, *vide* 9 Co. 65. b. Cro. Jac. 486. Where he may justify entering the house of a stranger to make an arrest, *vide* Lutw. 1432. ‖4 Taunt. 619. 5 Taunt. 765. 6 Taunt. 248.‖ If a sheriff make out a precept to his bailiff to arrest one before any writ directed to him, and the bailiff arrest the party accordingly, and afterwards a writ issue to the sheriff, the party arrested may have an action of *false imprisonment*. Sand. 298. 2 Keb. 173. 838.

A special verdict found that a *fieri facias* bore *teste* 4 *June*, but was really sued forth 11 *June*, and executed 12 *June;* and that the party against whom it went became a bankrupt 6 *June*, and a commission was taken out 17 *June*, and *trover* and *conversion* was brought against the bailiff who executed the writ; and the court held, that though the property was so bound that the execution should not have effect against the assignment of the commissioners, yet it was hard to punish the officer in *trover*, and make him a trespasser for doing what he was obliged to do, and from which he could not plead to excuse himself, and therefore gave judgment for the defendant. Sid. 271. Lev. 173. Keb. 930. 932. S. C. *Vide* 1 Burr. 20. 2 Burr. 814. ‖But that *trover*, though not trespass, lies against a sheriff or officer for seizing after an act of bankruptcy, and selling whether before the commission or after, see Cooper v. Chitty, Burr. 20. Black. Rep. 65. Smith v. Milles, 1 Term R. 475. Potter v. Starkie, 4 Maule & S. 260.; but it seems the mere seizure without a sale, or at least a removal, would not be a conversion. Wyatt v. Blades, 3 Camp. R. 396.‖

The statute 23 H. 6. c. 10. enacts, "That for an arrest or attachment the sheriff shall have 20*d.*, and the bailiff who makes the arrest 4*d.*, and that the sheriff or bailiff who doth contrary shall pay treble damages to the party grieved, and forfeit the sum of 40*l.*; one moiety to the king, and the other to the party that will sue; and that the justices of assize 23 H. 6. c. 10. *Vide* 5 Mod. 225. An action brought against a bailiff on this statute, for taking

5s. 4d. for an arrest; ‖and see Dew v. Parsons, 2 Barn. & A. 562.‖

" in their sessions, justices of the one bench and of the other, " and justices of peace in their county, may determine the said " offences."

1 H. 5. c. 4.

By the 1 H. 5. c. 4. it is enacted, " That they which be bailiffs " of sheriffs by one year shall be in no such office for three " years next following, except bailiffs of sheriffs which be in- " heritable in their sheriff-wicks; and that no under-sheriff, " sheriff's clerk, receiver, nor sheriff's bailiff, be attorney in the " king's courts during the time that he is in office with any such " sheriff."

Hob. 62. 263, 264. 11 H. 6. 42. b. 43. a. Noy, 101. Moor, 770. pl. 1064. 2 Roll. Abr. 278. Barnard. K. B. 259. 296. 2 Barnard. K. B. 215.

Bailiffs, being officers who are to execute the king's writs, are most commonly punished in those courts out of which such writs issue, by attachment; but it is impossible to set down all the misdemeanors and oppressive practices for which they are punishable in the discretion of the court: however, attachments have been granted against them where they have used needless force, violence, and terror in making an arrest; or where they have broken open doors where by law they could not, and there was no plausible excuse for doing it; where they have treated the persons arrested basely and inhumanly, or kept them in custody till they consented to pay money for their deliverance; or where they have extorted (*a*) money for taking bail; or made an arrest without authority, by force of a blank warrant filled up with the name of a special bailiff, by the party himself, without the privity or subsequent agreement of the sheriff; or if a bailiff levy a debt by virtue of an execution, and keep the money in his hands, and embezzle it; but even in these cases there may be such circumstances or matters of alleviation as will induce the court to excuse, if not wholly discharge them.

(*a*) 2 Burr. R. 926. *Vide* 2 G. 2. c. 22. and 32 G. 2. c. 28. *infrà*, tit. *Gaolers*, and tit. *Sheriff*.

(B) Of Bailiffs of Liberties or Franchises.

A BAILIFF of a liberty is one who hath the same jurisdiction with the sheriff's bailiff, granted to him by the lord of a liberty or franchise.

These liberties and franchises began by the lords purchasing the bailiwicks of the hundreds, sometimes for years, for life, or in fee, at a certain rate in fee farm; and for this the lords had the court-leet, the assizes of bread and beer, and the amends, *viz.* the fines for the breach of any of the articles examinable in the leet; and they likewise had the return of writs.

These franchises proving very inconvenient, because the sheriff could not enter into them to execute the king's writs, but was to direct them to the bailiff of the liberty, who had the execution of all writs, the statute Westm. 2. cap. 29. enacts, that if such bailiffs give no answer to the sheriff, the court should grant special warrant with a *non omittas*, which authorizes the sheriff to enter the franchise; and it being usual to take out the *capias* and *non omittas* together, we have but little material in our books relating to this matter.

Dalt. Sher. 465. 11 H. 4. 694. Bro. Offic. 34. Bro. Ret. 26.

But there are some cases in which the sheriff may enter without any clause of *non omittas;* as in case of a *quo minus*. So where the sheriff is by Westm. 1. cap. 17. to make deliverance by

by replevin; so where he is judge, as in a writ of *redisseisin;* so in *waste;* so in executing a warrant for breach of the peace.

If the sheriff executes the writ of a common person without a *non omittas,* the execution is good; but the sheriff is liable to an action by the lord for entering into his bailiwick. 2 H. 4. 1 Plow. 216. 243. F. N. B. 95.

‖And if the sheriff in such case suffer the defendant to escape within the liberty, the sheriff is liable to an action for the escape, since the arrest is not wrongful as against the defendant. Piggott v. Wilkes, 5 Barn. & A. 502.

However, it has been held by *Wood* B., that the killing a bailiff making such an arrest does not amount to murder, since the judge said the bailiff was a trespasser. Rex v. Mead, 2 Stark. R. 20.

It has been decided after full argument, that an action on the case cannot be maintained by the bailiff of a franchise for issuing a writ of *non omittas capias* in the first instance, without a previous *capias,* and return by the sheriff; since the long established usage of the court has legalized the practice. Carrett v. Smallpage, 9 East R. 330.

A writ of *fieri facias,* directed in the first instance to the bailiff of the *Isle of Ely,* out of the King's Bench, is erroneous and void, and the bailiff seizing goods under it is a trespasser.‖ Grant v. Bagge, 5 East, 128; and see 14 East, 289. 1 Bro. & B. 12.

The bailiff of a franchise cannot enter into the guildable; and if he does it is erroneous, because he has no authority out of the franchise more than the sheriff has in another county.

If there be two liberties within a county, *viz. St. Edmund de Bury* and *St. Ethelbed de Ely* in *com. Suffolk,* and a *capias* is directed to the sheriff to take the body of *B.* and the sheriff returns that he has made his mandate to the bailiff of *Ethelbed,* who has made no answer, the sheriff, on a *non omittas,* shall enter into the liberty of *Bury,* though the bailiff of that liberty has made no default. Bro. Offic. 55. Dalt. Sher. 464. Offic. Brev. 135. Thes. Brev. 166.

If the bailiff of a franchise had made an insufficient return, which the sheriff returned to the court, they formerly held the sheriff was answerable, and not the bailiff; for an insufficient return is no return, and the bailiff making no return, the sheriff ought to have said *nullum dedit mihi responsum;* but this is altered by the 27 H. 8. cap. 24., which says that the amercement for insufficient returns made by bailiffs of franchises shall be set on the bailiff's head, and not on the sheriff's. 5 H. 7. 11. 5 H. 7. 27. Bro. Ret. 89. 2 Term R. 11. See too 8 H. 6. c. 9. § 11.

[If the bailiff of a liberty, who hath the return and execution of writs, remove a prisoner taken in execution to the county gaol, and there deliver him into the custody of the sheriff, he is liable to an action for an escape.] Boothman v. Earl of Surry, 2 Term R. 5.

If the bailiff of a liberty dies after he has returned *cepi,* a *distringas* issues against his successor, because he takes it up under the return of his predecessor. Bro. Ret. Brev. 99. 14 E. 4. 1.

‖Where it appeared that King *Charles* II. by charter, reciting former grants of the franchise by *Philip* and *Mary,* and by *Charles* I., granted the execution of all writs to Viscount *Dunbar,* his heirs and assigns, in the liberty of *Holderness;* and it appeared that the officer had, since 1787, been in the habit of summoning jurors within the liberty to attend the quarter sessions; it was held that this evidence raised a presumption that there was Rex v. Jaram, 4 Barn & C. 692. 7 Dow. & Ry. S. C.

a franchise existing at the passing of the statute 27 H. 8. c. 24., there being no evidence to the contrary, and that it was the bailiff's duty, on receiving the sheriff's mandate, to summon a sessions jury.‖

(C) Of Bailiffs to Lords of Manors.

Roll. Abr. 339. BAILIFF of a manor may himself, or may command another to take cattle *damage-feasant* upon the land; for he hath the care of all things within the manor.

5 Co. 76. Pilkington and Hastings. [If the distress be impounded, But if a distress be taken for *damage-feasant*, amends cannot be tendered to the bailiff; for he cannot deliver a distress when it is once taken, no more than he can change the avowry of his master (*a*), or demand a rent upon a condition of re-entry.

the tender is too late either to the bailiff or principal, for it is then *in custodiâ legis*. But whether a tender to the bailiff before impounding be good, was not the point in Pilkington's case; for *there* the tender was after the impounding, and to a common servant, the master himself being present. Cro. Eliz. 815.] (*a*) Dy. 222. *Vide* 2 Stra. 1128.

Vide Cro. Jac. 178. Owen, 28. Hob. 154. A bailiff of a manor, though he has no interest in the land, has an authority to receive rents, take fealty, pay quit-rents, repair houses and fences, and in other things act for his master's benefit; but he cannot do any thing to his prejudice, nor can he tile a house that was before thatched, nor impale a place before mounded with a hedge.

Cro. Jac. 178. A bailiff may be steward of the same manor; for those are offices which are compatible.

Id. A bailiff hath no permanent estate, but is removable at the lord's pleasure.

Roll. Abr. 339. Diversity A bailiff of a manor may lease the piscary for years, but he cannot by any usage make a lease of his master's land.

where he may make a lease at will, though not a lease for years. Lit. Rep. 71.; for this *vide* Roll. Rep. 258. Cro. Jac. 577. 2 Leon. 46.

Roll. Abr. 685. But for this *vide* Godb. 110. Kelw. 177. Fitz. Bailiff, 7. Bro. Distress, 85. If a man takes cattle, without any command, for services due to the lord, if the lord after agree to the taking, he shall be adjudged his bailiff, although he was not his bailiff in any place before.

Comp. Incumb. 481.

Roll. Abr. 339. But *quære*, If there must not be a consideration given for A bailiff may give licence to another to go over the land; for this is a trespass to the possession only, and the bailiff hath the disposal of the profits of the possession.

such licence? *Vide* 1 Roll. R. 258. Cro. Jac. 337.

Palm. 402. In debt for rent, upon a lease for years, the defendant pleaded that the plaintiff made *J. S.* bailiff of his manor, of which the lands in lease were part, and gave him power to receive the rents of the lessees, *&c.*, and also power to make leases for years; and that an agreement between the said bailiff and defendant was made, that he should pay 100*l.*, and also surrender his lease to the use of the lord, and then should be discharged of the rent, which he hath done; and whether this agreement would bind the lord was doubted, and a peremptory day given to the defendant to maintain his plea, after which the reporter *nil plus inde audivit.*

A. leases

A. leases to *B.* for ninety-nine years, if *B.*, *C.*, or *D.* shall so long live, reserving a heriot of *5l.* upon the death of every of them; *B.* dies, and the bailiff of *A.* makes conusance as bailiff generally for a heriot, but does not shew that *A.* had made his election; and whether this was not good and incident to the place of bailiff, or at least whether this should not be intended for the benefit and advantage of the master till the contrary was shewn, *dubitatur*; and after the parties agreed. Lit. R. 33. 70, 71. Hetl. 12. 16, 17. S. C. ill reported.

No bailiff can distrain for a fine or amercement without a special warrant for so doing, which must be set forth by him in an avowry or justification of such a distress. (*a*) 5 Mod. 138. Cro. Eliz. 698. 748. Moor, 57. Salk. 107.

pl. 2. 108. Skin. 587. pl. 1. 2 Keb. 745. 2 Hawk. P. C. 96. (*a*) The case in Salkeld says, he should have set out some *estreat* from the court, or warrant from the steward.

BAILMENT.

[BAILMENT, properly so called, is a delivery of goods in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed. Improper bailment is, where the goods are legally in the hands of the possessor, upon such trust by *finding, or in consequence of some distinct contract.* Bailment is derived from the *French* verb, *bailler*, to deliver; which word, as well as the others of this origin, are applied in that language (*a*) to one only of those species into which this contract is divisible, *viz.* letting to hire.] Law of Bailment, 117. (*a*) *Bail*, in *French*, is *contrat par lequel on donne une terre à ferme, ou une maison à louage*; and *bailleur* is the person *qui baille à ferme.* Dict. de l'Académ.

(A) Of simple Bailment, ||or Deposit to keep.||

||(B) Of Bailment by way of Pledge: And herein of Pawnbrokers.||

(C) Of borrowing and other Bailments.

(D) Where the Thing bailed is destroyed or deteriorated, to whom is the Loss, and to whom is the Remedy: ||And of the several Degrees of Care required from various Bailees.||

(A) Of simple Bailment, ||or Deposit to keep.||

IF a man delivers goods to another to be kept, or, which is all one, to be safely kept (*b*), the bailee undertakes to keep them only from all damage that arises from his own negligence; and the [(*b*) This notion, that to *keep* and to *keep safely* are

the undertaking being only to keep them, he ought not to use them as though he had an interest in them.

one and the same thing, was denied by the whole court in the case of Coggs v. Barnard, 2 Ld. Raym. 911.] ‖See Jones on Bailment, 42.‖ It was formerly held, that where goods were bailed generally, if those goods, with others of the bailee's, were stolen, though without his default, the bailee should be responsible for them, there being a warranty in law annexed to all such bailments. 4 Co. 83. Southcote's case. But for this *vide* Co. Lit. 89. a. Cro. Eliz. 815. Kelw. 77. Sav. 74. Sid. 36. Roll. Abr. 3. pl. 2. Bro. tit. Bailment, 7., title Detinue, 35. ‖But that a depositary of goods without reward is only liable in case of gross neglect, such bailment being only beneficial to the bailor, see *post*, Jones on Bail, 117.‖

So, *à fortiori*, if a man delivers goods to another to keep as a man would keep his own; and this is called a special bailment, in which the bailee doth undertake for no more than for his diligence in the keeping of them, and has no manner of use of the thing to him committed, but the naked possession only. (*a*)

Co. Lit. 89. a. 4 Co. 83 b. ‖(*a*) With respect to use, Bracton, 99. lays it down that if the pawnee (and it would be the same as to a depositary) is at charge in keeping the thing bailed, as a horse, he may use it for his reasonable charge. Sir William Jones thinks, that if the thing will be impaired by use, the depositary may not use it: if it cannot be hurt, as chains of gold, jewels, &c. it may be used, but at peril of the depositary in case of accident; and if it be a horse, setting dog, or other animal requiring exercise, there would be a presumed authority from the bailor for moderate use. See Law of Bailment, 81. The *Roman* and *French* law permit the pawnee or depositary to milk cows delivered in bail, but require them to account for the milk and calves, deducting reasonable charges of nourishment. Poth. *Depôt*, n. 47. *Nantissement*, n. 55.‖

If *A.* leave a chest locked with *B.* to be kept, and take away the key, without acquainting *B.* with the particulars, the goods in the chest are in the possession of *A.*; for since *A.* keeps the key, the goods are locked out of the possession of *B.*; and *B.* (*b*) ‖not‖ being acquainted with the particulars, cannot be supposed to have them under his custody; so that neither the possession nor use of the goods are in *B.*; for though the possession of the box is in *B.*, yet is he shut out from the possession of the goods in the box; for that cannot be said to be in his possession which he cannot take hold of and remove, or order, during the continuance of such possession.

Co. Lit. 89. a. b. 4 Co. 83. [(*b*) *B.*'s knowledge or ignorance of the particulars would not affect the case at all under these circumstances.] ‖This opinion does not seem correct, though it agrees with Lord *Holt's dictum* in 2 Ld. Raym. 914. Sir William Jones, on the contrary, observes, "No man can proportion his care to the nature of the things without knowing them; and the difference may be very material as to the defence." Jones on Bailment, 38. And if a locked box contain articles of extraordinary value, it seems clear that the bailee is not bound to greater care than if the box contained articles of ordinary value, by reason of his ignorance of the contents. See Batson v. Donovan, 4 Barn. & A. 42. Sleat v. Fagg, 5 Barn. & A. 348. Bodenham v. Bennett, 4 Price R. 31., and Domat. Civ. L. lib. 1. tit. 7. § 1. says, that the bailee of a locked casket is only obliged to restore the casket as it was delivered, without being responsible for the contents. And in 1 Stark. Ca. 237., Lord *Ellenborough* expressly held, that the care required from the bailee became greater on his opening the box bailed, and ascertaining that it contained coin.‖

[And if *B.* open the chest, and take the goods to a broker's, and borrow money upon them, and deposit them with the broker as a security for the money so borrowed, *A.* may maintain trover for them (*c*) against the broker, without tendering him the money for which they were pledged by *B.*]

Hartop v. Hoare, 3 Atk. 44. 2 Stra. 1187. S. C. 1 Wils. 8. S.C. (*c*) The like law in the case of a remainder-man, upon the death of a mere tenant for life of goods pawned. Hoare v. Parker, 2 Term R. 376.] ‖16 Vin. Abr. tit. Pawn, 264. And so, also, a factor could not pledge the goods of his principal, so as to entitle the pawnee to detain them against the owner for the advance. Paterson v. Tash, 2 Stra. 1178. Daubigny v. Duval, 5 Term R. 604.; but see the alterations in the law by stat. 6 G. 4. c. 94. and *post*.‖

If

If the goods of *A.* are bailed by *B.* to *C.*, *C.* must deliver them to *B.*, for *C.* cannot pretend to remove or alter that possession committed to him, in order to restore it to the right owner; for the right of restitution must be demanded of him that did the injury, of which *C.* has no pretence to judge; and therefore it would be downright treachery in him to deliver them to any other than him from whom he had it. Roll. Abr. 607. ‖*Sed vide* 5 Taunt. 763. where *Gibbs* C. J. says, if the property is in others, the bailee may set it up in defence; and *Heath* J. says, it is peculiar to ejectment that he who is intrusted with possession of land must deliver it back to the lessor, but it applies to no other action. But see Dixon v. Hammond, 2 Barn. & Ald. 310., that an agent cannot dispute his principal's title.‖

But if *A.* bails goods to *B.* to which *C.* has a right, and *B.* dies, his executors are chargeable only to *C.* that has right; for the executors came to the possession by the law, and therefore must deliver it to those persons in whom the law has established the property; and the taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, so far as there are assets; but doth not embark the executor in the personal trusts of the deceased, any more than he is obliged to answer for his several injuries; and no man can tell how they might have been discharged or answered by the testator. Roll. Abr. 607. *Vide* title *Trover and Conversion.*

‖If a thing be deposited by two, or by one with the authority of the other, and received by the bailee to keep on joint account of the two, one of them cannot demand the thing unless under an authority of the other, so as to maintain *trover* on the bailee's refusal to deliver it. May v. Harvey, 13 East, 197.

(B) Of Bailment by way of Pledge: And herein of Pawnbrokers.‖

PLEDGING is where goods and chattels are delivered in security for money lent, and by such pledging the pawnbroker hath more than the naked possession in the nature of a bailment, for he hath the property and interest in the thing itself (*a*); and by the better opinions, shall have a reasonable use of it, so that it be without damage to the thing thus pledged. Doct. & Stud. 130. Roll. Abr. 338. 675. Owen, 124. 2 Salk. 522. pl. 1. [(*a*) But every bailee has a temporary *qualified* property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action, or an appeal in his own name against any stranger who may damage or purloin them. 21 H. 7. 14. b. 15. a. See Tr. on the Law of Bailments, 81, 82.] ‖And he may maintain case as well as trespass on his possession. Rooth v. Wilson, 1 Barn. & A. 59. Croft v. Alison, 4 Barn. & A. 590. A *gratuitous* permission to another to use a chattel does not divest the owner of the possession, and therefore he may maintain trespass. Lotan v. Cross, 2 Camp. R. 464. But if the bailee *hire* the chattel for a definite period, he has the possession during that time, and the owner cannot during the hiring support trespass, but only case. Hall v. Pickard, 3 Camp. 187.‖

‖It is said, that where the pawnee is at any expense to maintain the thing given in pledge, as if it be a horse or cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge.‖ Jones on Bail, 81. (3d edit.) See the rule of the *Roman* and *French* law as to this point. Poth. *Depôt*, n. 47.

If a man pledge goods to *B.*, and they are stolen (*b*), *B.* shall not answer for them, because he hath a property in them; and his custody is but a consequent of that property, and therefore he doth Co. Lit. 89. a. 3 Inst. 108. 4 Co. 83. Palm. 551.

Owen, 123. Yelv. 178. Cro. Jac. 244. Bulst. 29, 30. Roll. R. 181.

doth undertake to keep them as his own; though a man that undertakes to secure what is another's is bound to keep them at all adventures, since the right owner might possibly defend them with his life; but where a man is only obliged to keep them as his own, no unavoidable accident is to be imputed to him.

[(*b*) That is, if the bailee be *robbed* of them; for if they are taken *clandestinely* (the proper sense of the word *stolen*), he shall be answerable. 10 H. 6. 21. Bro. Abr. tit. Bailment, pl. 7.] ‖And this is the distinction of the *Roman* law, "Adversus *latrones* parum prodest custodia: adversus *furem* prodesse potest, si quis advigilet." Dig. 17. 252, 253. See also Poth. *Contrat de Louage*, n. 429., and Poth. *Contrat de Prêt à Usage*, n. 53. And Sir William Jones shews, that both Lord *Coke*'s doctrine and the reason (*suprà*) are incorrect, since a pawnee, according to Lord *Holt*, Ld. Raym. 917., and to the general principle applicable to cases where the bailment is *reciprocally* beneficial (as in a pledge), is bound to use *ordinary diligence* for restoring the goods; and the suffering the goods to be *stolen* is a breach of this obligation, though it is otherwise as to a *robbery*. Jones on Bail, 75. (3d edit.) And though the case, 29 Ass. pl. 28., seems to have decided that a pledgee was not answerable where the goods were *stolen*, Sir W. Jones shews that the word was there inaccurately used for robbery; in which he is confirmed by Broke's statement of the case. Bro. Abr. tit. Bailment, pl. 7. And Lord *Coke*'s reason, "because the pawnee has a property," would apply equally to all species of bailments, as well as that of a pledge; and the true reason is, that the law requires of a pledgee only ordinary and not extraordinary care. And Lord *Coke*'s conclusion, "therefore he doth undertake to keep them as his own," is not an accurate statement of the pawnee's undertaking, since he is bound to take more care of them than of his own, unless he is a *prudent* manager of his own concerns; the law requiring of him *ordinary care*. "*Aliena* negotia *exacto* officio geruntur." See Jones on Bail, 82.; and see 1 Esp. Ca. 515. 4 Dow. & Ry. 636.‖

Clarke v. Earnshaw, 1 Gow. 30.; and see 1 Esp. Ca. 315.

‖Where *A.* intrusted *B.* (a chronometer maker) with a chronometer to be repaired, and *B.* suffered his servant to sleep in the shop, in which the chronometer was deposited, and *B.*'s servant stole it, and it appeared that *B.* at the time when the theft was committed had deposited his own watches in a more secure place, *B.* was held liable to *A.* for its value.‖

Cro. Jac. 245. Yelv. 179. Bulst. 29. Bro. Bailment, 7. Roll. R. 129. Co. Lit. 89. Bull. Ni. Pri. 72. 2 Salk. 441.

If a man pledge goods, and tender the money to the pawnbroker, and he refuse, this determines the qualified property; and therefore if after such tender the goods are stolen, *&c.* the bailor shall have satisfaction made him in an action of *trover*; for a tender and refusal must in those cases amount to a payment, because otherwise no man could again come to his own, since pawns are over the value lent.

Cro. Jac. 245. Yelv. 179. Bulst. 29. 31. If *A.* pawns goods to *B.* for 25*l.*, and

And though the borrower tender the money and recover the goods in an action of *trover*, yet the pawnbroker may have an action of *debt* for his money; because though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whence it came. (*a*)

B. delivers them over to *C.*, and makes *D.* his executor, and dies, *A.* shall tender the 25*l.* to the executor, and not to *C.*; for *C.* is no more than a bailee, and hath only the custody of them; but the property of them is in *D.* as representative of *B.*, and therefore to him must the tender be made. Otherwise it is in the case of a mortgage, where the tender may be to the assignee, because the property of the land is in him. Cro. Jac. 244. Yelv. 178, 179. (*a*) But where a tender has been made, he should demand the money before he brings his action.

Yelv. 179. Co. Lit. 209.

So if a man lend perishable goods as a pledge, and they decay, yet the person to whom they are pledged may have an action of *debt* for his money, because the duty continues.

Bro. Attach. in Assize, 20.

These goods thus taken to pledge cannot be forfeited by the pawnbroker for his offence, nor can they be taken in execution, nor

nor attached for his debt, for the absolute property is in another; and therefore they are not alienable, nor by consequence forfeitable, because they cannot be forfeited without loss and danger to the absolute owner; and all qualified possessors take the thing under the restriction to preserve it for the right owner.

[But *qu.* Whether they are not liable to be distrained for rent? 3 Burr. 1498.] ‖The question is, whether they are within the exemption in favour of commerce? In Gilman v. Elton, 3 Bro. & B. 75. it was decided, that the principal's goods in the hands of the factor were not distrainable, on the ground of this exemption; and so also cloth delivered to a tailor. 4 Term R. 568.‖

If a man pledge goods, and after is attainted of felony, the king shall not have the goods without paying the sum for which they were pledged; for the alteration of the general property doth not alter the special property in the pawnbroker.

2 H. 7. 1. Bulst. 29.

‖Where a party's goods have been obtained from him by *fraud*, and pledged with a pawnbroker without notice, it has been held, that he cannot on conviction of the offender get the goods, and detain them against the pawnbroker; for this case is distinguishable from *felony*, where the owner's right of restitution is given by express statute, 21 H. 8. c. 11.

Parker v. Patrick, 5 Term R. 175.; and see 6 Taunt. 13. and *post.*

But by the 39 & 40 G. 3. c. 99. § 13. it is enacted, "That if "the owner of goods unlawfully pawned shall make out on oath "before a justice that he hath had his goods unlawfully obtained "or taken from him, and that there is reason to suspect that "any person hath taken them to pawn without the privity of "the owner, the justice may grant a warrant for searching the "house, warehouse, *&c.* of such person; and in case of refusal "to open the house, *&c.* the peace officer may break open such "house and search for the goods, and if found, and the property made out to the satisfaction of such justice, he may "cause the goods to be restored to the owner."‖

39 & 40 G. 3. c. 99. § 13.

If a man pledge goods, and then be outlawed, he cannot redeem them, because then the absolute property of them is in the king; but if the outlawry be reversed, then the outlawed person is reinstated in his property as if there had been no outlawry, and therefore may redeem them.

Bulst. 29.

If the money be not paid at the day, the property is absolute at law, but still the right owner has his redemption in equity, as in case of a mortgage.

One pawned jewels to *A.*, who signed a writing that they were to be redeemed in twelve months, otherwise for the 110*l.* lent, they were to be as bought and sold; *A.* within a short time after delivers over the jewels, together with some plate of his own, to *B.* as a pledge for 200*l.*; afterwards *A.* borrowed 38*l.* and 50*l.* of *B.* on promissory notes, to be repaid on demand: *B.*, by his answer in chancery, insisted it was agreed that the pledge should be a security as well for the money on the notes, as for the money first lent, but could make no proof of any such promise or agreement; and though a redemption was decreed, yet it was on payment of all that was due to *B.*, as well upon the notes as on the pawns; but the goods of *A.* which were pawned were

2 Vern. 691. 698. Abr. Ca. in Eq. 324. Demaindray and Metcalf, Pr. Ch. 420. S. C. Gilb. Eq. R. 104. S. C. 1 Atk. 229. 236. S. C. cited by Lord *Hardwicke.*

were to be first applied as far as the value of them would extend.

5 H. 7. f. 1. In the old books they took the nature of a pledge to be, that it ought to be delivered at the same time that the money was lent; and if the goods were not delivered at the same time, in security of the money, they did not plead it as a pledge, but in the nature of a licence, to excuse the trespass.

2 Leon. 30. Yelv. 164. But by later authorities it appears, that the pawnbroker hath a special property, though it be not delivered at the time of the money lent.

2 Leon. 30, 31. Yelv. 164. As if *A.* be indebted to *B.*, and delivers goods to *C.* in satisfaction for the debt of *B.*, the property is thereby altered, and the right to the goods is vested in *B.*; so it is where the goods are delivered to *C.* in security of the money of *B.*, there *B.* hath a special property in them; and in these cases *A.* cannot countermand such delivery to *C.*, or take the goods back again, because the property of these very goods is vested in *B.*; for here there is a consideration to alter the property, and that is the debt due to *B.*; so that it is not a bare naked donation which the party may possibly revoke before the possession be vested in *B.* himself, for *ex nudo pacto non oritur actio*; there is no consideration to found an action on a naked donation; but here there is a consideration to alter the property; so that upon the immediate delivery of the goods the property is vested in *B.*

Dyer, 49. 1 Stra. 164. Cowp. 125. Before these resolutions that the property was altered by the delivery of the goods by *A.* to the use of *B.*, the only remedy for such goods when countermanded was in equity, upon the consideration; for it was ever thought altogether inequitable that such delivery of the goods upon a valuable consideration should be countermanded at pleasure.

2 Co. 79. Bulst. 29. *Vide* head of *Mortgages*, 1 Ves. 278. There is great difference between a pawn and a mortgage of lands; for if goods be pawned without mention of time for redemption, they may be redeemed after the death of the pawnbroker; but if lands are mortgaged without any mention of the time for redemption, they cannot be redeemed after the death of the feoffee in mortgage; for when the feoffment is made to the mortgagee and his heirs, the limitation is absolute, and the condition only goes in derogation of that absolute feoffment; so that as far as the condition doth not extend, the absolute words in the feoffment must take place; and from hence it is that a condition must be taken strictly, and can never be extended, because since the condition goes in defeasance of the estate absolutely limited, it absolutely must come in to shut out all extended construction; and therefore in this case, where the feoffment is made on condition that the feoffor pay so much money to the feoffee, the money must be paid to the feoffee during his life; for money is not limited to be paid to his heirs, and therefore there the words of the absolute feoffment take place; but where goods are pawned, the pawnbroker hath but a qualified property, the absolute ownership is in the person that deposits them; and this property cannot be extended beyond the intent for which it was created; and

and that is only for securing the money lent; for should the property be thus extended, it would be to the injury of him that has the absolute ownership. Now the intent of the parties in not limiting a time of redemption was plainly in ease of the pledger, and therefore the time of redemption must be during his life (*a*); and he cannot be confined to the life of the pawnbroker, for that might fall more to the disadvantage of the person pledging than if a time had been limited; and there are no absolute words to induce such a rigorous construction, contrary to the design of the parties; but if the pledger doth not redeem during his own life, his executors cannot redeem, for then the words and intent both agree to make an absolute property to the pawnbroker. *

[(*a*) In such case, therefore, the statute of limitations will not attach. 1 Ves. 278. And if the pledger become bankrupt, his assignee may file a bill in equity for the redemption of the pledge; for, being a stranger to what is due, he cannot otherwise ascertain the precise sum he is to tender. *Ibid.*] * *Qu.* In these cases equity would not relieve, unless it was clearly proved, in case of death, the benefit of redemption was to be lost?

But if time be set for the redemption of a pledge, and before the time the pledger dies, his executors may redeem it, and it shall be assets in their hands; for where there is a time limited, there by the express words the party hath till the time appointed; and the time appointed is indefinite, and not during the life of the pledger; and therefore if he dies his executors shall redeem; and therefore the death of either party cannot prejudice. Bulst. 29, 30

Some have holden, that upon a valuable consideration a pledge is assignable over, and that on such assignment the tender of the money from the pledger must be to the assignee, because the pawnbroker hath a special property, and what he hath he may transfer over. Bulst. 31. Owen, 124. But if a thing is not in my possession, I cannot grant it as a pawn, though I have a right to it; for a naked right is not transferable over. 2 Roll. R. 459.

[A factor hath no authority to pledge the goods of his principal; and if he do (*c*), the latter may recover the value of them from the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. Paterson v. Tash, 2 Stra. 1178. (*c*) Daubigny v. Duval, 5 Term R. 604.; but Lord *Kenyon* in this case thought that the principal was bound to make tender to the pawnee to the extent of the money due from the principal to the factor, though not beyond that sum. ‖But see *cont.* M'Combie v. Davies, 7 East R. 6. However now, by 6 G. 4. c. 94. § 5., any person may accept a pledge of goods which a factor has of his principal, and shall acquire all the right, title, and interest which the factor himself had, and no more; and consequently the principal, to maintain trover, would now be bound to tender to the pawnee all that he owed the factor. And see tit. *Merchant and Merchandize.*‖

By stat. 1 Jac. 1. c. 21. § 5. The pawn of any goods wrongfully purloined, taken, robbed, or stolen from any person, to any broker in *London*, *Westminster*, *Southwark*, or within two miles of *London*, shall not alter the property thereof.] 1 Jac. 1. c. 21. § 5.

If a pawnbroker refuse, upon tender of the money, to redeliver the goods pledged, he may be indicted; for, being secretly pawned, it may be impossible to prove a delivery in *trover* for want of witnesses. 2 Salk. 522. pl. 1. *per Holt* C. J. and *Eyre* J.

A pawnbroker was indicted for refusing to deliver a silk petticoat which the wife of *J. S.* had given him in pawn for the repayment of 2*s.* 6*d.*, after a tender of the money; and it being moved Carth. 277. King v. Gallwich; but the reporter adds a

moved to quash the indictment, the court (*absente Holt*) refused, because of the great abuse by pawnbrokers.

quære, and says, that if the defendant ad demurred to this indictment, it could not have been maintained by law, being only a breach of contract, which is actionable but not indictable. *Vide* 2 Hawk. P. C. 301., and stat. 29 G. 3. c. 57. for preventing the unlawful pawning of goods, and for the easy redemption of goods pawned. [This act does not extend to any loan above 10*l.*, or to persons lending money upon pledge at 5*l.* per cent. without further profit.]

39 & 40 G. 3. c. 99.

‖By the 39 & 40 G. 3, c. 99., intituled "An act for the better regulating the business of pawnbrokers," it is enacted, that if any goods or chattels shall be pledged for securing any money lent thereon, not exceeding 10*l.* and the profit thereof, and if within one year the real owner of such goods shall tender unto the person lending the money borrowed and profit, according to the rates of that act, and the person lending shall, without reasonable cause, neglect or refuse to deliver back the goods, *&c.* so pawned, then and in such case, on oath thereof made by the pawner or other credible person, a justice is empowered to cause the person taking such pawn to come before him; and on payment by the pawner of the principal money and profit, and in case of refusal to receive the same on tender thereof before the justice, such justice shall direct the goods to be delivered to the pawner; and if the person taking the pawn shall refuse to deliver up or make satisfaction for the goods, then the justice is authorized to commit the party to the house of correction or other public prison, there to remain until he shall deliver up the goods, or make such satisfaction as to the justice shall seem reasonable.

By the seventeenth section of this act, all goods pawned shall be deemed forfeited, and may be sold, after the expiration of one year, exclusive of the day whereon they were pawned.

Walter v. Smith, 5 Barn. & A. 439.

It has been decided on this clause, that if the goods remain unsold in the pawnbroker's hands after the year, and a tender is made by the owner while they are so, the pawnbroker cannot afterwards sell them; and if he does, the owner may maintain trover against him.

Peet v. Baxter, 1 Stark. R. 472.

Where one employed to sell goods by commission pawned them, and the owners made a demand of the goods on the pawnbroker, who refused them, it was held, that the owners might maintain trover against the pawnbroker, although they did not produce the duplicates at the time of the demand, pursuant to the fifteenth section of the above statute; for they claimed by title paramount to the pawner of the goods.‖

(C) Of borrowing and other Bailments.

Cro. Car. 271. 2 Roll. Abr. 92. (*a*) The law did not oblige *B.* to take the cattle into pasture; consequently *B.* gave credit to the person of the owner.

IF *A.* puts his beasts into *B.*'s pasture, on agreement to pay *B.* sixpence per week for the pasturage, *B.* cannot retain the beasts of *A.* until he hath paid him the money, unless this were at first provided by their agreement; but the only remedy that *B.* has is upon the contract. (*a*)

But

But if a horse be committed to an hostler, he shall detain him till he is paid for his meat. (*a*) 8 Co. 147. 39 H. 6. 18.

5 E. 4. 2. b. 2 Roll. Abr. 85. (*a*) He was obliged by law to take in the horse if he had room. ‖And upon the same principle innkeepers have a lien on the goods of their guests for the entertainment furnished; and a tavern and coffee-house in *London* is an inn for this purpose. Thompson v. Lacy, 3 Barn. & A. 283.‖

So if cloth be committed to a tailor to make up into a garment, he shall detain the cloth until he is satisfied for his labour. 22 E. 4. 49. Cro. Car. 271.

8 Co. 147. For in behalf of trade and commerce, the law doth annex the condition that the bailee shall retain in certain cases; for men that get their livelihood by commerce, and by entertainment of others, cannot annex such disobliging conditions that they shall retain the bailor's property in case of nonpayment, or make such disadvantageous and impudent suppositions that they shall not be paid; and therefore the law annexes such a condition without any express agreement of the parties. Besides, goods that are put into the places of public entertainment and trade, are, for the sake of public commerce, taken into the custody of the law as well as of the party, and therefore cannot be there distrained. Now goods that are in the custody of the law, cannot come out thence till the purposes are satisfied for which they were there placed; and the purpose for which these chattels are first committed to such public places is, that they might be there conserved, and the party to whom they were committed paid for his trouble and charge about them. Now since the act of the law doth no man any injury, it cannot free any thing from such public custody till the party is satisfied to whom they were thus committed. *Vide* tit. *Inns and Innkeepers*, and *Trover*.

A tailor hath cloth delivered to him to make up into a garment, which he doth accordingly; he shall have an action for his work, without delivering the garment: and if the tailor refuse to deliver the garment upon request, it ought to be shewn on the other side in excuse of the action; for the tailor's action is founded upon the promise; and if he hath done the work, and is ready to deliver the garment, he hath performed all that the law requires on his part; and on that consideration is entitled to the benefit of the defendant's promise. Palm. 223, 224.

If a man lends another his sheep, oxen, or his cart, the borrower hath a qualified property in them, according to the purposes for which they were borrowed; and by force of this loan they may be used reasonably for these purposes and for the time agreed on; and if they perish in such occupation, it is at the peril of the lender; but if they perish in any other manner, the borrower must answer for them. Doct. & Stud. D. 2. c. 38. ‖Noy's Max. 91. Jones on Bailm. 69.‖

If *A.* borrow a horse to ride to *Dover*, and he ride out of his way, and the owner of the horse meet him, he cannot take the horse from him, for *A.* has a special property in the horse till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away, for the continuance of all property is to be taken from the form of the original bargain, which in this case was limited till the appointed journey was finished. Yelv. 172. Cro. Jac. 256. S. C. [Where a bailee may be guilty of larceny, see 1 Hawk. P. C. 134. &c. Leach's Cases, 527. 173.]

But if *A.* borrows a horse to go to *Dover*, and goes to other places, the owner may have an action on the case against him for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. Roll. R. 128.

‖The party borrowing a horse is bound to keep it, unless something is said to the contrary.‖ Handford v. Palmer, 2 Bro. & B. 360.

Co. Lit. 57. Cro. Eliz. 784. Moo. 248. Owen, 52. Dyer, 121. pl. 17.

If a man lend another his sheep to stock his land, the borrower hath the bare use of them; but if he kill them the owner shall have a general action of trespass, or an action of trover, at his election; for though the use is in the borrower, yet the property is in the lender, and the killing of the sheep is an open violation of another's property, which is complained of in the general action of trespass.

5 E. 4. 2.

If I sell you a horse for 20*l.*, I shall retain him unless the money be actually paid, or conditioned to be paid at a future day; for unless there be *quid pro quo* the property is not altered.

Doct. & Stud. (D) 2. c. 38. ‖Noy's Max. 91. Bract. 99. a. b. Ld. Raym. 916.‖

As to the borrowing of things perishable, as corn, wine, honey, or the like, a man must, from the nature of the thing, have an absolute property in them, otherwise they could not supply the uses for which they were lent, and therefore he is obliged to return something of the same sort, the same in quantity and quality with what is borrowed. ‖And if they perish, it is at the peril of the borrower.‖

(D) When the Thing bailed is destroyed or deteriorated, to whom is the Loss, and to whom is the Remedy: ‖And of the several Degrees of Care required from various Bailees.‖

4 Co. 83. Southcote's case. Doct. & Stud. (D) 2. c. 38.

IT is holden by some, that if *A.* commits goods to *B.* to be kept, or, which is all one, to be safely kept, and they are stolen, that *B.* must answer the value of them to *A.* Others have made a distinction, that if *B.* had undertaken for a price to keep them, that then he should have been bound to answer for them if they had been stolen, because there is a consideration to found the promise; but where no reward is agreed on, there they say there can be no consideration on which the promise is built, and therefore a naked promise which affords no action: but the reasons urged against this are, that where another loses by my undertaking, I am equally bound to make good the value of my promise, as if I myself was to receive gain by the bargain; for since another man's property, and possibly the whole fruits of a long and painful industry, are lost and wasted by my undertaking to secure it, certainly I, from whom the damage arose, ought to make him satisfaction; for every man is presumed to guard his own, and not easily to part with that which cannot be acquired without great difficulty; and therefore it must be presumed that he would have safely kept his property, and not have committed it to me, unless I had undertaken to secure it; and if I fail in that undertaking, I am bound to a restitution; for I am equally obliged to a restitution where another man suffers an injury by my means, as where I myself commit an injury; and had the law any other course in these cases, it were a perfect inlet to all collusion; for agreements and contrivances might

Post. (245). Coggs and Barnard. 2 Ld. Raym. 913. 2 Stra. 1099. 12 Mod. 487.

might arise between the men of violence and such treacherous undertakers, as are not easy to be discovered.

‖Where a depository for hire had lodged the goods deposited in a place of security, where things of greater value were deposited, he was held not answerable, though the goods were stolen by his own servants, since positive negligence must be proved, in order to charge him.‖ Finucane v. Small, 1 Esp. Ca. 315.; and see *antè* p. 508.

If a carrier, ferryman, or hostler, be robbed, he shall answer the value of the goods, for the carrier, *&c.* hath his hire (*a*), which implies an undertaking for the safe custody and delivery of them; for no man would give another money for securing his property, if the party that received it were not to undertake on his part to secure it. 4 Co. 84. Co. Lit. 89. ‖(*a*) The hire is not the reason, for a factor and bailiff have equally a hire; the reason is the public employment he exercises, and the policy of preventing carriers confederating with thieves. 1 Ld. Raym. 917. 1 Salk. 143. 12 Mod. 487.‖

If *A.* delivers goods to *B.* to be delivered over to *C.*, *C.* hath the property, and *C.* hath the action against *B.*; for *B.* undertakes for the safe delivery to *C.*, and hath no property or interest but for that purpose. Roll. Abr. 606.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case if *A.*, the bailor, bring trover, he reduces the property again in himself, for the action amounts to a countermand of the gift; but if the delivery was on a valuable consideration, then *A.* cannot have trover, because the property is altered, and in trover the property must be proved in the plaintiff. Bulst. 68. compared with 2 Leon. 50. Yelv. 164.

If a man delivers goods to another, the bailee shall have a general action of trespass against a stranger, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to resort to the original cause of that injury, and in amends there to do himself right. 13 Co. 69. 21 H. 7. 14. b. ‖Rooth v. Wilson, 1 Barn. & A. 59. Croft v. Alison, 4 Barn. & A. 590.‖

If I deliver goods to *B.*, and *C.* that hath right demands them of him, if *B.* either before or pending the action deliver over the goods to me, this is a good bar to the action of *C.* brought against *B.*, for since *B.* hath undertaken to deliver the goods back to me, he shall not be chargeable for the honest performance of that undertaking; for *B.* that is trusted with my possession shall not remove or alter my possession, and therefore shall not be put to answer for that to which the law obliges him. F.N.B.138.M. Roll. Abr. 607.

But if I find goods and convert them, and another recover them from me, yet a stranger that has right shall have his action against me, and therefore two persons claiming in trover shall interplead with each other; for I have by my finding the property in me till another shews a better right; now this property continues until the real owner appears; and if I by weak defences do not support that property, that shall be no injury to the right of another; for the original injury begins from me, by undertaking to intermeddle with what is another's, and which I am sure is none of my own. Roll. Abr. 607.

Robinson v. Ward, 1 Ryan & M. Ca. 274.; and see Wren v. Kerton, 11 Ves. 377. Massey v. Banner, 4 Madd. 415. 1 Jac. & W. 241.

‖Where an agent receiving money for his principal paid it along with his own money, into his general account at his banker's; on the banker's failing, it was held that the agent was responsible for the loss; and it is the same though he acts gratuitously; in order to protect himself he should pay it in to a separate account.‖

These cases do not proceed on the ground that the defendant is a negligent bailee, but that by confusing the money with his own, he has made it his own, and incurred a debt to the amount to his employer.

Roll. Abr. 607.

If a bailee deliver the goods to another, there he shall have an action of detinue against him, because he hath his possession, and undertakes for the custody; and the original bailor may have his action against either of them, because in him is the property which both are bound to answer to him.

5 Co. 14. Cro. Eliz. 777. 784. Owen, 52. Dyer, 121. Godb. 72. Doct. & Stud. (D) 2. c. 38.

If a man lend or let another his horse, and for want of safe keeping the horse die, the owner is entitled to an action on the case; so if a man lend another sheep to teth his land, and by the negligence of the borrower they are drowned, an action on the case lies; so if a man lend another a horse, and he put him into a stable that is ruinous, and the stable tumble in upon the horse and kill him, an action on the case lies; but if the stable had been strong and substantial, and had fallen by violent tempest, then is the borrower excused; so if a man lend another a horse, and he die of divers diseases, the borrower is excused.

The reason of these several cases is this, that when any man borrows or hires any thing, and only uses it according to the purposes of the loan, that contract bears him out from all accidents that are consequent upon such usage; for there is no reason why the borrower should not have the use of it according as the owner had licensed and empowered him; and if any unavoidable accident happen upon such a licence, the lender must impute it to the folly of his own permission; but if it happen through the negligence of the borrower, then it is fit he should answer for it. ‖See Jones on Bailm. 65. (3d edit.)‖

Dean v. Keate, 3 Camp. 4.

‖When a hired horse is taken ill, if the hirer call in a farrier he is not answerable for the medicines the farrier may administer; but if he prescribes for him himself he assumes a new degree of responsibility, and if the medicine causes the horse's death, he does not exercise that degree of care which may be expected from a prudent man to his own horse, and is consequently answerable to the owner.

Cooper v. Barton, *Id.* 5.

In an action for not properly taking care of a hired horse, some evidence of negligence must be given; it is not enough to shew that he was let sound and returned with his knees broken.

Bray v. Mayne, 1 Gow Ca. 1.

After a hired horse is exhausted, and has refused its feed, the hirer is bound not to use it, and if he afterwards pursue his journey with it, he is liable to the owner for its value.‖

Moor, 543. [See 1 Roll. Abr. 4. S. C.

If *A.* take a gelding to pasture, and the gelding be stolen, no action lies against *A.*, unless he had made a special *assumpsit* to deliver him (*a*); for the undertaking of *A.* is to feed the gelding in the fields and in the open air, and not to keep him safely, as the hostler is obliged to do in his stable; and the law will not stretch men's promises beyond their first undertaking.

(*a*) But Rolle mentions no such reason; and according to him, *Popham* C. J. advanced generally, "That if a man, to whom horses are bailed for agistment "leave open the gates of his field, in consequence of which neglect they stray and are stolen "the owner has an action against him."] ‖And so, also, if the bailee put the horse at dark "into

into a field badly feneed, whereby the horse falls into the neighbour's field and is killed, although the neighbour was bound to fence. Rooth v. Wilson, 1 Barn. & A. 59.]

If a man find goods and abuse them, or if he find sheep and kill them, this is a conversion; but if a man find butter, and by his negligent keeping it putrefy; or if a man find garments, and by negligent keeping they be moth-eaten, no action lies; so it is if a man find goods and lose them again; and the reason of the difference is this: where a man delivers goods to another, the bailee by acceptance of the goods undertakes for the safe custody of them, and it is to be presumed that the owner would not have parted with them but under the confidence of that security; but where a man only finds the goods of another, the owner did not part with them under the caution of any trust or engagement, nor did the finder receive them into his possession under any obligation; and therefore the law only prohibits a man in this case from making an unjust profit of what is another's; but the finder is not obliged to preserve those goods safer than the owner himself did, for there is no reason for the law to lay such a duty on the finder in behalf of the careless owner, and it seems too rigorous to extend the charity of the finder beyond the diligence of the proprietor; it is therefore a good mean to punish an injurious act, *viz.* the conversion of the goods to his own use, but not to punish a negligence in him, when the owner is guilty of a much greater one.

Leon. 123. 225. Owen, 141. 2 Bulst. 21.

A carrier is bound to the safe delivery of a box, though he doth not know what is in the box, unless he refuses to carry it without he be instructed in the particulars, for the party is not obliged to tell him.

Allen, 93. *Vide* head of *Carriers.*

I shall, as applicable to this doctrine, insert the following noted case, with the argument at large of the Lord Chief Justice *Holt.*

In an *assumpsit* the case was this: The defendant did undertake to remove a quantity of brandy from *Brook's Market* to *Water Lane*, and by reason of his neglect one of the casks broke: and on not guilty, a verdict was found for the plaintiff; and in arrest of judgment, two exceptions were taken:

Trin. Term. Anno 2 *Ann. Reginæ* in *B. R.* 1703. Coggs v. Barnard, 2 Ld. Raym. 909. S. C. Salk. 26. S. C. Com. R. 133. S. C.

1st, Because in the declaration he was not alleged to be a common porter.

2dly, Because it was not averred that he had a reward.

But the whole court resolved, that in this case the plaintiff ought to have his judgment.

Holt, Chief Justice, his argument was to this purpose:

There be six several sorts of bailments, which lay a care and obligation upon the party to whom the goods are bailed.

1. The first is a bare and naked bailment to another, to keep for the use of the bailor, which is called *depositum.*

[Sir William Jones thinks this division of bailments a little inaccurate; that in truth the *fifth* sort is no more than a branch of the *third*, and a *seventh* might with equal reason have been added, since the *fifth* is capable of another subdivision. He acknowledges, therefore, but *five* species. 1. *Depositum*, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. *Mandatum*, or *commission*; when the mandatory undertakes, without recompense, to do some act about the things bailed, or simply to carry them; and hence Sir Henry Finch divides bailment into two

two sorts, to *keep*, and to *employ*. Law. bk. 2. c. 18. 3. *Commodatum*, or *loan for use*; when goods are bailed without pay, to be used for a certain time by the bailee. 4. *Pignori Acceptum*; when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. *Locatum*, or hiring, which is always for *a reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary use of the *thing*; or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed and bestowed on the thing delivered; or, 3. *locatio operis merciun vehendarum*, when goods are bailed for the purpose of being *carried* from place to place, either to a *public* carrier, or to a *private* person. Law of Bailm. 35, 36.] ‖In this learned and elegant essay, Sir W. Jones has, by a close analysis of the cases, shewn the confusion occasioned by Lord *Coke*'s inaccurate doctrine as to the responsibility of a mere depository for *stealing*, without his default. (see Co. Lit. 89. a. b. Southcote's Ca. 4 Rep. 83. b.) and as to the non-responsibility of a pledgee in such case by reason as, Lord *Coke* says, of his property; (*Ibid.*,) he has confirmed, with slight exception, the luminous view of the responsibility of the several bailees, by Lord *Holt* in Coggs v. Barnard, 1 Ld. Raym. 909., by reference to the text of the civil law and its commentators, from which, through the medium of Bracton, Lord *Holt* derived his doctrine. He has pointed out the incongruity in Ld. *Holt*'s system, in requiring the same extreme care from a hirer as from a borrower, and has traced it to its source in a peculiar expression in the Digest, copied by Bracton; and has thus, besides illustrating the subject with much apposite learning, done all that reasoning, without judicial authority, can do, to reduce the *English* law on the subject to a system harmonizing with the settled doctrine of *Rome*, with the laws of other countries, and with the rules of natural equity and good sense. His conclusions may be summed up thus: that when the bailment is beneficial merely to the bailor (as in cases of gratuitous deposits to keep) the bailee is only responsible for fraud, or that extreme negligence which in legal presumption is equivalent to it; that where the bailment is mutually beneficial (as in cases of pledge, of letting and hiring, of performing works for pay), the bailee is responsible for ordinary neglect, or the want of that ordinary care which a prudent man takes of his own goods; and that where the bailment is beneficial solely to the bailee (as in loans for use without reward) the bailee is responsible even for a slight neglect.‖

2. A delivery of goods to another which are in themselves useful to keep, and these are to be restored again in specie, which is called *accommodatum*.

3. A delivery of goods for hire, which is called *locatio* or *conductio*.

4. A delivery by way of pledge, which is called *vadium*.

5. A delivery of goods to be carried for a reward.

6. Such a delivery as here in the case at bar, where goods are delivered to do some act about them, as the carrying, and without a reward, which is called *mandatum* by *Bracton*, *lib.* 3. 100.; in *English*, an acting by commission.

And though I do not think all these immediately necessary to the case in question, yet the explanation of them will make the case clearer.

Mytton v. Cock, 2 Stra. 1099.

1. Then as to the first, if a person out of kindness keeps the goods of another, he shall not be answerable if they be stolen, without there be a particular default in him: and 2dly, such a bailee is not chargeable for a common neglect, for it must be a gross neglect for which he shall be liable. (*a*) I must confess I have a great authority to encounter, which is *Southcott*'s case, 4 Rep. 83 b. However, my Lord *Coke* in his report goes farther than the case itself, for he there makes a difference between keeping generally, and safe keeping; which in the case itself is not mentioned, but in his note at the end of it; and I cannot think it to be justice to charge the bailee if the goods be lost without any default of his; for why should he answer for the wrongs of other people, against whom he undertook not?

‖(*a*) Where a gratuitous bailee turned the horse bailed after dark into a pasture-field where his own cattle grazed, and it fell into a neighbour's field by reason of defect of fences, and was killed, he was considered responsible to the bailor. Rooth v. Wilson, 1 Barn. & A. 59. *Sed quære*,

quære, Whether this was *gross* negligence? The point decided was, that the bailee might sue the neighbour in *case* for his defect of fences and recover the value of the horse: and the objection being taken that he had no property to maintain the action, it was held, that he might maintain it on the ground of his liability over to the bailor. But *qu.* Whether, without this reason, the action might not be supported on the ground of the bailee's *possession*? See *per Abbott* and *Holroyd* Js., 1 Barn. & A. 62.; and see tit. *Trespass* (C), Vol. VII., and 2 Saund. R. 47. b. By special agreement the depositary may render himself liable for less than gross negligence, Jones, 47. According to the *Roman* law, if the bailee *volunteered* himself to undertake the charge, he became responsible for ordinary neglect, though not for casualties. Dig. l. 16. tit. 3. l. 35.; since he might prevent the owner employing a person of more vigilance; and this seems the law of *France*. Code Civ. Art. 1928.‖

There never was, before *Southcott*'s case, any solemn determination of this matter; the first case of it was in 29 Ass. pl. 28. 8 Ed. 2. Fitz. Detinue, both quoted in *Southcott*'s case; but I cannot agree to the reasons of those cases, for the neglect of the party may be as great where goods are locked up in a chest, as where not (*a*), and by that reason ought to be chargeable as much in the one case as in the other; and the 4 Ed. 4. is only a debate of two counsel at the bar, for *Danby* was not then C. J., and what he said was only for his client, and not of authority; and 3 H. 7. is only a sudden opinion. Now *Southcott*'s case came long after, *viz.* 43 Eliz.; and there two judges in the absence of the other two gave that opinion, which cause was improved by my Lord *Coke*; but it has been the constant practice for as long as I knew the court, that in all the trials at *Guildhall*, where upon the evidence no default appeared in the bailee, to direct for the defendant; nor did ever any one venture, upon the authority of *Southcott*'s case, to find the matter specially: I take it that this bailee is so far from being charged, that though the goods be lost by a common neglect, he shall not be answerable; as if he negligently keep his own goods, and that his own and his friend's goods are both lost (*b*); now the loss of his own is an argument of his sincerity, and therefore he shall not be chargeable; this is in *Bracton*, 99.; and though this is an ancient author, yet it is agreeable to reason, and is not in this point only the law of *England*, but of foreign countries, as may be seen in Justinian's Inst. where I believe *Bracton* got his notion. Now if there be an apparent gross neglect, it is looked upon to be a fraud; but otherwise if it be not a gross neglect; and I know no reason why the bailee upon taking goods, if it were in writing, shall not be charged against the wrong of a third person, as in Hob. 34. Cro. Jac. 425. and 3 Cro. 514.; and yet without writing, as in *Southcott*'s case, to be charged; and the Doctor and Student, 128. 212., says, it is for the advantage of the bailor, and that an action does not lie unless they be lost through negligent keeping; so that I do not find sufficient reason nor authority to support the opinion of *Southcott*'s case.

(*a*) See Law of Bailm. 37, 38, 39. ‖*Antè*, p. 506.‖

‖(*b*) But if it be proved that his house being on fire he saved his own goods, and having time to save those deposited he suffered them to be burned, he shall restore the worth to the owner. Poth. Contrat de Depôt, n. 29. Stiern. de Jure Sueon. l. 2. c. 5.; and see 1 Gow, N. P. Ca. 30.‖

2. A lending *gratis* to use for his advantage, there the borrower is strictly bound to keep it, for if he be guilty of the least neglect he shall be answerable; as if I lend a horse to go to the North of *England*, and he goes to the *West*, and the horse is stolen

‖And the civil law accords with this: "Commodatum autem

plerumque solam utilitatem continet ejus *cui commodatur*. Et ideo verior est Q. Mucii sententia existimentis et culpam præstandam et diligentiam." Dig. 13. 6. 5. 2. Domat's Civ. L. p. 1. b. 1. tit. 5. § 2.

stolen, he shall in that case be chargeable; for if he had gone as I directed, the horse, perhaps, would not have been stolen; this sort of bailment is mentioned in *Bracton* 99.; but in this case, if this horse had been in the stable of the bailee, and stolen thence without his default, as perhaps the thieves might first have bound the bailee, and then have taken the horse, he shall not be answerable; but if he left the stable doors open, he shall for that neglect be answerable. *Bracton* says, he ought to take the utmost care, but in no place says he shall be charged where no default was in him.

Grot. b. 2. c. 12. § 15. And so is the *French* law, Code, Art. 1928.

Lethbridge v. Phillips, 2 Stark. Ca. 544.

‖Where *A.* lent a picture to *B.*, who wished to shew it to *C.*, and *B.*, without any previous communication with *C.*, sent it to his house, where it was accidentally injured; it was held, that *C.* was not responsible for not keeping the picture; for he could not be made a bailee without his consent.‖

‖(*a*) Sir Wm. Jones, Law of Bailm. 86. shews, that Bracton's doctrine, here cited by Ld. *Holt*, requiring the same extreme care from a hirer as from a borrower, is copied from Justinian, Inst. 3. 25. 5., where the words are speaking of a hirer, "Talis ab eo desideratur custodia qualem *diligentissimus* paterfamilias suis rebus adhibet;" which doctrine was, as stated in the Proeme to the Institutes, taken from the Commentaries of Gaius. And in the Digest l. 19. tit. 2. 25. 7. Gaius, treating of the liability of a person employed to transport a column for breakage, says, "Culpa autem abest si omnia facta sint quæ *diligentissimus* quisque observaturus fuisset." Sir W. Jones urges that the superlative "diligentissimus," is used alone by Gaius on the subject of hiring, other writers using the positive, and he ascribes it to his peculiar style; and "diligens" is the word used by Gothofred in the Gloss, Dig. *ubi suprà*, and by Vinnius, Inst. lib. iii. t. xxv. 5. And the bailment of hiring (*locatio-conductio*) being mutually beneficial, it is contrary to principle to require the same extraordinary care as from a borrower who has the chattel solely for his own benefit. And this rule is consistent with the decisions in Dean v. Keate, 3 Camp. 4. Cooper v. Barton, *Ibid.* Huber thus lays down the same distinction: "Contractus vel ineuntur in utriusque commodum vel in alterutrius utilitatem duntaxat. Qui utriusque partis utilitatem continent *mediocri diligentiâ* contenti sunt, levemque culpam recipiunt; qui unius saltem commodum spectant, hi vel continent utilitatem ejus qui de damno queritur, vel in ejus gratiam initi fuere qui damnumfecit. Priori casu nil nisi *lata* culpa præstatur, posteriore *levissima*." Hub. Præl. Jur. Civ. lib. iii. tit. xv. 10.‖

3. As to the third bailment, where goods are hired out for a reward, *Bracton*, 62. says, the hirer is to take all imaginable care (*a*), and to restore it at the time; and he is bound to the utmost diligence, such as the most diligent master of a family useth; which care if he so useth, he shall not be bound. Now the most diligent man is liable to be robbed; and therefore I collect, that if he be so careful as according to *Bracton's* definition, and be robbed, he shall not be liable.

4. If goods be pawned, the pawnee has a special property, which is in nature of a security, to compel the pawner to pay; and if the goods be the worse for using, the pawnee must not use them; as clothes *&c.*; but if they be not the worse for using, he may use them at his peril; as jewels pawned to a lady, and she keeps them in a box, and they are stolen, she shall not be charged; but if she goes abroad with them to a play, and there they are stolen, she shall be answerable. 2dly, If the pawnbroker be at charge in keeping them, as if it were a horse, and he gives it meat, he may use it for his reasonable charge he has been at, Bracton, 99. (*b*) If a creditor takes a pawn, he is bound to restore

‖(*b*) As to use, see *antè*, p. 506.‖

restore it upon payment; but if he, notwithstanding all his diligence, lose it, he shall howsoever recover his debt, 29 Ass. pl. 28.; for the law does not lay upon him an obligation to keep against all accidents; but if the money be tendered, and he after detains, and then it is lost, he shall then be liable, for he is then a wrong-doer, and his keeping it after is the occasion of its being stolen, and he is then answerable at all events. (*b*)

‖(*b*) According to the *Saxon* common law, if cattle pawned perished by accident the pawnee could not recover his debt from his debtor; but this was altered by an Electoral constitution as being contrary to equity, and the loss was made to fall on the debtor. Huber Præl. Jur. Civ. t. i. p. 291. *notâ.*‖

5. Goods to be carried for a reward. 1st, If you deliver them to a public or common carrier, and they are stolen, he must be liable, for the law charges him at all events; but yet the act of God, or the enemies of the queen, may excuse; and this is a political institution by the laws of *England*, that people may be safe in their dealing; for otherwise, carriers, that are frequently trusted with things of great value, would be often tempted to confederate with thieves. (*c*) 2dly, But he who has a particular private employment, though he has a reward, yet he is not bound against all events, as a factor or a bailiff, if they do to the best of their power; and that is *Southcott's* case; and he is bound no otherwise than as his master himself should do; for it were unjust to charge him with what he cannot prevent. (*d*)

‖(*c*) This is the true reason of the carrier's extensive responsibility, and not the hire, as mentioned by Lord *Coke*. 1 Inst. 89.; and see tit. *Carriers*, Vol. ii.

(*d*) The captain of a ship in the king's service, having received on board bullion of an individual, to be brought to this country for freight, on the arrival of the ship, the bullion was lost; and on an action being brought, it was objected that it was illegal in the defendant to take goods on freight contrary to 22 G. 2. c. 33. But the court held, whether it was illegal or not, the captain was liable for the loss of the bullion. Hatchwell v. Cooke, 2 Marsh. R. 293.; and see Hodgson v. Fullarton, 4 Taunt. 787. But supposing the carrying to be illegal, *qu.* whether the action would be maintainable? See Laugton v. Hughes, 1 Maule & S. 593. Cannan v. Bryce, 3 Barn. & A. 179. Bloxsome v. Williams, 3 Barn. & C. 232.; *sed vide* Hodgson v. Temple, 5 Taunt. 181.‖

6. To this point, here is a man not intrusted to keep, but to carry, and not to have any thing for his pains; and he, through his own negligence, miscarries; though he be to have nothing, yet it appears there was a neglect, and for that reason he is chargeable; but if the goods had been misused by a third person in the way as he carried them, and without any neglect of his, I hold that he would not then be liable, because he had nothing for a reward. In Bracton, lib. 3. 100., this is called *mandatum*, and ariseth upon the *emendato*, in *English*, acting by commission; and if he, through his negligence, suffer his goods to be damaged, he is liable. Vinius's Comment upon Just. Inst. 684.; *mandatum* is there defined to be a contract whereby any thing is committed *gratis* to be done for another; and with this agrees *Bracton*; and though this word be not used in any other book of the law, and this be an old authority, yet in this point he is supported by reason; and, upon the whole, I am of opinion that the defendant in this case is liable, for it is a deceit to the plaintiff his being negligent; for it is upon the confidence of his carefulness that the plaintiff intrusted him; and in Godb. 64., and in 2 H. 7., for the negligent keeping of sheep, *&c.*, an action lay; for there is a consideration, *viz.* the trusting, though no money be paid; and

and here he becomes chargeable by the mischief he has done. 29 H. 6. 49. 33 H. 6. 34. 11 H. 4. 33. By these cases, though a man promises to build a house for another, he shall not be bound, being *nudum pactum*; yet I doubt not but if he had once gone about the building it, and he do it so ill that it falls, an action would lie (*a*); and in Yelv. 4. the plaintiff declared, that in consideration that he delivered to the defendant twenty quarters of corn, the defendant assumed upon request to deliver the corn again to the plaintiff; and it was there held that the action lay; but this judgment was after reversed in the Exchequer-chamber; and contrary to it is a case in Yelv. 128.; but in the same book 50., is the case, fol. 4., of *Biggs* and *Riches*, confirmed and allowed good law; and there *Gaudy* and the court held it a bad reversal; and contrary to that reversal solemnly adjudged in 2 Cro. 667. Now if a trust be once undertaken, that is a sufficient consideration; the cases in the Register, 110., are full in point, for there the very precedent is *quod* (the defendant) *tam negligenter*, &c. *carriavit quod papa illa confracta fuit*, without any mention of a reward, or that he was a common carrier; though in latter days for the greater caution they insert these words, *pro quâdam mercede* *; so that he that is intrusted by commission, if he enters upon the employment, and after any loss accrues to the owner through his neglect, he is liable though he receive no reward; but if any loss accrues to the owner, not through any neglect of his, though he receive a reward as a factor, &c., yet shall not he be liable. So that upon this whole matter, I am of opinion judgment ought to be given for the plaintiff.

* These words should not be inserted, if not warranted by the fact, as I conceive a plaintiff would be nonsuited if he could not prove it.

Gibson v. Inglis, 4 Camp. 72.

It has been held, that the *London Dock Company* are liable for the negligence of their servants in unloading goods in the docks, though they derive no profit from the labour, the owners of the goods not being allowed to employ men.

Shiells v. Blackburne, 1 H. Black. 158.

Where a merchant gratuitously undertook to enter a parcel of goods of *A. B.*, together with some of his own at the custom-house for exportation, and made a wrong entry, whereby both parcels were seized; it was held, that having taken the same care of the goods of *A. B.* as of his own, and having no reward, and not being of a profession which implied any particular skill in what he had undertaken, he was not liable to an action for the loss occasioned to *A. B.*; but Lord *Loughborough* said, if a ship-broker or clerk in the custom-house had undertaken the entry, a wrong entry by him would have been gross negligence.

Nelson v. Mackintosh, 1 Stark. Ca. 237; and see *ante*, p. 506.

Where a captain of a vessel undertook, though not for hire, to carry the plaintiff's box on board his vessel, and on the voyage opened the box to see that it contained nothing contraband, and put the contents (a quantity of doubloons, dollars, &c.) into a bag in the captain's chest, where his own valuables were kept, and the chest was lost; it was held, that the captain, on opening the box, should at least have restored it to its former state of security, and that he had, by intermeddling and altering the custody of the plaintiff's money, imposed on himself the duty

duty of carefully guarding it against all perils; and a verdict was found for the plaintiff.

And consistently with the case (p. 522.) cited by Lord *Holt* from the Year Books, it was held, that a declaration, alleging that the plaintiff retained the defendant, a carpenter, to repair a house before a given day, and that the defendant accepted the retainer, but did not perform the work, was bad; since there was no reward, and it was a mere nonfeasance. But a count stating that the plaintiff, being possessed of old materials, retained the defendant to perform carpenters' work, and use the materials, but that the defendant, instead of using them, used new ones, increasing the expense, was good; since it appeared that the defendant entered on the work, and therefore his improper performance was a misfeasance.

Elsee v. Gateward, 5 Term R. 143.

But in a late case, where the declaration stated, that in consideration the plaintiffs would retain the defendant to lay out a sum of money on annuity, the defendant undertook to do his duty in the premises, but that defendant laid out the money on the mere personal security of a person insolvent, whereby the plaintiffs lost the money, the declaration was held bad after verdict; since no reward was stated, and it was not stated that the defendant acted corruptly or was grossly negligent.‖

Dartnall v. Howard, 4 Barn. & C. 345.

See more on this subject, titles, "CARRIERS," "INNS AND INNKEEPERS," "TROVER."

BANKRUPT.

THE granting of commissions of bankrupt seems to be derived from the civil law, which constituted a guardian to a prodigal in the same manner as to a madman; and such guardian the pretor appointed on the petition or application of relations, as well as creditors: but the feudal law, though it admitted of commissions of lunacy *ex necessitate*, would allow of none for prodigality; that not being reckoned injurious, because such prodigal could not alien his lands without the leave of his lord: and farther, the condition of a freeman was not to be altered without the crime of felony. But, as trade and commerce increased, it was found necessary, for the support of credit, to introduce such a law amongst us, and therefore our acts of parliament have confined it to traders and creditors only.

Digest. lib. 27. tit. 10. For the definition and derivation of the word, *vide* 4 Inst. 277. [2 Black. C. 471. "Perhaps," saith a writer upon this subject, "it can in no "case be less "necessary to "investigate "the etymology of a word, because the whole system of the bankrupt-law is founded upon positive "statutes; and no light can possibly be derived to the subject but what tends to elucidate "them." Co. Bankrupt Laws, 1.] 2 Black. C. 474.

The

Co. Bankrupt Laws, 3.

[The first statute noticing the crime of bankruptcy, was made against the *Lombards*, who, after they had made obligations to their creditors, suddenly escaped out of the realm: it was therefore enacted, "that if any merchant of the company acknow-"ledge himself bound in that manner, that then the company "shall answer the debt; so that another merchant, who is not of "the company, shall not be thereby aggrieved nor impeached." But the first statute made concerning *English* bankrupts was 34 H. 8., which has been much altered by 13 Eliz., and other subsequent statutes.

1 Burr. 474.

It is to be observed, that all the acts concerning bankrupts make but one system of law: they are, therefore, to be taken together, and to be construed favourably for the benefit of creditors, and to suppress fraud: for though a bankrupt was formerly considered merely in the light of a criminal, and therefore a strict construction might be expected, in conformity to the universal practice in deciding upon penal statutes; yet, at present, the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on principles of humanity as well as justice.]

2 Black. C. 471.

We shall consider the laws of bankruptcy, as moulded by the several acts of parliament, under the following heads:

(A) What Kind of Trade, Occupation, or Profession a Man must be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he must do, permit, or suffer, which will make him one: ‖and herein

1. *Of the Trading.*
2. *Of the Acts of Bankruptcy.*

1. Of those Acts which are only such when done with intent to delay or defeat Creditors.

2. Of those Acts which are Acts of Bankruptcy without reference to the Intent.‖

(B) Of the Commission of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto.

(C) Of the Commissioners, their Duty; and herein of the Power they may exercise over the Bankrupt, or others, in discovering of the Bankrupt's Estate.

(D) Of the Assignees; and herein of the Manner and Time of choosing them, ‖of their Removal‖ and Nature of their Trust, ‖Rights, and Duties.‖

(E) Of

(E) Of the Creditors, who are such; and herein of proving their Debts.

(F) Of the Bankrupt's Estate and Effects, to which the Commissioners or Assignees are entitled, when it shall be said to be vested in them; and herein of fraudulent Dispositions by the Bankrupt.

‖(G) Of Property passing to the Assignee as being in the reputed Ownership of the Bankrupt.

(H) Of the Relation to the Act of Bankruptcy; and to what Extent it is qualified.

(I) Of Actions and Suits by the Assignees, and Evidence therein.‖

(K) Of setting off, submitting to Arbitration, and compounding Debts due to the Bankrupt.

(L) Of the Distribution to be made of the Bankrupt's Estate.

(M) How the Bankrupt is to demean himself; and herein of the Crime in not appearing, and discovering his Estate, and the Privilege he is to enjoy during his Attendance.

(N) Of the Surplus of the Estate, and the Allowances to be made to the Bankrupt; and herein of his Discharge and Certificate.

[(O) Of Partners.]

(A) What Kind of Trade, Occupation, or Profession a Man must be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he must do, permit, or suffer, which will make him one: ‖and herein

‖1. *Of the Trading.*

‖THE new Bankrupt Act, by which the preceding statutes are repealed, contains the following enactment, as to the trades which subject a party to bankruptcy: "And be it "enacted, that all bankers, brokers and persons using the "trade or profession of a scrivener, receiving other men's "moneys or estate into their trust or custody, and *persons in-* "*suring ships or their freight, or other matters, against perils of* "*the sea, warehousemen, wharfingers, packers, builders, car-* "*penters, shipwrights, victuallers, keepers of inns, taverns, hotels,* "*or coffeehouses, dyers, printers, bleachers, fullers, calenderers,* "*cattle or sheep salesmen,* and all persons using the trade of "merchandize by way of bargaining, exchange, bartering, *com-* "*mission, consignment,* or otherwise in gross or by retail, and "all

6 G. 4. c. 16. § 2. The parts in italics are new.

she should think fit, and to be by no means subject to the debts, control, or intermeddling of her said husband. And it was thereby further agreed, that the said *Anne* should have the liberty of trading without any interruption from her said husband, she paying all the debts then owing by him in trade, and maintaining their children at her own expense, and saving him harmless from the same, and from all contracts and agreements to be thereafter entered into by her, either in the way of trade or otherwise. The separation took place, and the husband received the 600*l.* to his own use; and they ever after lived separate and apart from each other, and he went to the *East Indies*. The said *Anne* was left in possession of effects to the amount of 900*l.*, to be employed, and which were employed by her, in the said trade; and, by buying and selling goods in that trade, she got her living and maintenance for herself and children, continuing in her husband's house, and there carrying on the business of a linen-draper, on her own account, and in her own name, as a sole trader, near four years. In *December* 1771, a commission of bankrupt was taken out against her, when the commissioners refused to find her a bankrupt, because she was a *feme covert* residing in the county of *Middlesex*, and not a *feme sole* merchant trading in the city of *London:* but, upon petition to the Lord Chancellor (counsel being heard on both sides), his lordship ordered the commissioners to proceed to find Mrs. *Fitzgerald* a bankrupt, and the messenger to take possession of her effects: and accordingly, she was afterwards declared a bankrupt. (*a*)

(*a*) The authority of this case hath been confirmed by subsequent decisions. Ringstead v. Lanesborough, Co. Bankrupt Laws, 52. Barwell v. Brooks, *Id.* 36. Corbet v. Poelnitz, 1 Term R. 5. ‖But these cases being now overruled by the subsequent decisions of Marshall v. Rutton, 8 Term R. 545. Nurse v. Craig, 2 New R. 148. Beard v. Webb, 2 Bos. & Pull. 93. Marsh v. Hutchinson, 2 Bos. & Pull. 226. which have restored the old law that a feme covert cannot be sued alone for debts, though contracted while living separate from her husband with a separate maintenance, it follows that a commission of bankrupt cannot be supported against her in such case, but only in cases where she would be liable to be sued as a *feme sole;* as where the husband has abjured the realm, been transported, or the like. Cook's B. L. 47. (8th edit.) Whitm. B. L. 5. Eden's B. L. 1.‖

Co. Bankrupt Laws, 44. *Ex parte* Mear, 23d July 1787.

But if a *feme sole* trader commits an act of bankruptcy, and afterwards marries, and lives with her husband, she cannot be made bankrupt. A commission of bankrupt issued 20th *December* 1785, against *Francis Mear*, by the name of *Frances* the wife of *Henry Mear* of *Moseley* in the parish of *Yardley*, in the county of *Warwick*, before her intermarriage known by the name of *Frances Piper* of *Birmingham*, in the county of *Warwick*, innholder. She had before her marriage kept an inn in *Birmingham*, but had declined business on 27th *December* 1784, previous to the date of the commission, and on 14th *February* 1785, had intermarried with *Henry Mear*. The act of bankruptcy was proved before the commissioners to have been committed in *October* 1784. *Mear* and his wife petitioned to supersede the commission, alleging that neither the petitioning creditor's debt, the trading, nor the act of bankruptcy, could be proved, and also relying upon the illegality of the commission, as having been issued against a married woman. The Lord Chancellor was of opinion, that the commission was illegally issued against the said *Frances Mear*, upon the ground of her marriage; and therefore it was ordered to be superseded, without going into the other objections.

An

An executor of a trader, who merely disposes of the testator's stock, or buys things for the purpose of meliorating it, is not liable to be a bankrupt.] 1 Atk. 102. Comb. 185. 1 Show. 294. Testator ordered the residue of his estate to be employed in carrying on his trade: this residue is liable for all the debts of the trade. Hankey v. Hammond, at the Rolls, 1785. In Hankey v. Twogood, Mich. 1785, Lord *Thurlow* expressed the same opinion; and also intimated, that the executor carrying on the trade with it *might be a bankrupt*, even though his name did not appear, and that he would be personally liable for the debts. Co. Bankrupt Laws, 84.

‖But if he carries on the trade with an intent of continuing it indefinitely, and to make a general profit for himself, or of those beneficially entitled to the stock, he is a trader within the bankrupt law.‖ Christ. B. L. 1. 75. Eden's B. L. 5.

A shoemaker is within 13 Eliz. c. 7., for he lives by his credit in buying leather, and selling it again in shoes, and not on his manual labour only, as labourers and husbandmen do; for the thing bought and sold under different forms is the leather; and though the shoemaker's labour (*a*) is employed in the alteration of the form, yet men do not contract for the labour, but for the thing itself. Cro. Eliz. 268. pl. 6. Cro. Car. 31. pl. 1. 3 Mod. 530. (*a*) The labour, in this case, is only in melioration of the commodity, and rendering it more fit for sale. A butcher hath been holden to be a trader within the statutes; and this, though the court expressed themselves very sensible of the inconvenience of extending the bankrupt laws to persons whose living is undoubtedly gotten by mechanical labour, with a mixture of buying and selling. Dalley v. Smith, 4 Burr. 2148.]

A weaver and dyer are within the statute, for they get their living by buying and selling, and therefore may have an action for calling them bankrupt. Cro. Jac. 584. pl. 6. ‖As this case appears to have been doubted, *dyers* are expresly mentioned in new act, 6 G. 4. c. 16. § 2.‖

If one covenants with the king to victual the fleet at a certain rate, and thereupon buys up a great quantity of provision, *&c.*, though with the surplus he victuals merchants, yet being originally designed for the use of the navy, it will not make him a trader within the act; and it is one act or contract only, and not a continued trading. Vent. 270. Sir Thomas Littleton's case, adjudged.

An innkeeper, as such, can be no bankrupt; for though he buys provisions to be spent in his house, yet he does not properly sell them, but utters them at such rates as he thinks reasonable, and the attendance of his servants, furniture of his house, *&c.* are to be considered; and the statutes only mention merchants that used to buy and sell in gross, or by retail, and such as get their living by buying and selling; so that their principal subsistence is by buying and selling: now the contracts with innkeepers are not for any commodities in specie, but they are contracts for house-room, trouble, attendance, lodging, and necessaries, and therefore cannot come within the design of such words, since there is no trade carried on by buying and bartering commodities; and though in this case a jury should find that the innkeeper got his living by buying and selling, it would not bring him within the statute, for the reasons aforesaid. Cro. Car. 549. Jones, 437. Crisp and Pratt, March, 35. S. C. 3 Lev. 309. S. P. adjudged between Newton and Trigg. Comb. 181. S. C. 3 Mod. 527. S. C. 1 Show. 268. S. C. Carth. 149. S. C. Salk. 109. S. C. Skin. 291. S. P. Luton v. Bigg. Upon the authority of these cases, it hath been adjudged, contrary to an *obiter* opinion of Ld. *Holt*, in 1 Ld. Raym. 287. and 12 Mod. 159., that a *victualler, quâ victualler*, is not an object of the bankrupt laws, even though he may occasionally sell liquors out of the house in small retail quantities, if the sale be confined to particular friends. Saunderson v. Rowles, 4 Burr. 2064.

Perking v. Proctor, 2 Wils. 382. But if an *inn-keeper* or a *victualler* sell liquors out of the house to *any one* who applies, that will subject them to the laws, however small the quantities sold may happen to be. Patman v. Vaughan, 1 Term R. 572. Priest v. Pidgeon, *B. R.* 12 G. 3. Willet v. Edmonds, *B. R.* 13 G. 3. 1773. Co. Bankrupt Laws, 49. ‖These distinctions are now done away by the new act 6 G. 4. c. 16. § 2. which expressly enacts that all "victuallers, keepers of inns, taverns, hotels, or coffee-houses," shall be traders liable to become bankrupt.‖

Comb. 181. 3 Mod. 327. *Ex parte* Walker v. Harvey, 22d *November* 1788. *Ex parte* Craddock, 21st *Dec.* 1792. Co. Bankrupt Laws, 74.

[A schoolmaster who buys books to sell to his scholars, or the owner of a mine who buys candles to sell to his workmen, cannot be bankrupts.]

It was formerly holden, that, if the buying and selling be *in proportion* to any other way the party hath of living, he may be a bankrupt; and, upon this principle, a farmer, who bought and sold very large quantities of such things as were the produce of his farm, was adjudged a bankrupt. Mayo v. Archer, 1 Stra. 513. 8 Mod. 46. S. C. Buscall v. Hogg, 3 Wils. 146. S. P.; but see *infrà*.

6 Ves. R. 8. ‖Nor can a colonel of a fencible regiment who merely sells horses occasionally at *Tattersall's*.

Summersett v. Jarvis, 3 Brod. & B. 2. Nor a person who keeps hounds, and who buys dead horses for their use, and afterwards sells off the skins and bones.

Bolton v. Sowerby, 11 East, 276. Nor a person who, finding he has more than he wants of a commodity, merely sells off the residue.

Carter v. Dean, 1 Swanst. 64. Nor a cowkeeper who lives by selling milk, and when any cows become unfit for use, sells them off.

Heamy v. Birch, 3 Camp. R. 233. But a fisherman who buys fish at sea of other fishermen to fill up his cargo, and brings them for sale to *London*, is a trader within the bankrupt laws, though he only buy during one season.

Gale v. Halfknight, 3 Stark. 56.; and see 14 Ves. 603. 1 Rose, 84. In all such cases it is a question for a jury whether there is evidence of an intention to deal generally.‖

3 Mod. 155. (*a*) But a shipcarpenter is. Ld. Raym. 741. ‖In the 6 G. 4. c. 16. § 2. A carpenter that sells wrought timber seems to be within the statute, for he sells the materials, though altered by his workmanship, so that he gets his living by buying in and selling out the timber; but otherwise it seems it is of a mere working carpenter. (*a*)

"carpenters" and "*shipwrights*" are expressly named; but the proviso excepting common "labourers or workmen for hire," prevents a mere working carpenter from being liable to bankruptcy.‖

5 Esp. 147. 2 Camp. 500. ‖It was formerly decided that a builder was not a trader within the bankrupt laws; but the new act 6 G. 4. c. 16. § 2. expressly includes builders.‖

Sid. 411. Vent. 29. 2 Keb. 487. Comb. 181. S. P. ‖(*b*) 4 Ves. 168. This seems within the words of the late act, "buying and "letting for "hire." 6 G. 4. c. 16. § 2.‖ The buying part of a ship makes no trading, because it is no buying and selling within the statute; but the buying part in the ship, and the party's employing it in carrying and re-carrying goods for himself, is an evidence of trade, because the exportation and importation of goods is the business of a merchant; but if a man buys a part of a ship which he lets to freight, this is no evidence of trade (*b*), for there is no exportation or importation; and if he repairs a ship, which is usual on the credit of the bottom, and afterwards takes a share in it for his debt, and employs the ship in exportation, it has been holden by some, that

that since this is compulsory upon him, having no other way to obtain his debt, it shall not be taken as an evidence of trading, because it is only accidental, and not the way the party hath put himself in to get his livelihood.

A man's buying and selling brings him not within the statutes, for they intend such as gain the greatest part of their living thereby; and therefore where a farmer bought and sold cattle (*a*), it was adjudged that he was not a bankrupt, for a farmer is not within the statutes, because he only sells the profits originally raised from the ground; and if he buys in commodities, and sells them again, this is only accidental.

March, 35. Cro. Car. 549. Danv. Abr. 687. But, in later cases, it hath been established, that the *extent* of the trading is not material; ‖see 2 Taunt. R. 176.‖ that the true criterion is whether the party means to sell (with a view to profit) to any person who applies for the commodity in which he professeth to deal. The intention of the party to trade in such commodity, is a question of fact to be left to a jury. ‖The question in such cases is, whether the buying and selling of the articles is with a view of making a profit *as a trader*, or whether it is merely ancillary to the profitable occupation of the farm. Patten v. Browne, 7 Taunt. 409. Stewart v. Ball, 2 New R. 78. Bolton v. Sowerby, 11 East, 274. Hale v. Small, 5 Moo. 58.‖ Where a farmer bought horses not calculated for the farming business, and for the express purpose of selling again, it was holden, that he made himself an object of the bankrupt laws: whether more or fewer instances of his so buying and selling, it was said, was proper for the consideration of the jury. Bartholomew v. Sherwood, 1 Term R. 573. ‖See Wright v. Bird, 1 Price, 20.‖ (*a*) See stat. 5 G. 2. c. 30. § 40. [A person buys cattle at a fair, keeps them three or four days, and then drives them to another fair to sell them, he is a drover within this statute of 5 G. 2., and cannot be a bankrupt. Bull. Ni. Pri. 39.] ‖But such person might now be a bankrupt, as drovers are not excepted in the late act 6 G. 4. c. 16.‖

[If a man manufactures the produce of his own land, as a necessary or usual mode of reaping or enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buy the necessary ingredients and materials to fit it for market: as in the case of a farmer buying rennet and salt, to convert his milk into cheese; or making his apples into cider. So in the case of alum works; the rude mass of which is the rock, which is dug, burned, steeped, and boiled in lead, and then mixed with kelp, lees, and urine. Such also is the case of coal-mines (*b*), where raising the coals out of the pit is as necessary to the enjoyment of that species of produce, as reaping and threshing corn is to the enjoyment of corn. But where the produce of the land is merely the raw material of a manufacture, and used as such, and not as the mode of raising such produce, where the soil is manufactured and converted into quite another thing, there in truth the party is and ought to be considered as a trader. And such seems to be the case of brick-making. With respect, however, to this species of manufacture, cases have arisen, wherein the question, Whether it will bring a man within the bankrupt laws? hath been much agitated: and as this question hath, from accident, not been finally settled, we shall state the facts at large. Upon a petition for a new trial, an issue having been directed to try, whether the petitioner was or was not a bankrupt, it appeared from the report to have been proved, that the petitioner, who was a farmer, renting a farm of upwards of 100*l.* a-year, made bricks of earth taken off the waste without any licence from the lord (to whom he afterwards paid

Newton v. Newton, Co. Bankrupt Laws, 76. (*b*) Port v. Turton, 2 Wils. 169.

Ex parte Harrison, 1 Br. Ch. R. 173.

paid a consideration); that he used a kiln for the purpose, not built by him himself, and had, at various times, made from 40,000 to 70,000 bricks every year, and sold different quantities, sometimes only to certain persons, and sometimes generally to all who came for them. It was further in evidence, that the kiln was a small one, not fit for making more than 7000 bricks at a time. One of the witnesses swore he was employed by the bankrupt to make bricks at a certain price, and that he sold them at an advanced value. Mr. Justice *Buller*, who tried the cause, told the jury that the question was, whether the bankrupt kept a public sale kiln? if he did, it was a trading within the bankrupt laws; but if it was a mere private kiln for his own use, and that having too many, he had only sold to a neighbour, that would not be such a trading. The jury found that it was a public sale-kiln, and gave a verdict for the assignees; and Lord *Thurlow* C. refused to grant a new trial. "Purchasing the "earth," said his lordship, "might, and he thought it would, "be holden to be for the purpose of carrying on the trade of a "brick-maker. Here the earth was not indeed purchased, but "taken by way of trespass, purged by the subsequent consider-"ation, which would amount to obtaining a license, and that "brings it within the bankrupt laws; that it was not to improve "his own estate, but a purchasing of the earth by license, an-"cillary to carrying on the trade of a brick-maker."

Co. Bankrupt Laws, 61. 1 Term R. 54. 1 Br. Ch. R. 178.

In the case of *Parker* v. *Wells*, there was a special verdict, which stated a demise from the Archbishop of *Canterbury*, in the year 1767, to *John Parker*, the father of the plaintiff, of an extensive farm of 800 acres, in which there was a parcel of brick ground, for 21 years. It stated similar demises to *John Parker*, the father, prior to that in 1767; and also a subsequent similar one to the plaintiff in 1780: it stated further, that one *William Berand*, for 20 years and more, before the year 1768, rented the said parcel of brick ground from the said *John Parker*, the father, and made and sold bricks there. That the said *W. Berand* died in 1768; and upon his death the plaintiff took the said brick ground into his own possession, and then and there bought certain materials and necessary things, which were of the said *W. Berand*, in his lifetime, used in making bricks there at the valuation of 130*l.*, and then and there made bricks and tiles of the earth there, and sold them; and that, during the time the plaintiff so held the said land, he made bricks and tiles for sale of the earth or clay arising from the brick grounds, and bought sand and fuel, which were necessary ingredients for converting the earth and clay into bricks and tiles. Upon these facts the Court of C. P. gave judgment for the plaintiff, holding that he was not a bankrupt, the business of brick-making being carried on by him, *merely as a mode of enjoying the profits of a real estate.* This judgment, however, was reversed by the Court of K. B. Upon a writ of error from the judgment of this last court, the following questions were put to the judges, by order of the House of Lords. 1. Whether the finding on this verdict be sufficient

sufficient whereupon to give final judgment? 2. If the finding be insufficient, what award ought to be made on such finding? 3. If the finding be sufficient, whether upon such finding the plaintiff in error appears to be a trader within the true intent and meaning of the statutes concerning bankrupts? The judges present were unanimously of opinion on the first question, in the negative; and upon the second, that a *venire facias de novo* ought to be awarded; whereupon the judgments both of the Court of C. P. and of K. B. were reversed; and it was adjudged, that the Court of King's Bench do award a *venire facias de novo.* The plaintiff did not proceed on the *venire facias de novo*, but another action was brought by agreement of the parties in the Court of K. B. *Buller* J., previous to summing up the evidence, told the jury there were three questions for them to determine. 1st, Whether *Parker* carried on the trade of making and selling bricks and tiles for sale, for the purpose of drawing a profit therefrom? 2d, How long he carried on trade for that purpose, whether from the 23d of *June* 1768, when *Berand* died, to the time of his absconding, which was on the 7th *January* 1783, or from what time to what time? 3d, Whether he was a joint occupier of the farm with his father, or the father had the sole beneficial enjoyment of the farm to his death? 1st. The jury found that the plaintiff did carry on the trade of making bricks and tiles for sale, for the purpose of drawing a profit therefrom. 2d. That he carried on the trade for that purpose, from the 23d of *June* 1768, when *Berand* died, to *Michaelmas* 1778.; that he ceased to make bricks at *Michaelmas* 1778, and he also ceased to sell them on the same day. 3d. That the father had the sole enjoyment of the farm to the time of his death. This finding was to have been drawn up as a special verdict; but, as it appeared that Mr. *Parker* had left off brick-making before the petitioning creditor's debt accrued, the defendants waived a special verdict, and a general one was entered for the plaintiff. Another commission was afterwards taken out by a creditor, prior to *Parker*'s quitting brick-making, which commission was submitted to.]

Dom. Proc. 15th *May* 1787.

‖The judgment of the C. B. in the above case has been supported by a subsequent case, where it was held that a devisee for life of an estate, part of which is a brick ground, who makes bricks on it for sale generally with a view to profit, is not a trader within the bankrupt law, though he purchase the coals and some of the wood used in burning the bricks, and though he occupied the brick ground as a brick-maker for some time before it came to him by devise; for this is only a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state, and is not a buying of any commodity to sell again, within the meaning of the bankrupt laws, nor does it fall within the principle of them, since they were levelled against those who get great substance of other men's goods into their hands upon credit: and Lord *Eldon* has held that any person whatever having a freehold or term in the land is not a trader

Sutton v. Weeley, 7 East, 442.;

Ex parte Gallimore, 2 Rose, 424.; and see Heane v. Rogers, 9 Barn. & C. 577. *acc.*

for making bricks from the produce of it; but if he purchases the materials he is.

Paul v. Dowling, 1 Moo. & Malk. 263. So also though the landowner buys chalk to burn with the bricks, and then sells the bricks and the lime produced from the chalk, he is not a trader, if his only object in buying the chalk be the more convenient burning of the bricks, and not the profit derived from the lime.

Ex parte Ridge, 1 Ves. & Bea. 360. So also a farmer making lime from a lime-pit on his farm, and selling the surplus beyond what he uses on the farm, is not a trader.

Ex parte Gardner, *ibid.* 45. Nor the proprietor of a quarry delving or cutting stones for sale from it.‖

Ex parte Meymot, 1 Atk. 196. [A person who hath dealt merely in running and smuggling goods, though it is an offence, and contrary to an act of parliament, is still a trader within the meaning of the bankrupt acts, and liable to a commission.]

Cobb v. Symonds, 5 Barn. & Ald. 516. Wright v. Bird, 1 Price, 20. ‖And so also a person trading as an unlicensed horse-dealer.‖

Highmore v. Molloy, 1 Atk. 206. [Lord *Hardwicke* was inclined to think a pawnbroker within the bankrupt acts, and especially within the 39th clause of 5 G. 2., the words of which are, "Whereas persons dealing as bankers, "brokers, and factors, are frequently intrusted with great sums "of money, and with goods and effects of very great value be- "longing to other persons; it is hereby further enacted, that "such bankers, brokers, and factors shall be, and hereby are "declared to be, subject and liable to this and other the statutes "made concerning bankrupts:" for, he said, though pawnbrokers are not expressly named, yet the general word *broker* is the genus, and all other kinds of brokerage the species.]

Rawlinson v. Pearson, 5 Barn. & Ald. 124.; and see 1 Moo. & Malk. 263. ‖This decision was confirmed in a late case; in which it was also held that a person who had ceased to receive pledges, but continued to sell off the unredeemed pledges, was *continuing* to trade as a pawnbroker, and was therefore liable to be a bankrupt.

Ex parte Stevens, 4 Madd. 256. (*a*) It has been observed that this argument is removed by the late act which contains no such recital, Eden. B. L. 6., and it is of course equally taken away in the above case of a pawnbroker, though it was entirely on the effect of this recital, that pawnbrokers were held in the above cases within the bankrupt laws. Whether an insurance-broker is or is not within the meaning of the word broker in the bankrupt law, has been discussed but not decided. It was argued that he was not, since he was not, like other brokers, a person intrusted with "sums of money and "effects of great value," according to the recital in 5 G. 2. c. 30. § 39. (*a*)

Pott v. Turner, 6 Bing. 704. A ship-broker has been held within the late act, and the court considered that the words "receiving other men's moneys or estate into their trust or custody," applied not only to scriveners, the next immediate antecedent, but also bankers and brokers.

Ex parte Bell, 15 Ves. 355. The new act also includes "persons insuring ships or their "freights, or other matters, against perils of the sea," who were not formerly liable to be bankrupt; and under this description an

an underwriter might probably now be a bankrupt, though it was held he was not within the former acts.‖

[The clause in 5 G. 2. relating to dealers as bankers, took its rise from that part of 21 Jac. 1., relating to scriveners, who were more numerous than in latter days; for bankers having taken upon them to act as scriveners, have made it necessary for the legislature to add bankers; and a person acting as a banker will be considered as such, although he does not keep an open shop.]

Ex parte Wilson, 1 Atk. 218. ‖Bankers are named in the new act, § 2.‖

‖Scriveners are mentioned in the late act in the same language as in 21 Jac. 1. c. 19. § 2. as "persons using the trade or profession of a scrivener receiving other men's moneys or estates into their trust or custody;" and it is held that, in order to make a man a money scrivener, he must carry on the business of being trusted with other people's monies, to lay out for them as occasion offers; and if an attorney takes procuration for loans as well as his fees as an attorney, acting in the former capacity to such an extent as to afford evidence of his intention always to do so, he may be the object of a commission as a scrivener.‖

Adams v. Malkin, 5 Camp. 534. *Ex parte* Malkin, 2 Ves. & Bea. 31. Hutchinson v. Gascoigne, 1 Holt, N.P.C. 507.; and see 2 Scho. & Lef. 414. 2 Esp. N. P. C. 555.

[Drawing and re-drawing bills of exchange may or may not be exercising trade and merchandize; it depends upon circumstances; it is a question of law upon the fact. Drawing and re-drawing for *large* sums, and for a long time, though no commission money be allowed, it was adjudged would make a man a bankrupt; *secùs*, where a party drew bills upon his *own* account, at the expense of paying a quarter *per cent.* commission besides interest at *5 per cent.*, for their being discounted, and borrowed accommodation-notes in exchange for his own to the same amount.

Richardson v. Bradshaw, 1 Atk. 128. Hankey v. Jones, Cowp. 745.

Buying and selling bank stock or other government securities will not make a man a bankrupt.

Colt v. Netterville, 2 P. Wms. 308. ‖*Vide* Eden's B. L. 10.‖

Lord C. J. *Holt* inclined to think that a share in the Stationers' Company would not make a man a bankrupt; but Lord Keeper *Wright* held otherwise.

Bird v. Mayor, 2 Ld. Raym. 851. ‖But now by the late act 6 G. 4. c. 16. § 2. no member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament shall be deemed as such a trader liable to become bankrupt.‖

A man who lives by buying only, or selling only, cannot be a bankrupt.]

Com. Dig. tit. Bankrupt.

‖The publisher of a newspaper who buys the whole daily impression from the proprietors, and resells it at a profit, and bears the loss of such as remain unsold, is a trader within the bankrupt laws.‖

Gimmingham v. Laing, 2 Marsh. 236.

[There can be no such thing as an *equitable* bankruptcy; it must be a *legal* one.]

Small v. Oudley, 2 P. Wms. 429.

If a man contracts a debt while he is a trader, and after leaves off, and lives upon his estate in the country, and then absconds for this debt, he is a bankrupt, because he lived by his trade when the debt was contracted; but if a merchant leaves off his trade, and after contracts debts, and then sells off the surplusage of his goods

Palm. 325. Vent. 5. Lev. 17. Sid. 411. Sir Robert Cotton's case. 3 Keb. 451.

goods, but hath neither factor, correspondent, nor packer, he is no bankrupt. (*a*)

(*a*) *Tamen qu.* For in Vent. 166., where the same case comes on again, the court holds that he is a bankrupt; otherwise the mischief would be great, for men cannot take notice when another withdraws his trade, or when he commands his factors beyond sea to deal no farther for him; but they seeing great quantities of goods and merchandize in his hands, are apt to trust him; so that it is fit they should be relieved by the statutes.

Ex parte Patterson, 1 Rose, 402. Wharam v. Routledge, 5 Esp. R. 235. *Ex parte* Cundy, 2 Rose, 357.

‖It is now settled that the question, whether or not a trader has ceased his trading, does not depend upon the mere discontinuance of it, or the absence of any specific acts of trading, but upon the circumstance whether there be an intention to exercise or resume it, which is a question for a jury.‖

Sid. 411. Vent. 5. Comb. 463. But see Dougl. 295. But if a person leaves goods in the hands of another to be disposed of, and is to be partner with him in loss and gain, he may be a bankrupt, for he still carries on his trade by proxy. Palm. 325. But the having of a joint stock does not make a bankrupt, without some proof of a disposal thereof; for otherwise there is no commerce driven. 2 Keb. 487.

If a trader gives over his trade, and then contracts debts, and then goes into trade again upon a new stock, it seems upon the petition of such intermediate creditors he cannot be made a bankrupt, because such creditors did not trust him upon the credit of his trade.

Palm. 325.

If a trader becomes security for another, he is a bankrupt within the statute, because he is trusted upon the reputation of his stock and dealings, as well where he is security, as where he contracts for his own debts.

Raym. 375. Dowesworth and Anderson, 2 Jones, 141. S. C. 2 Vern. 162. S. C. cited.

A man buys in *England* only, and sells in *Ireland*, he may be a bankrupt, for many merchants buy beyond sea, and sell in *England* only, and others buy here, and sell beyond sea; for it is trading that makes a man capable of being a bankrupt.

Salk. 110. pl. 5. Bird and Sedgwick, on a trial at bar. [See the same point reluctantly ruled by Ld. *Hardwicke*, upon the authority of this case, in the matter of Astley, *Ex parte* Smith, cited in Cowp. 402., and *Ex parte* Williamson, 1 Atk. 82. And, conformably to these decisions, it is now settled, that if a merchant who trades to *England*, but who is a native of, and hath been constantly resident in, a country not subject to the *English* laws concerning bankrupts, comes into this country, and commits an act of bankruptcy, he becomes an object of the bankrupt laws. Alexander v. Vaughan, Cowp. 398. Ingliss v. Grant, 5 Term R. 530. S. P. ‖Williams v. Nunn, 1 Taunt. 270. Allen v. Cannon, 4 Barn. & Ald. 418.‖ But the act of bankruptcy must be committed here: that cannot be committed abroad. *Ibid.*

A gentleman of the *Temple* went from thence to *Lisbon*, where he turned factor, and traded to *England*, and broke: it was insisted upon that the statutes of bankrupt did not extend to persons out of the realm, the subject of them being cases of arrests, outlawries, and departing the realm; and that the 21 Jac. 1. c. 19. which extends to aliens, is to be understood of aliens here: but the court held him a bankrupt by reason of his trading hither and back again, which gained him a credit here.

Surtees v. Ellison, 9 Barn. & C. 750.; and see 1 Mont. & Mac. 287.

‖A trading which ceased before the 6 G. 4. c. 16. took effect, will not support a commission issued after that time.‖

¶2. *Of the Acts of Bankruptcy: And herein*

1. Of those Acts which are only such when done with intent to delay or defeat Creditors.

2. Of those Acts which are Acts of Bankruptcy, without reference to the Intent.

1. The acts of bankruptcy of the first kind are enumerated in section 3. of the new act. "And be it enacted, that if any such "trader shall depart this realm, *or being out of this realm shall* "*remain abroad*, or depart from his dwelling-house, or other- "wise absent himself, or begin to keep his house, or suffer him- "self to be arrested for any debt not due, or yield himself to "prison, or suffer himself to be outlawed, or procure himself "to be arrested, or his goods, money or chattels to be attached, "or sequestrated, *or taken in execution*, or make or cause to be "made, *either within this realm or elsewhere*, any fraudulent grant "or conveyance of any of his lands, tenements, goods or chattels, "*or make or cause to be made any fraudulent surrender of any of* "*his copyhold lands or tenements, or make or cause to be made* "*any fraudulent gift, delivery or transfer of any of his goods or* "*chattels*, every such trader doing, suffering, procuring, exe- "cuting, permitting, making or causing to be made any of the "acts, deeds or matters aforesaid, with intent to defeat or delay "his creditors, shall be deemed thereby to have committed an "act of bankruptcy."

6 G. 4. c. 16. § 3. The alterations made by the new act are printed in Italics.

Departing the Realm.¶ [Departing the realm will not be an act of bankruptcy, unless done with a view of defrauding or delaying creditors: but if it appear that they are in fact delayed by such absence, it will be the same as if the original departure had been fraudulent.

Ex parte Gulston, 1 Atk. 193. 139. Davis's Bankrupt Laws, 50.

Therefore one *Woodier*, a mercer on *Ludgate-hill*, who fled beyond sea for the murder of his wife, whereby his creditors were prevented from recovering their debts, was holden to have committed an act of bankruptcy.]

Bull. Ni. Pri. 59. See a confirmation of this case in Raikes v. Poreau, *cor. Buller* J., *London* Sittings after Trin. Term 1786. Co. Bankrupt Laws, 92.

¶However it had been settled before the new act, that unless the departure was with intent to delay creditors, it did not constitute an act of bankruptcy, although creditors were in fact delayed by it; and in one of these cases (7 Term R. 516.) *Lawrence* J. reconciled the cases of *Woodier*, and *Raikes* v. *Poreau*, with this doctrine, since though it was not the immediate object of the parties in those cases to delay their creditors by going abroad, yet as that must be the necessary consequence of such an act, it would be evidence of their intending to delay them.

Fowler v. Padget, 7 Term R. 509. *Ex parte* Mutrie, 5 Ves. 576. *Ex parte* Osborne, 1 Ves. & Bea. 177. Warner v. Barber, 1 Holt, 175.; and see Ramsbottom v. Lewis, 1 Camp. 279. Holroyd v. Whitehead, 3 Camp. 530.

And it had also been settled, that if the act was done with the intent to delay, it was not necessary that delay to a creditor should actually take place.

Robertson v. Liddell, 9 East, 487.

And accordingly, in the new act, the words, "or whereby "creditors may be defeated or delayed," are omitted.¶

[But

Co. Bankrupt Laws, 93. ‖Eden, B. L. 15.; and see 3 Stark Ca. 151.‖

[But a trader going abroad, to avoid performing a duty, will not therefore be a bankrupt; as if it be to avoid an arrest upon an *excommunicato capiendo*, or the service of process to enforce a decree in Chancery, unless it be a decree for the payment of money: but if creditors, by such absence, are delayed and defrauded, it then becomes an act of bankruptcy, according to the principle of *Woodier's* case, and that above referred to.] ‖But see *suprà*.‖

Williams v. Nunn, 1 Taunt. 270.; and see Windham v. Paterson, 4 Camp. 289. *Ex parte* Osborne, Rose, 387.

‖The word realm, means nothing more than the extent of the jurisdiction of the courts of *England*, for if a trader leave this country and go to *Ireland*, with intent to delay his creditors, it will be an act of bankruptcy within this clause; and if a trader residing in *Ireland*, or elsewhere, come to this country upon some temporary business, and again quit it to avoid being arrested by a creditor, it is a departing this realm within the meaning of the statute, although the trader is returning to his own home.

Warner v. Barber, 1 Holt's Ca. 175.

But where a trader having business both in *England* and *Spain*, goes to the latter country to look after his concerns, his departure is not an act of bankruptcy, though his creditors are delayed; but if he is actuated also by the fear of arrest, then it is otherwise.

Vin. Abr. tit. Creditor and Bankrupt, 59.

2. *Or, being out of the Realm, shall remain Abroad.*‖ Before the late act, it had been laid down, that [though a trader depart the realm in good circumstances, yet if he run in debt, and defer his return in order to avoid arrests, this is tantamount to his departing in order to defraud his creditors.]

Windham v. Paterson, 4 Camp. R. 286.

‖And Lord *Ellenborough* had held that a person remaining abroad to delay his creditors, committed an act of bankruptcy, under the words, "otherwise absent himself," in the statute 1 Jac. 1. c. 15.; but this decision would seem to be inconsistent with the principle, that the act of bankruptcy must be committed in *England*. The above additional words were therefore introduced into the act, in order to make the remaining abroad with intent to delay the creditors, a clear act of bankruptcy, though the original departure might not be with that intent. (*a*)

(*a*) It will now, therefore, be unnecessary to consider how far letters written by the bankrupt abroad are evidence of his object in departing. See Rawson v. Haigh, 2 Bing. 99.

6 G. 4. c. 16. § 3.

3. *Or depart from his Dwelling-House.* This also may or may not be an act of bankruptcy, according to the motive by which the trader is influenced.

Robertson v. Liddell, 9 East, 487.

If it is done with the intent to delay a creditor, it is an act of bankruptcy; and this whether he be actually delayed or not.

Fowler v. Padgett, 7 Term R. 509.

If not done with this intent, it is not an act of bankruptcy, though delay be actually occasioned by it.

Ex parte Osborne, 2 Ves. & B. 177.

Holroyd v. Whitehead, 3 Camp. 530.

If the trader leaves his house without making arrangement for continuing his business, and under such circumstances that his establishment must necessarily be broken up, his intent to delay his creditors may be inferred.

Co. B. L. 99. Lingood v.

The absence must be voluntary, and not occasioned by an arrest. It must be to avoid a debt, and not merely to avoid performing

performing a duty: therefore if the trader depart to avoid an attachment for nondelivery of goods according to an award, it is not an act of bankruptcy; but it is otherwise if the attachment be for nonpayment of money. Eade, 1 Atk. 196.

If a trader depart his house to avoid an arrest, knowing a writ to be out against him, this is an act of bankruptcy, though he have an erroneous idea that the officer has the writ with him. *Ex parte* Bamford, 15 Ves. 449.; and see 1 Maule & S. 676.

The length of absence is immaterial, the act of bankruptcy being committed the moment the trader leaves his house. Holroyd v. Gwynne, 2 Taunt. 176. Spencer v. Billing, 3 Camp. 312. *Ex parte* Gardner, 1 Ves. & Bea. 45.

A departure from a temporary abode, where the trader carries on his business, if with intent to delay creditors, is an act of bankruptcy. Bigg v. Spooner, 2 Esp. 651. Vincent v. Prater, 4 Taunt. 604. Spencer v. Billing, 1 Camp. 310. Holroyd v. Gwynne, 2 Taunt. 176.

The question of the trader's intention in leaving his dwelling-house is a question of fact for the jury. Capper v. Desanges, 3 Moo. 4.

Where two partners left their house, avowedly for the purpose of getting two bills discounted, it was left to the jury whether this was their real object, or whether they departed with intent to delay their creditors, and the jury having found the latter, the court refused to disturb the verdict. Deffle v. Desanges, 8 Taunt. 671.

Where a trader, on hearing that a creditor had called for money, left a message for him, that he could not spare, and would not let him have it, and that he should go out of the way, and not return home till dinner-time, and he accordingly did so, and the creditor called and received the message, but did not call at dinner-time when the trader was at home, the jury having found that this was not an absenting to delay a creditor, the court thought their determination right. Vincent v. Prater, 4 Taunt. 603.

And so also in a case where the jury found a similar verdict on an alleged act of bankruptcy, in the trader's going away from his house, on occasion of a meeting of creditors, in order to avoid irritation and harsh language.‖ *Ibid.*

[The bankrupt's declaration of his fears of being arrested, or of his bad circumstances, is not evidence of a bankruptcy, unless where it is concomitant with facts, such as removing his goods, books, *&c.* or where the bankrupt himself contests the commission.] Ambrose v. Clendon, Ca. temp. Hardw. 267. Cockran v. Love, at Ni. Pri. *cor.* Lord *Kenyon*, 3d *June* 1790. ‖*Vide post*, as to the new act of bankruptcy by insolvency.‖ declaration of

‖*Or otherwise absent himself.*‖ [*Absenting himself*, may become an act of bankruptcy or not, from the intention of the party: if it be done with a view of defrauding, or even delaying his creditors, and the absence be but for a single day, it will be an act of bankruptcy; and his very absenting himself is sufficient *primâ facie* evidence of an intent to defraud or delay his creditors: but it must be voluntary, and not by means of an arrest.] 1 Salk. 110. 1 Burr. 484. Hall's case, 2 Stra. 809. ‖6 G. 4. c. 16. § 3. re-enacting the provision of 13 Eliz. c. 7. § 1. 1 Jac. 1. c. 15. § 2.‖ Green, 53.

‖Thus where the trader admitted creditors repeatedly into his house, Bigg v. Spooner, 2 Esp. 651.

house, and saw them, but on their asking for money, went out under pretence of getting it, and never returned, and it appeared he went either to the billiard room or the tavern, this was held an act of bankruptcy, for though the original departure might be referred to the object of getting the money, the staying away afterwards was absenting himself with intent to delay creditors.

Judine v. Da Cosser, 1 New R. 234.

So where a trader having a counting-house in town, and a dwelling-house in the country, left the former on *Friday*, and took his books with him to his country-house, which he finally left on the *Tuesday* following, the Court of Common Pleas held, that having left his counting-house without the *animus revertendi*, he had committed a complete act of bankruptcy from the time of his departure.

Bayly v. Schofield, 1 Maule & S. 338.; and see Chenoweth v. Hay, *Ibid.* 676.

So where a trader, on being arrested, escaped from the officer, and took refuge in another man's house, and remained there till dark, declaring that he did it to avoid other creditors, this was held an absenting himself within the meaning of the statute.

Mills v. Elton, 3 Price R. 142.

But where the trader being informed by the attorney of the petitioning creditors, that he had delivered a warrant to a sheriff's officer to arrest him, and the attorney advised him to repair to his office, to avoid a public arrest, which the trader did, and remained there a considerable time, this was held not to be an act of bankruptcy; since the bankrupt did not keep out of the way to avoid the arrest, but only to avoid its being done in a public manner.

Gimmingham v. Laing, 2 Marsh. R. 236.

This clause is not necessarily confined to an absenting from the dwelling-house, or indeed any particular place, but extends to any evasion of a creditor in any place: therefore leaving the *Royal Exchange* (which the trader frequented) at the approach of a creditor; breaking an appointment with a creditor to meet him there; the proprietor of a theatre retiring behind the scenes, to avoid a sheriff's officer, giving orders to be denied to him; have been held acts of bankruptcy within this clause.

Tucker v. Jones, 2 Bing. 2. Palm. 325. 1 Salk. 110. ‖See Deacon, ch. 3. § 2.‖

But a mere single breach of an appointment to meet a creditor is not an act of bankruptcy.‖

‖*Or begin to keep House.*‖ If a man keeps his house for a long time, this does not immediately make him a bankrupt; but if he conceals himself within his house but for a day, or hour, to delay or defraud his creditors he is a bankrupt.

Cro. Eliz. 13. Godb. 25.

If there be a process out against a merchant, who thereupon keeps house to save himself from an arrest, and after goes out to market, and other places, but hearing of a new process, keeps house again, and after goes at large; *per cur.*, he is no bankrupt, because though the keeping house is an act of bankruptcy for which a commission might have issued at that time, yet by his going abroad it is purged; and though the statute makes the keeping house an act of bankruptcy, yet it must be understood of a keeping in order to conceal himself.

Hopkins v. Ellis, 1 Salk. 110. p. 6.

But if *A.* commits a plain act of bankruptcy, as keeping house, *&c.* though he after goes abroad, and is a great dealer, yet that will not purge such act of bankruptcy, but he will still remain a bank-

a bankrupt: but if the act was not plain, but doubtful, then going abroad, and dealing, *&c.* will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors, and keep out of the way, it will not be an act of bankruptcy within the statute. Also, if after a plain act of bankruptcy, he pays off, or compounds with all his creditors, he is become a new man.

[Colkett v. Freeman, 2 Term R. 59. S.P. A plain unequivocal act of bankruptcy cannot be purged or explained by subsequent circumstances. *Ibid.*] ‖Mucklow v. May, 1 Taunt. 479. Wood v. Thwaites, 3 Espin. 244.‖

[Although the statute of *Eliz.* mentions "the beginning to "keep house to defraud creditors" as an act of bankruptcy, yet the construction which it hath obtained is, that there must be an actual denial to some one creditor, with intent to defraud or hinder such creditor, in order to constitute the act: that the debtor's keeping house "with that intent," or giving general orders to a servant to deny him to creditors, without an actual denial to some creditor who hath a debt at that time due, will not be sufficient.

Garret v. Moule, 5 Term R. 575. Hawkes v. Saunders, Trin. 24 G. 3. *B. R.* Co. Bankrupt Laws, 94. 7 Vin. Abr. 6. pl. 14. ‖But it now settled that the actual denial to a creditor is only evidence of the intent of the trader in beginning to keep house, and that the intent may be proved by other evidence; and that if the trader has given a general order to deny with such intent, an actual denial need not be proved. Robertson v. Liddell, 9 East, 487. 14 Ves. 86. Bayley v. Schofield, 1 Maule & S. 338. Lloyd v. Heathcote, 2 Bro. & Bing. 388. Harvey v. Ramsbottom, 1 Barn. & C. 55. *Ex parte* White, 3 Ves. & Bea. 129.‖

A denial to a creditor coming at an unseasonable hour, or a denial in case of sickness, or being engaged in company or business, is not an act of bankruptcy.]

Bull. Ni. Pri. 39. 1 Atk. 202.

‖So also a denial on a *Sunday*, or when the trader is at dinner. *Ex parte* Preston, 1 Rose, 21. *Ex parte* Hall, 1 Atk. 201. Smith v. Currie, 3 Camp. 349. Shaw v. Thompson, 1 Holt, 159.

But where a trader gave a general order to be denied as not at home, and was so denied by his servant to a creditor, although the trader was ill and incapable of transacting business, yet a jury having found that he had committed an act of bankruptcy, the court refused to disturb the verdict; saying that the creditor ought to have been told that he was at home, but ill.

Lazarus v. Waithman, 5 Moo. 363.

It has been held that a denial to a creditor, merely demanding his debt, and not asking to see the trader, is not evidence of beginning to keep house; but this case has been doubted.

Dudley v. Vaughan, 1 Camp. 271. Eden's B. L. 22.; and see 1 Deacon, 56.

A denial to a creditor, unless previously directed by the trader, is not an act of bankruptcy, although he afterwards assent to it.

Ex parte Forster, 17 Ves. 416. 1 Rose, 50. See 1 Moo. & Malk. 458.

It is no objection to this act of bankruptcy, that at the time of the denial the trader was seen by the creditor.

Ex parte Bamford, 15 Ves. 451.

A denial at a friend's house may be an act of bankruptcy.‖

1 Maule & S. 338. 1 Ry. & Moo. 58.

It hath been holden (*a*), that a denial to a person coming on behalf of a creditor to demand the debt will not be within the statute. But it is certain, that, in practice, a denial to the clerk of

(*a*) Barrow v. Foster, *cor.* Ld. *Camden*, *Norwich* S. A.

1765. Bromley v. Mundee, Bull. Ni. Pri. 39.

of a holder of a bill or note is considered as such evidence of keeping house as to make it an act of bankruptcy.

Colkett v. Falch, Co. Bankrupt Laws, 99. ‖*Ex parte* Bamford, 15 Ves. 449.‖

Cumming v. Baily, 6 Bing. 563. *Sed vide* 19 Ves. 543.

‖Closing the doors and shutters of a banking-house has been held a "beginning to keep house," although the banker did not reside at the banking-house.‖

Hooper v. Smith, 1 Black. R. 441. Bull. Ni. Pri. 39. Allen v. Hartley, M. 25 G. 3. *B. R.* Co. Bankrupt Laws, 7.

Whether a denial in consequence of a preconcerted agreement between the debtor and his creditors shall be an act of bankruptcy, was formerly doubted: but it seems now to be settled, that if the denial be to any of the creditors privy to such agreement, it is fraudulent, and not a good act of bankruptcy: *secùs* if to a creditor not acquainted with the agreement.

Cawley v. Hopkins. *London* Sittings after Mich. Term. 1785. *cor. Buller* J. *Ibid.* 102. ‖Bamford v. Baron, 2 Term R. 594. Tappenden v. Burgess, 4 East, 230.‖

Ex parte Moule, 14 Ves. 602. *Ex parte* Binmer, 1 Madd. 250.

‖And a commission founded on a concerted act of bankruptcy, or taken out at the instance of the bankrupt, will be superseded, although he has obtained his certificate.

Shaw v. Williams, 1 Ryan & M. 19.

A distinction has been taken between a commission founded on a concerted act of bankruptcy, and a commission issued at the desire of the bankrupt, but founded on a *bonâ fide* act of bankruptcy.

Ex parte Staff, Buck's B. C. 249. 431.

The former has been held invalid at law, since a concerted act of bankruptcy is in fact no act of bankruptcy, but the latter has been held to be valid at law. And in one case the Vice Chancellor refused to supersede a commission in equity, on the ground of its issuing at the request of the bankrupt. This decision was, however, reversed on appeal, by the Lord Chancellor.

Ex parte Grant, 1 Glyn & J. B. C. 17.; but see 6 G. 4. c. 16. § 7. as to the new act of bankruptcy by declaration of insolvency.

And in a subsequent case it was settled as an invariable rule that no commission, though good at law, should be permitted to stand which was issued at the solicitation of the bankrupt.

Roberts v. Teasdale, Peake's Ca. 27.

It is no objection to an act of bankruptcy, that the bankrupt was advised to commit it by a friend.

Prosser v. Smith, Holt Ni. Pri. Ca. 442.

Although the petitioning creditor himself may not be privy to a concerted denial by the trader, on the petitioning creditor calling, yet if it has been arranged by the attorney for the petitioning creditor, who is also attorney for the bankrupt, it is fraudulent, and will not constitute an act of bankruptcy.‖

‖*Or suffer himself to be arrested for a debt not due.* This, which was constituted an act of bankruptcy by 13 Eliz. c. 7. § 1. and 1 Jac. 1. c. 15. § 2., is re-enacted by 6 G. 4. c. 16. § 3.‖

Billing. 95. Good. 25. ‖This is re-enacted 6 G. 4. c. 16. § 3.‖

‖*Or yield himself to prison.*‖ *Yielding himself to prison*, is to be intended a voluntary yielding for debt; and if a person capable of paying, will, notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy.

Ex parte Burton, Vin.

B. was arrested for 28*l.*, and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared,

declared, to force his creditors to come to a composition. The Lord Chancellor said, this is an act of bankruptcy within 1 Jac. 1., though without such intent, yielding himself to prison was no act of bankruptcy, unless he lay there two months; otherwise where the party procures himself to be arrested on a sham debt, for that by the statute of *Elizabeth* is immediately an act of bankruptcy. tit. Creditor and Bankrupt, 62.

‖*Or suffer himself to be outlawed.*‖ If a man permit himself to be outlawed to the intent or purpose to defraud his creditors of a just debt, it is one of the causes of bankruptcy; so that on a special verdict, if a jury find that he was outlawed, and do not find that it was *in fraudem creditorum*, this is not a sufficient finding to make him a bankrupt; because the intent of the statute was, that it must be such an outlawry as the debtor permits by keeping out of the way to defraud his creditors. Bradfordd's case, 1 Keb. 11. [2 Sid .69. 114. 176. S.C.] 1 Lev. 13. S.C. ‖See 6 G. 4. c. 16. § 3.‖ [Ld. C.B. *Comyns* saith, that if the outlawry be reversed before the commission issues, or for default of proclamation after the commission, it shall not be an act of bankruptcy. Com. Dig. tit. Bankrupt, c. 4. But *qu.* of this opinion? for it rests merely on the great authority of that writer; and if the outlawry were originally fraudulent, and intended to defraud or delay creditors, it seemeth that no subsequent event would be sufficient to purge the fraud, and prevent the effect of the bankrupt acts.]

[An outlawry in *Ireland* doth not make one a bankrupt; but in the county palatine of *Durham* it doth.] Com. Dig. tit. Bankrupt (C), 4. Co. Bank upt Laws, 103

‖*Or procure himself to be arrested.* This was made an act of bankruptcy by 1 Jac. 1. c. 15. § 2., and is re-enacted by 6 G. 4. c. 16. § 3. It is obvious, that under this head, it is unimportant whether the debt be a just debt or not. G. 4. c. 16. § 3.

Or procure his goods, money, or chattels to be attached, sequestered, or taken in execution.‖ *Ibid.*

Willingly or fraudulently procuring his goods to be attached or sequestered, is declared to be an act of bankruptcy, for it is a plain and direct endeavour to disappoint his creditors of their security. But an attachment out of a court for default or laches is not an act of bankruptcy; nor if *A.* has a rectory impropriate, and the tythes are sequestered for not repairing the chancel, will he thereby become a bankrupt. The attachment here meant, and which the legislature had in view, is that sort of attachment by which suits are commenced, as in *London* and other towns where that species of process is used; therefore a fraudulent judgment and execution sued thereupon, was held not to be procuring goods to be attached within the words of this act. (*a*) 2 Black. Com. 478. 1 Com. Dig. 523. Clavey v. Haley, Cowp. 427. Harman v. Spottiswood, M. 13 G. 3. *B. R.* Co. Bankrupt Laws, 122. ‖(*a*) But the words of the late act above supply this defect.‖

‖" *Or make or cause to be made, either within the united realm* 6 G. 4. c. 16.
" *or elsewhere, any fraudulent grant or conveyance* of any of his § 3.
" lands, tenements, goods, or chattels; or make or cause to be
" made any fraudulent surrender of his copyhold lands or tene-
" ments; or make or cause to be made any fraudulent gift,
" delivery, or transfer of any of his goods or chattels."

The words above, from the new act, are much more extensive than those of the old statute. The first clause (which was to be found in the statute of 1 Jac. 1. c. 15.) is extended to deeds executed out of the realm, which had been held not to constitute an act of bank-

(a) Dick. 533. 5 Term R. 530.; and see Cowp. 398. 1 Rose, 150. (b) *Ex parte* Cockshott, 3 Bro. C. C. 502. Co. B. L. 162.

bankruptcy (*a*). The second clause as to copyholds, which is new, is introduced in consequence of Lord *Thurlow's* decision (*b*), that as copyholds could not be taken in execution for debt, a surrender of them could not have the effect of delaying creditors, and was therefore not within the statute 1 Jac. 1. c. 15. The last clause, which is entirely new, is intended to embrace all such fraudulent deliveries of personal property, in preference of particular creditors, to the delay or defeat of the creditors in general, as were formerly void as fraudulent preferences, but which did not constitute acts of bankruptcy, not falling within the language of the statutes. The facts, therefore, which formerly constituted a fraudulent preference, will now probably be held to amount in all cases to an act of bankruptcy under this clause. It has been found convenient, however, to class the modern cases on this subject with the old cases as to fraudulent preference, *post*, p. 622, 623. to which the reader is referred.‖

Martin v. Pewtress, 4 Burr. 2478. ‖But under the latter clause above from the 6 G. 4. c. 16. § 3., such fraudulent sale, though not by deed, is now an act of bankruptcy, and not merely a fraudulent preference. See *post*, p. 622, 623.‖

[*Making any fraudulent grant or conveyance of his lands and tenements, goods, or chattels.* A fraudulent grant to come within the meaning of this statute, ‖1 Jac. 1. c. 15. § 2.‖ must be by deed; therefore a fraudulent sale of goods, not by deed, is no act of bankruptcy in itself: but being a scheme concerted at the eve of a bankruptcy, to cheat innocent persons, in order to secure particular creditors, it is such a fraud as shall render the sale void.

Worsely v. De Mattos, 1 Burr. 467. Wilson v. Day, 2 Burr. 827. Butcher v. Easto, Dougl. 282. And it makes no difference whether the assignment be to indemnify a surety, or for a present debt. Hassel v. Simpson, Hil. 24 G. 3., 1784, *B. R.* Co. Bankrupt Laws, 106. ‖Newton v. Chantler, 7 East, 138.‖

A trader, before he becomes a bankrupt, may prefer one creditor to another, and may pay him his debt; or may make him a mortgage, with possession delivered; or may assign part of his effects: but a preference of one creditor to the rest, by conveying by deed all his effects to him, or so much of his stock in trade as to disable him from being a trader, is a fraud upon the whole bankrupt law, and an act of bankruptcy.

Kettle v. Hammond, Sittings after Hil. 7 G. 3. Co. Bankrupt Laws, 108. ‖Eckhardt v. Wilson, 8 Term R. 140. (*a*) This doctrine rests on the ground that the trader thereby deprives himself of the means of carrying on trade, and vests his property in persons of his own choice, instead of trustees chosen by the creditors, and under the controul of the great seal. It has, however, been repeatedly disapproved. 16 Ves. 148. 17 Ves. 198. Mont. Dig.‖ (*b*) Bamford v. Baron, cited in 1 Term R. 594. ‖See 9 Barn. & C. 310.‖

An assignment of all a trader's effects for the benefit of all the creditors, has been holden an act of bankruptcy (*a*), unless they all assent to the deed. But in such case (*b*), it is not permitted to those who execute the deed to set it up as an act of bankruptcy.]

Ex parte Cawkwell, 1 Rose, 313. Back v. Gooch, 1 Holt R. 13. 4 Camp. 232. S. C. *Ex parte* Shaw, 1 Madd. R 598.; and see Buck's C. 104. 426.

‖Nor can this be done by those who are privy to it or act under it.

Tappenden v. Burgess,

But this estoppel does not apply to the assignees, who are merely trustees for the creditors, but only to the petitioning creditor

creditor who originates the commission; and therefore, if the latter has never consented to the deed, it is no objection to the assignees' title to recover the bankrupt's estate, that three of them were creditors who signed the deed. 4 East, 230.; and see 1 Stark. R. 262.

But if the petitioning creditor has signed the deed, the assignees cannot set it up as an act of bankruptcy, although the petitioning creditor is not one of the assignees. Tope v. Hockin, 7 Barn. & C. 101.

And such a deed is equally an act of bankruptcy, though it contain a proviso, that it shall be void if a certain amount of creditors shall not execute in a given time; or if the trustees should avoid it; or if a commission of bankruptcy should issue in a certain time. 4 East, 230. Dutton v. Morrison, 17 Ves. 193.

But where the deed was intended for execution by three persons, and was incapable of operation unless executed by all, the court held, that being executed only by one, it could not be considered as an act of bankruptcy. *Ibid.*

And a deed of assignment without stamp cannot be an act of bankruptcy, since it is invalid. Whitwell v. Dimsdale, Peake's Ca. 167.

And by § 4. of the 6 G. 4. c. 16. it is enacted, that where any trader shall execute any conveyance or assignment by deed to a trustee of *all* his estate and effects, for the benefit of all his creditors, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof; provided that such deed shall be executed by every such trustee within fifteen days from the execution thereof by such trader; and that the execution by the trader and trustee be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in *London*, or within forty miles thereof, in the *London Gazette*, and also in two *London* daily newspapers, and in case such trader does not reside within forty miles of *London*, then in the *London Gazette*, and also in one *London* daily newspaper, and one provincial paper published near his residence; and such notice shall contain the date and execution of such deed, and the name and abode of such trustee and attorney or solicitor.‖ 6 G. 4. c. 16. § 4.

An assignment of part of a trader's effects may, under certain circumstances, be good and valid; but an assignment of his effects, with only a colourable exception of a small part (*a*), will not prevent the deed from being fraudulent; and of course it will be an act of bankruptcy. Jacob v. Shepherd, 1 Burr. 478. Unwin v. Oliver, *Id.* 481.

(*a*) Gaynor's case, *Id.* 477. Law v. Skinner, 2 Black. R. 996. Compton v. Bedford, 1 Black. R. 362.

‖ In general, an assignment of so much of a trader's stock as would operate to produce insolvency and disable him from carrying on trade, is an act of bankruptcy. Black. R. 442. See Berney v. Davison, 1 Bro. & Bing. 408. 4 Moo. 126. Berney v. Vyner, 1 Bro. & Bing. 482. 4 Moo. 322.

And Lord *Eldon* has intimated, that a mere assignment of debts might be an act of bankruptcy; of course depending upon what other effects the trader had.‖ 14 Ves. 186.

Linton v. Bartlett, 3 Wils. 47. Devon v. Watts, Dougl. 86.

And an assignment by deed of only *part* of a trader's effects to a fair creditor will, if done in contemplation of a bankruptcy, be itself the very act.

Round v. Hope Byde, *London* Sittings after Mich. Term. 1779. Co. Bankrupt Laws, 114.

Morgan v. Horseman, 3 Taunt. 241.

‖Thus, where the trader, being pressed by a particular creditor, conveyed certain estates to that creditor upon trust to sell, and pay himself, and on further trust to pay debts to relations of the trader, in order to give them a preference, in contemplation of bankruptcy, the deed was held an act of bankruptcy; for though fair as respected the provision for payment of the creditor, being executed under pressure for his debt, yet as to the relations it was fraudulent and void.

Pulling v. Tucker, 4 Barn. & A. 382. See Gibbins v. Phillips, 7 Barn. & C. 529. (*a*) Although these words are omitted in the 6 G. 4. c. 16. § 3.; and the only words are, "with intent to defeat or delay his creditors," yet as a man is supposed to intend the consequences of his own acts, the construction will be the same.

And though not made in contemplation of bankruptcy, yet a *voluntary* conveyance by the bankrupt, whether of the whole or of a part of his property, in order to give a preference to particular creditors, to the prejudice of the general creditors, is an act of bankruptcy; for it is a conveyance, *whereby the creditors may be defeated or delayed* (*a*) within the meaning of the statute 1 Jac. 1. c. 15. § 2. And although the deed remain in possession of the bankrupt, and he carry on his trade for three years subsequently, this has been decided to make no difference.‖

Hassel v. Simpson, Co. Bankrupt Laws, 107.

A grant or conveyance, fraudulent within the statute 13 Eliz. or 27 Eliz., is an act of bankruptcy.

‖For the decisions on these statutes, see tit. *Fraud* (C).‖

See *Ex parte* Cockshott, 3 Bro. 502.

‖*Or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements.* This act of bankruptcy is entirely new.

1 Co. B.L. 162.

Or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels. This act of bankruptcy is new, as sales or transfers of goods by bankrupts, though fraudulent, were not before acts of bankruptcy, unless by deed; they were however invalid as fraudulent preferences. (See the cases on this subject, *post*, p. 623.)‖

‖2. Of those Acts which are Acts of Bankruptcy without Reference to the Intent.

6 G. 4. c. 16. § 5. The alterations made by this clause are printed in Italics.

These acts of bankruptcy are specified in the fifth, sixth, and eighth sections of the new act. By § 5 it is enacted, "that if any "trader, having been arrested *or committed to prison* for debt, "*or on any attachment for nonpayment of money*, shall, upon such "or any other arrest *or commitment for debt, or nonpayment of* "*money*, or upon any detention for debt, lie in prison *for twenty-* "*one days, or having been arrested or committed to prison for* "*any other cause, shall lie in prison for twenty-one days after any* "*detainer for debt lodged against him, and not discharged*, every "such trader shall be thereby deemed to have committed an "act of bankruptcy; or if any such trader, having been arrested, "*committed, or detained for debt*, shall escape out of prison or "custody,

" custody, every such trader shall be deemed thereby to have " committed an act of bankruptcy from the time of such arrest, " *commitment, or detention:* provided, that if any such trader " shall be in prison at the time of the commencement of this " act, such trader shall not be deemed to have committed an " act of bankruptcy by lying in prison, until he shall have lain " in prison for the period of two months."

§ 6. " And be it enacted, that if any such trader shall file, in " the office of the Lord Chancellor's secretary of bankrupts, a " declaration in writing, signed by such trader, and attested by " an attorney or solicitor, that he is insolvent, or unable to " meet his engagements, the said secretary of bankrupts, or his " deputy, shall sign a memorandum that such declaration hath " been filed; which memorandum shall be authority for the " printer of the *London Gazette* to insert an advertisement of " such declaration therein; and every such declaration shall, " after such advertisement inserted as aforesaid, be an act of " bankruptcy committed by such trader at the time when such " declaration was filed; but no commission shall issue there- " upon, unless it be sued out within two calendar months next " after the insertion of such advertisement, and unless such ad- " vertisement shall have been inserted in the *London Gazette* " within eight days after such declaration was filed; and no " docket shall be struck upon such act of bankruptcy before " the expiration of four days next after insertion of such adver- " tisement, in case such commission is to be executed in *London*, " or before the expiration of eight days next after such insertion, " in case such commission is to be executed in the country; and " the gazette containing such advertisement shall be evidence to " be received of such declaration having been filed." § 6.

§ 8. " And be it enacted, that if any *such trader, liable by vir-* " *tue of this act to become bankrupt* (*a*), shall, after *a docket struck* " against him (*b*), pay to the person or persons *who struck the* " *same*, or any of them, money, or give or deliver to any such " person any satisfaction or security for his debt, or any part " thereof, whereby such person *may* (*c*) receive more in the " pound in respect of his debts than the other creditors, such " payment, gift, delivery, satisfaction, or security, shall be an " act of bankruptcy; and *if any commission shall have issued* " *upon the docket so struck as aforesaid, the Lord Chancellor may* " *either declare such commission to be valid, and direct the same to* " *be proceeded in, or may order it to be superseded, and a new com-* " *mission may issue; and such commission may be supported either* " *by proof of such last-mentioned or any other act of bankruptcy;* " and every person so receiving such money, gift, delivery, " satisfaction, or security as aforesaid, shall forfeit his whole " debt (*d*), and also repay or deliver up such money, gift, satis- " faction, or security as aforesaid, or the full value thereof, to " such person or persons as the commissioners acting *under such* " *original commission*, or any new commission, shall appoint, for " the benefit of the creditors of such bankrupt."

§ 8.

(*a*) Instead of any "bankrupt or bankrupts."

(*b*) Instead of "after issuing any commission." 15 Ves. 473.

(*c*) Instead of "shall" and the word "privately" omitted. 15 Ves. 463.

(*d*) See 2 Glyn & Ja. 291. Whether the Chancellor has jurisdiction to enforce payment from the petitioning creditor of the forfeiture, see 2 Glyn & Ja. 261. 265.; and see *post*, 549.

[*Being arrested for debt shall, after such arrest, lie in prison two months or more, upon that or any other arrest or detention in prison for debt.*]

‖The alterations made by the new act respecting this act of bankruptcy, are printed above (p. 546.) in italics. The clause now is extended to commitments on attachment for nonpayment of money; the time is reduced to twenty-one days; and the clause extends to persons lying in prison on a detainer for debt after a commitment for any other cause. This last alteration removes all doubt whether a trader committed on criminal process, and lying in prison on detainers for debt lodged against him during such commitment, commits an act of bankruptcy.‖

See *Ex parte* Bowes, 4 Ves. R. 168. Rex v. Page, 1 Bro. & Bing. 308. 7 Price, 616. 3 Moo. 656.

3 Lev. 58. ‖1 Atk. 147.‖

The arrest must be lawful, and therefore an arrest by an executor before probate is not within the act.

Cooke B. L. 97.

‖An arrest upon a bond before the day of payment, in order to oblige the obligor to find sureties according to the custom of *London*, seems not to be sufficient.

Cobb v. Symonds, 5 Barn. & A. 516.

A penalty due to the crown is a debt within the statute; and a person lying in prison the requisite time, being unable to pay penalties for smuggling, commits an act of bankruptcy.‖

1 Burr. 439.

The statute does not make the mere being arrested an act of bankruptcy. The most substantial trader is liable to be arrested; but the presumption of insolvency arises from his lying in prison two months, without being able to get bail; nor will this presumption be obviated by a mere formal bail put in for the purpose of changing from one custody to another. Where bail is really put in, the bankruptcy only relates to the time of the surrender; but when it is only a formal bail, it will have relation to the first arrest. Therefore, a man arrested in *Kent*, and brought up to *London* to be bailed, and immediately turned over to the King's Bench prison, where he lay two months, was held a bankrupt from the first arrest. In a case where a man was arrested on the 2d of *May*, and on the 4th of *May* was charged in custody with that and another action, and lay in prison till the 2d of *July* at the suit of the first plaintiff, when he was discharged out of custody as to him, and continued in prison at the suit of the second plaintiff till the 6th of *July*; the court held there was plainly an act of bankruptcy on the 4th of *May*, whatever dispute there might be as to its being a bankruptcy on the 2d.

Duncomb v. Walter, 3 Lev. 57. 1 Vent. 370. Raym. 479. Rose v. Green, 1 Burr. 439. King v. Leith, 2 Term R. 141. Coppendale v. Bridgen, 2 Burr. 818.

Hope v. Gill, Beawes Lex Mer. 489.

It has in one case been determined, that lying in prison two lunar months will make the party bankrupt from the time of the first arrest; and though the commission was taken out before the two months (*a*) expired, yet he appearing to be bankrupt by relation to a time before the suing it out, it was held sufficient.

‖(*a*) Now twenty one days.‖

Moser v. Newman, 6 Bing. 556. Higgins v. M'Adam, 3 Younge & J. 1.

‖But it is decided on the construction of the words of the late act (see p. 546.), that the act of bankruptcy by lying in prison twenty-one days does not relate to the time of the first arrest.

Glassington v. Rawlins,

The day of the arrest is included in the computation of the time, which is not completed till the expiration of the last day.

If

If the arrest is on the 4th *July*, the act of bankruptcy is complete on the 24th.‖ 3 East, 407. Higgins v. M'Adam, 3 Younge & J. 1.

Being arrested for 100*l. or more, just debts, shall escape out of prison.*

‖The alterations made by the language of the new statute are printed above (p. 546.) in italics. By this statute, any amount of debt will be sufficient; whereas, under the 21 Jac. 1. c. 19. § 2. it must have been a debt of 100*l.* or upwards; the words "committed" or detained" are introduced; and it is expressly enacted, that the act of bankruptcy shall commence "from the time of the "arrest, commitment, or detention."‖ 6 G. 4. c. 16. § 5.

The act clearly intends such an escape as shews he means to run away, and thereby to defeat his creditors; it must be an escape against the will of the sheriff; for a man shall not be made a criminal where he has not the least criminal intention to disobey any law.

Therefore, a man who was arrested in *Kent*, and coming to town in custody of the sheriff's officer, was permitted by him to call at his attorney's house in the city, and from thence immediately carried to the judge's chambers in obedience to a *habeas corpus*, was held not to have escaped in the sense of this act of parliament, but to have remained substantially in custody notwithstanding his being carried into another county. Rose v. Green, 1 Burr. 440.

‖*Declaration of insolvency filed at the bankrupt office.*—See the sixth section of the statute above (p. 546, 547.). The object of this provision, which is entirely new, is to enable the honest trader who believes himself insolvent, or who has not the present means of paying his debts, to effect an equal distribution of his property among his creditors.‖ 6 G. 4. c. 16. § 6. Eden, B. L. 55.

If any bankrupt, after issuing any commission against him, pay to the person who sued out the same, or otherwise give and deliver to such person, goods or any other satisfaction and security for his debt, whereby such person shall privately have and receive more in the pound in respect of his debt than the other creditors, such payment of money shall be an act of bankruptcy. 5 G. 2. c. 30. § 24. ‖See § 8. of the new act, *antè*, p. 547.‖

‖The alterations made as to this act of bankruptcy will be found printed in italics, and noticed in the margin above (p. 547.).

Under the former act it was held, that giving security to a creditor who had *struck a docket* against the trader, was not within the statute if a commission had not issued; though Lord *Rosslyn* and Lord *Eldon* agreed that it was within the mischief intended to be remedied. Accordingly, the new statute substitutes striking the docket for issuing of the commission. 3 Ves. 549. 15 Ves. 464. 1 Deacon, 807.

By the new act the Lord Chancellor is empowered either to declare any such commission issued, or docket struck to be valid, and direct it to be proceeded in, or to order it to be superseded; whereas under the 5 G. 2. c. 30. § 24. it seems that such commission must necessarily have been superseded.

While such commission remains unsuperseded by the Lord Chancellor, it cannot be disputed in a court of law, on the ground Garrett v. Biddulph, 1 Esp. R. 105

ground of the money or security given by the trader to the creditor contrary to the statute.

Filing a petition to take the benefit of the Insolvent Act.—This act of bankruptcy is not specified in the bankrupt act, but it is made one by the late insolvent act 7 G. 4. c. 57. § 13.

Acts of bankruptcy by traders having privilege of parliament.—

6 G. 4. c. 16. § 9. By § 9. of the new act if any such trader having privilege of parliament shall commit any of the aforesaid acts of bankruptcy, a commission may issue against him, and the commissioners and all persons acting under such commission, may proceed as against other bankrupts, but such person shall not be arrested or imprisoned during the time of such privilege, except in cases hereby made felony.

§ 10. And if any creditor of such trader having privilege of parliament, to such amount as is requisite to support a commission, shall file an affidavit in any court of record at *Westminster*, that such debt is justly due to him, and that such debtor, as he verily believes, is such trader as aforesaid, and sue out of the same court a summons, or an original bill and summons against such trader, and serve him with a copy, if such trader shall not within one calendar month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sureties, as any of the judges of the court shall approve of, to pay such sum as shall be recovered in such action, together with costs, and within one calendar month next after personal service of such summons, cause an appearance to be entered to such action in the proper court, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor of such trader to such amount as aforesaid, may sue out a commission against him, and proceed as against other bankrupts.

§ 11. And if any decree or order shall have been pronounced in any court of equity, or any order made in bankruptcy or lunacy against any such trader, having privilege, to pay any money, and such trader shall disobey, the same having been duly served, the person entitled to receive such sum or interested in enforcing the payment thereof, may apply to the court to fix a peremptory day for the payment, which shall accordingly be fixed; and if such trader, being personally served with such last-mentioned order eight days before the day therein appointed for payment of such money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy from the time of the service, and any such creditor may sue out a commission against him, and proceed as against other bankrupts.‖

Vernon v. Hankey, *London* Sittings after Trin. Term, 27 G. 3. In an action brought against the defendants (one of whom had been a co-assignee with the plaintiff, and removed for the purpose) to recover the proceeds of a variety of articles, amounting to upwards of 6000*l.*, which had been assigned to them by the bankrupt, after several acts of bankruptcy; *Buller* J. said, there have been three points made in this case; 1*st*, Whether by

‖See *ante*, p. 537. as to

by the leaving her house, Mrs. *Tyler* intended to delay her creditors. 2dly, Whether the leaving of the kingdom without such intention, but whereby in fact creditors are delayed, be an act of bankruptcy. 3dly, As to the composition with Mr. *Thackery*. They are all points of general consequence and importance. The first is a question of fact, and it is for you to say what you think was Mrs. *Tyler*'s intention when she left her house: she knew that a great number of bills were soon to become due, and had not made any provision for the payment of them; besides, the affidavit of the defendant for the purpose of himself taking out a commission is very strong, and shews you what he thought at the time. I remember a case about fourteen years ago, in which Lord *Mansfield* held such an affidavit conclusive evidence against the defendant, and upon application to the court, though it was said not to be conclusive, the judges were all of opinion, that it was *primâ facie* evidence against such person disputing the bankruptcy he had sworn to. these acts of bankruptcy.‖

2dly, As to the going abroad, there cannot be any doubt that Mrs. *Tyler*'s creditors were thereby delayed; but it is said, that it is not sufficient unless the going was with an intention to delay them, and that the bankrupt went to *Calais* merely to avoid an impending prosecution. The law upon this subject is established by *Woodier*'s case, which happened in 1739, and was not so strong a case as this, for he had more ground for his apprehension, having killed his wife. The point, indeed, has never been neatly before the court since that time; but that case has always been considered, and acted upon as good law. And at this time, without examining into the expedience of that decision, I should be extremely averse to overrule it. For as you have often heard it observed from this seat, certainty and uniformity of decision are, in matters of this sort, of much more material consequence than the establishment of a rule one way or the other. 3dly, It appears from Mr. *Ward*'s evidence, that *Thackery* had sued out a commission which was sealed on the 13th of *May*, and that on the 19th, in the presence of one of the defendants, he agreed upon Mrs. *Tyler*'s paying him 200*l.*, and giving security for the remainder of his debt, that the commission should die away. This is expressly made an act of bankruptcy by the 5 G. 3. c. 30. § 24. The assignment then made to the defendants, being subsequent to those acts of bankruptcy, there cannot be any doubt of the plaintiff's title to recover. The jury found a verdict for the plaintiff.

The legislature having by positive laws declared what acts shall be considered as criterions of insolvency or fraud whereon to ground a commission, none other can be admitted by inference or analogy. Therefore, it is not an act of bankruptcy for a trader secretly to convey his goods out of his house and conceal them to prevent their being taken in execution; nor to give money for notice when a writ shall come into the sheriff's office; nor for a banker to refuse payment, if he appears, and keeps his shop open.] Cole v. Davies. 1 Ld. Raym. 725. Bull. Ni. Pri. 40. Packenham v. Blan, Select Cases in Chancery, 42.

Philips v. Hopwood, 10 Barn. & C. 39.; and see 9 Barn. & C. 750. 4 Bing. 212.

‖Where a trader committed an act of bankruptcy in *March* 1825, on which a commission might have issued on the statutes then in force, and on the 1st of *May* those statutes were repealed, and on the 2d of *May* the repealing act was repealed, and the former acts thereby revived, and in *July* a commission issued; it was held to be supported by the act of bankruptcy in *March*.‖

(B) Of the Commission of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto.

(*a*) For if twenty swear that such a one is a bankrupt, yet a commission cannot be awarded without a petition from the creditors for that purpose, [supported by a proper affidavit of the debt. 5 G. 2. c. 30. But such affidavit need not state the particulars by which the bankrupt becomes indebted. *Ex parte* Ward, 1 Atk. 153.] 2 Chan. Ca. 190. (*b*) As if the words of the act had been, *shall* or *ought* to grant. Vern. 152. 2 Chan. Ca. 191. ‖17 Ves. 512. 1 Rose Ca. 220.‖

THE commission of bankrupt, which arms the commissioners with all the power they are to exercise over the bankrupt and his estate, is to be granted by the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, on the application of creditors only (*a*); and this is a matter not discretionary, but to be granted *de jure*. (*b*)

6 G. 4. c. 16. § 12.

‖The 6 G. 4. c. 16. § 12. enacts, "that the Lord Chancellor "shall have power, upon petition made to him in writing against "any trader having committed any act of bankruptcy, by any "creditor or creditors of such trader, by commission under the "great seal, to appoint such persons as to him shall seem fit, "who shall, by virtue of this act and of such commission, have "full power and authority to take such order and direction, "with the body of such bankrupt, as herein-after mentioned, as "also with all his lands, tenements, and hereditaments, both "within this realm and abroad, as well copy or customary-hold "as freehold, which he shall have in his own right before he "became bankrupt, as also with all such interest in any such "lands, tenements and hereditaments as such bankrupt may "lawfully depart with all, and with all his money, fees, offices, an-"nuities, goods, chattels, wares, merchandize, and debts, where-"soever they may be found or known, and to make sale thereof "in manner herein-after mentioned, or otherwise order the "same for satisfaction and payment of the creditors of the said "bankrupt.

6 G. 4. c. 16. § 13.

"And be it enacted, that the petitioning creditor shall, be-"fore any commission be granted, make an affidavit in writing "before a master ordinary or extraordinary in Chancery (which "shall be filed with the proper officer), of the truth of such his "or their respective debt or debts, and shall likewise give bond "to the Lord Chancellor in the penalty of two hundred pounds, "to be conditioned for proving his or their debt or debts, as "well before the commissioners as upon any trial at law, in "case the due issuing forth of the commission be contested, "and also for proving the party to have committed an act of "bankruptcy

" bankruptcy at the time of taking out such commission, and " to proceed on such commission; but if such debt or debts " shall not be really due, or if after such commission taken out it " be not proved that the party had committed an act of bank- " ruptcy at the time of the issuing of the commission, and it shall " also appear that such commission was taken out fraudulently " or maliciously, the Lord Chancellor shall and may, upon pe- " tition of the party or parties against whom the commission was " so taken out (*a*), examine into the same, and order satisfaction " to be made to him or them for the damages by him or them " sustained, and for the better recovery thereof, may assign " such bond or bonds to the party or parties so petitioning, who " may sue for the same in his and their name or names.

(*a*) Instead of "party grieved."

" And be it enacted, that no such commission shall be issued " unless the single debt of such creditor, or of two or more per- " sons being partners petitioning for the same, shall amount to " one hundred pounds or upwards, or unless the debt of two " creditors so petitioning shall amount to one hundred and " fifty pounds or upwards, or unless the debt of three or more " creditors so petitioning shall amount to two hundred pounds " or upwards; and that every person who has given credit " to any trader upon valuable consideration, for any sum pay- " able at a certain time, which time shall not have arrived when " such trader committed an act of bankruptcy, may so petition " or join in petitioning as aforesaid, whether he shall have any " security in writing or otherwise for such sum or not.

6 G. 4. c. 16. § 15.

Formerly it was necessary that a joint commission should include all the ostensible members of a firm, for the commission must either be joint or several; but by the present act it is provided, that any creditor or creditors, whose debts are sufficient to entitle him to petition for a commission against all the partners of any firm, may petition for a commission against any one or more of them; and in every commission against two or more persons, it shall be lawful for the Lord Chancellor to supersede such commission as to one or more of such persons; and the validity of such commission shall not be thereby affected as to any other of such persons.‖

3 Term R. 123. 4 Ves. 163. 6 G. 4. c. 16. § 16.; and see § 17.

[If a creditor has his debtor in execution, he cannot petition for a commission of bankruptcy; for the body of the debtor being in execution, is a satisfaction of the debt in point of law. Therefore, where a commission had issued on the petition of a creditor, who had the bankrupt in execution, it was upon that account superseded.

Goddard v. Vanderhayden, 5 Wils. 271. Barnaby's case, 2 Stra. 653. ‖See Miles v. Rawlins,

4 Esp. 194. A creditor, whose debt is omitted in an insolvent debtor's schedule, may sue out a commission on such debt against the insolvent. 2 Glyn & Ja. 68. and see 4 Barn. & A. 256.‖

Nor has the petitioning creditor the ordinary election to sue the bankrupt at law, or come under the commission; for if he were to elect to proceed at law, the commission must be superseded, which would affect those creditors who had proved debts under it, and this incapacity of the petitioning creditor to sue the bankrupt extends to other cases in which common creditors are not

Ex parte Lewes, 1 Atk. 154.

Paterson, 1 Stark. 144. *Ex parte* Nokes, 2 Mont. B. L. 148.; and see 1 Gow. 17.

of a trader cannot be petitioning creditors, until an account is settled and the partnership determined; but if the debt does not arise out of the partnership transactions they may.‖

Heylor v. Hall, Palm. 325.

[If a tradesman becomes security for another, it creates such a debt that the creditor may take out a commission.

Mosely, 27.

So a solicitor's bill for fees will support a commission: and notwithstanding an order obtained that the bill should be taxed by a master, and all proceedings at law in the mean time stayed; if the solicitor whilst the bill is under taxation, sues out a commission of bankrupt against his client, it has in one case been determined to be no contempt, nor a sufficient cause to supersede the commission, because the order of reference extends only to the bringing of actions, and the common and ordinary proceedings.]

Ex parte Sutton, 11 Ves. 163.

‖And a debt upon an attorney's bill is sufficient to ground a commission, though the bill has not been signed and delivered according to the statute.

Ex parte Steele, 16 Ves. 166. *Ex parte* Howell, 1 Rose, 312.

But the bankrupt or any creditor may have the bill taxed, provided the bankrupt at the time of his bankruptcy was not concluded from doing so.‖ *Ex parte* Prideaux, 1 Glyn & Jam. 28.

Ex parte Goodwin, 1 Atk. 100. ‖*Qu.* Whether an uncertificated bankrupt can petition where his assignees make no claim. 2 Rose, 230.‖

[The executor of a bankrupt, unless the commission against his testator has been superseded, cannot take out a commission for a debt due to the testator; because the debt vested in his assignees, and consequently the executor is not entitled to be the petitioning creditor.]

Rogers v. James, 7 Taunt. 147. 2 Marsh. 425.

‖An executor may sue out a commission on a debt due to him as executor, although his probate at the time of the commission had not a sufficient stamp, provided he afterwards obtain one.

The secretary of a company authorized by act of parliament to *sue* and *be sued* in the name of their secretary, cannot sue out a commission of bankrupt on a debt due to the company, Guthrie v. Fisk, 3 Barn. & C. 178.

Ex parte Paddy, 3 Madd. 241.

And he may sue it out before he has obtained probate, if he afterwards obtains one before the adjudication of the commissioners; for the probate has relation back to the testator's death.

Ex parte Staples, 7 Vin. Abr. 67.

As the husband cannot sue alone for a debt due to the wife *dum sola*, so he cannot without her sue out a commission on such a debt.

Master v. Winter, Dav. 464. Rumsey v. George, 1 Maule & S. 176.

And this whether the debt be due to the wife as executrix or administratrix, or due to her in her own right.

M'Neilage v. Holloway, 1 Barn. & A. 218. *Ex parte* Barber, 1 Glyn & Ja. 1.

But where a woman is payee of a note or bill of exchange, payable to her or her order, as such note or bill vests absolutely in the husband, by the marriage, he may alone sue out a commission of bankrupt upon it; it being a chattel personal, not a mere chose in action.

Sadler v. Leigh, 4 Camp. 195.

A factor who sells goods of his principal, in his own name, though not under a *del credere* commission, is a good petitioning creditor against the purchaser, until the principal has intervened and agreed to take the purchaser as his debtor.

If

If a bill is drawn on an infant, and he accept it after he is of age, the acceptance forms a good petitioning creditor's debt. Stevens v Jackson, 4 Camp. 164. 195.

An infant cannot be a petitioning creditor, because he cannot give a valid bond to the Lord Chancellor. *Ex parte* Barrow, 3 Ves. 554.

A person voluntarily residing and carrying on trade in an enemy's country, cannot be a petitioning creditor; for this is an adherence to the king's enemies, and such person cannot sue in this country. M'Connell v. Hector, 5 Bos. & Pull. 113.

But where a party in ignorance of a declaration of war, went to the hostile country, and it did not appear that his residence there was voluntary, and he did not trade there, the court thought that the residence, under such circumstances, did not affect his debt. Roberts v. Hardy, 3 Maule & S. 533.

And a residence in an enemy's country, for the fair purposes of trade, under a licence, will not invalidate the debt of the petitioning creditor. *Ex parte* Baglehole, 1 Rose, 271.; and see 1 Camp. 482.

A debt may be the foundation of a commission, though the debtor is discharged under the insolvent debtor's act, and has included the debt in his schedule; for it is not thereby extinguished. Jellis v. Mountford, 4 Barn. & A. 256. *Qu.* Whether such a commission would be superseded? and see 2 Glyn & Ja. 68.

A debt payable to the creditor only on a certain contingency, cannot be the foundation of a commission, notwithstanding that a security be given for it which is absolute in its form. *Ex parte* Page, 1 Glyn & J. 100.

If two persons exchange acceptances, and before the bills become due one commits an act of bankruptcy, there is not such a debt due from him to the other as will support a commission. Sarrat v. Austin, 4 Taunt. 200. See 1 Deacon, 97.

A verdict for damages in an action of special *assumpsit* does not constitute a good petitioning creditor's debt, before judgment is actually signed; and therefore if the act of bankruptcy occur between the verdict and judgment, such debt will not support a commission.‖ *Ex parte* Charles, 16 Ves. 256. 14 East, 196. overruling Longford v. Ellis, 1 H. Black. 29. *notâ*; and see *post*.

[A debt due from a partnership is a legal debt to support a separate commission. *Ex parte* Crisp, 1 Atk. 134. Co. Bankrupt Laws, 20.

A sum awarded by arbitrators will support a commission notwithstanding a bill filed to set aside the award; for the arbitration bond is a debt at law, and binds the parties, until it is set aside for corruption or partiality, *&c.* And if a bill filed were a foundation to supersede the bond, a person by filing a bill might at once frustrate the effect of the award. *Ex parte* Lingood, 1 Atk. 241. ‖A sum due for taxed costs on a judgment, as in case of a nonsuit, is not sufficient, at least if the bankrupt has been attached. 1 Mont. & Mac. 262.‖

A creditor, before the party entered into trade, may on account of such debt sue out a commission, but a creditor for a debt contracted after leaving off trade, cannot. But when a commission is sued out, those creditors who have become such since the party quitted trade may come in and share the dividend with Butcher v. Easto, Dougl. 282. Meggot v. Mills, 12 Mod. 159. 1 Ld. Raym.

with those who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy.]

287. Cotton v. Daintry, 1 Sid. 411. 1 Ventr. 29.

Dawe v. Holdsworth, Peake's Ca. 64.; and see 2 Stra. 1042.

‖A simple contract debt contracted in trade is not so far extinguished by a bond given for it by the debtor after quitting trade, as to prevent a commission being founded on it.

Meggott v. Mills, Ld. Raym. 287. See, on the subject of appropriation of general payments, tit. *Obligation*, Vol. V. p. 822., *note*.

If a trader owing 100*l.* in trade, become indebted to the same creditor in 100*l.* more after quitting trade, and then pay 100*l.* without expressing on what account, a commission cannot be issued on the old debt; for it is to be presumed the 100*l.* was paid on that account.‖

Ex parte Mackerness, 1 P. Wms. 260. *Ex parte* James, 19th *June* 1719, 1 P. Wms. 610. Swaine v. Demattos, 2 Stra. 1211. Chilton, v. Whiffen, 5 Wils. 17. The statute extends to goods sold on credit. Cockran v. Love, at Ni. Pri. *cor.* Ld. *Kenyon*, 3d *June* 1790. ‖But see Price v. Nixon, 5 Taunt, 338. Parsloe v. Dearlove, 4 East, 456.‖

[A creditor by *bond payable at a future* day, having sued out a commission of bankruptcy before the time of payment, Lord Chancellor *Parker* ordered it to be superseded, because the money was not then due: but this, though good law at the time of the decision, has since been altered by the 5 G. 2. c. 30. § 22. which extends to all sorts of bonds and securities given on good consideration for the payment of money, notwithstanding the preamble speaks only of bonds given for goods in trade.]

Ex parte Douthat, 4 Barn. & Ald. 67.

‖Where a trader drew a bill for valuable consideration in favour of *A.* and afterwards committed an act of bankruptcy, before the bill was due, or had been presented for acceptance, *A.* was held to have a good petitioning creditor's debt, though it appeared that, subsequent to the commission issuing, the bill had been paid by the acceptors; for the commissioners, and those acting under them, could not know that the bill would be paid, and could not be made trespassers by an *ex post facto* payment by a third party, which they could not foresee.

Under the former statutes, a debt contracted before the act of bankruptcy but payable afterwards, was not sufficient to support a commission, unless there was a security in writing. But the present statute enacts, "that every person who has given credit "to any trader upon valuable consideration, for any sum payable "at a certain time, which time shall not have arrived when "such trader committed an act of bankruptcy, may so petition, "or join in petitioning as aforesaid, *whether he shall have any "security in writing or otherwise, for such sum or not.*"‖

6 G. 4. c. 16. § 15.

Toms v. Mytton, 2 Stra. 744.

If the debt of the petitioning creditor appears to have been contracted subsequent to a secret act of bankruptcy committed by the trader, no commission ought to be granted upon his petition. Accordingly, where it appeared that a man was a bankrupt in *January* 1724, and the debt of the petitioning creditor was a note dated in *September* 1725, it was holden to be a void commission. But if a debt originally upon a simple contract were extinguished by the creditor's accepting a bond after a secret act of bankruptcy, it shall not operate as an extinguishment

Ambrose v.

ment of the simple contract, so as to deprive the creditor of his right to petition.]

Clendon, 2 Stra. 1042.

‖Nor if the creditor, subsequent to the act of bankruptcy, obtain a judgment at law against the debtor, will such judgment extinguish the simple contract debt, so as to prevent the creditor petitioning.‖

Bryant v. Withers, 2 Maule & S. 123.

[This necessity of the petitioning creditor having a legal debt due before any act of bankruptcy, seems also to be tacitly admitted by the reasoning of the judges in several cases, where a question has arisen, Whether an indorsee of a note given before, but indorsed after a secret act of bankruptcy, is entitled to be a petitioning creditor? Such a creditor is allowed to petition, because he stands in the place of the indorser, and the debt is not created by the indorsement, but by the making of the note which was before the bankruptcy. The authority of these cases, and the reasoning on them, has been acknowledged and confirmed by the Court of King's Bench, in *Bingley* v. *Maddison*. In that case a note was given by the bankrupt in *January*, and it became due in *June*. The act of bankruptcy was in *October* following, and the indorsement in *November*. The indorsee of the note was petitioning creditor, and sued out the commission. It was contended, that at the time of the bankruptcy the petitioning creditor had no debt, and therefore the commission could not be supported. The court observed, that this was a case in which the law of *England* allowed the assignment of a chose in action. The debt payable to *B.* is assigned to *D.* The consequence is, that the assignment relates to the original debt, and the assignee stands in his place. That the indorsee always came in under the commission, because the indorsement relates to the original debt. That it stood thus upon principle, and the cases are clear, explicit, and positive, and of the highest nature. The case in the Common Pleas (*a*) is a solemn opinion of the whole court. They therefore held the commission valid.]

Ex parte Thomas, 1 Atk. 73. 2 Wils. 135.

Bingley v. Maddison, *B. R.* Mich. Term, 1783, Co. Bankrupt Laws, 24.

(*a*) 2 Wils. 135. But see De Golls v. Ward, Ca. temp. Talb. 243.

‖But the bill or note must be endorsed to the petitioning creditor previous to the issuing of the commission.

Rose v Rowcroft, 4 Camp. 245.

The doctrine that the petitioning creditor's debt must be existing prior to the act of bankruptcy, gave rise to setting up a prior debt and act of bankruptcy to defeat a commission. Though it was not allowed to the bankrupt to resist a commission on this ground, yet a debtor to the estate might make this defence.

Donovan v. Duff, 9 East, 22. Bryant v. Withers, 2 Maule & S. 123. 2 Rose, 12.; and see Cook's, B. L. 526.

The present statute enacts by section 19. "that no commission "shall be deemed invalid, by reason of any act or acts of bank- "ruptcy prior to the debt or debts of the petitioning creditor or "creditors, or any of them, provided there be a sufficient act "of bankruptcy subsequent to such debt or debts."

6 G. 4. c. 16. § 19.

And by the 18th section it is enacted, that if after adjudication the debt of the petitioning creditor shall be found insufficient (*a*) to support the commission, the Lord Chancellor, on the application of any other creditor, having proved a debt sufficient

§ 18.

(*a*) See Muskett v. Drummond, 10 Barn. & C. 153.

The section applies not only to cases of deficiency in amount, but to any original defect in the nature of the petitioning creditor's debt. 1 Mont. & Mac. 59.; and see 2 Glyn & Ja. 131.

cient to support the commission, may order the commission to be proceeded with, provided such debt has been incurred not anterior to the debt of the petitioning creditor.

§ 20.

(a) See *Ex parte* Kirby, 1 Mont. & Mac. 440.

And by section 20. the Lord Chancellor is empowered to direct an auxiliary commission to issue for proof of debts under 20*l*., and for the examination of witnesses (*a*) on oath, or for either of such purposes; and the commissioners in such commission shall possess the same powers to compel the attendance of and to examine witnesses, and to enforce the production of books, papers, and writings, as are possessed by the commissioners under the original commission.‖

Brown v. Chapman, 3 Burr. 1418. Bonham's case, 8 Rep. 121. ‖(*a*) which is re-enacted by § 13 of 6 G. 4. c. 16. *supra*.‖ *Ex parte* Gayter, 1 Atk. 144.

[Notwithstanding the stat. 5 G. 2. has provided a remedy (*a*) against maliciously suing out commissions of bankrupt, yet it is holden not to take away the common law remedy by an action for damages, but that the party may proceed at law to obtain such redress for the injury he has sustained as a jury think he is entitled to. Where a party elects to abide by the remedy afforded by the statute, he must petition the Lord Chancellor to have the bond assigned to him. It is, however, in the breast of the court, where the bankruptcy is a doubtful case, and the commission superseded, either to direct an enquiry before a master of the damages sustained by the bankrupt, or *a quantum damnificatus* upon an issue at law; and after the damages are settled, the court may, for the better recovery thereof, order the bond to be assigned. But where the case is attended with any flagrant circumstances, the bond will be immediately assigned without further enquiry.]

Smith v. Broomhead, 7 Term R. 504.

‖The assignment of the bond by the Lord Chancellor is conclusive of the commission having been fraudulently and maliciously sued out; this fact cannot be questioned in the action on the bond.

11 Ves. 416. 5 East, 55.

Neither more nor less than the penalty can be recovered.

Ex parte Rimene, 14 Ves. 600.

And therefore if the conduct of the petitioning creditor is not flagrant enough to justify an assignment of the bond, the Lord Chancellor will order the bond to stand as security for the damages, to be ascertained in an issue of *quantum damnificatus*.

Holmes v. Wainwright, 1 Swanst. R. 20.; and see 1 Rose, 454.

If an action on the case is brought, it is a waiver of the right of action on the bond, and though the jury give less damages than the penalty, no action lies on the bond.

In the action on the case malice must of course be proved; the damages are unlimited.

Ex parte Warren, 1 Rose, 276. 19 Ves. 162.

If an action is brought, and the circumstances justify it, the Lord Chancellor will, on petition, order the commission and proceedings to be brought by the solicitor, into the office of the secretary of bankrupts, for the purpose of being evidence, and that the plaintiff may inspect and take copies, *&c.*

6 G. 4. c. 16. § 14.

By 6 G. 4. c. 16. § 14. it is enacted, that the petitioning creditor or creditors, shall at his or their own costs, sue forth and

and prosecute the commission, until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs (*a*), and by writing under their hands shall direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors, such costs out of the first monies that shall be got in under the said commission. (*b*) "And all bills of fees or disbursements of any solicitor or "attorney employed under any commission, for business done "after the choice of assignees, shall be settled by the commissioners, except that so much of such bills as contain any "charge respecting any action at law, or suit in equity, shall "be settled by the proper officer of the court in which such "business shall have been transacted, and the same so settled "shall be paid by the assignees to such solicitor or attorney; "provided that any creditor who shall have proved to the "amount of 20*l.* or upwards, if he be dissatisfied with such "settlement by the commissioners, may have any such costs and "bills settled by a master in chancery, who shall receive for such "settlement and the certificate thereof 20*s.* and no more."‖

[(*a*) This direction, that the commissioners shall settle the bill, does not prevent the chancellor, upon petition, from referring it to a master in chancery to tax it, if, upon the hearing, there should appear to be reasonable objections against the allowances made by the commissioners. *Ex parte* Vincent, 24th *March* 1786. *Ex parte* Clarke and Coghlan, 29th *May* 1789.; 22d *March* 1790.; 26th *November* 1791. Co. Bankrupt Laws, 10.] (*b*) This clause is in lieu of the 46th sect. of 5 G. 2. c. 30.

(C) Of the Commissioners, their Duty; and herein of the Power they may exercise over the Bankrupt and others, in discovering his Estate.

‖BY 6 G. 4. c. 16. § 21. (re-enacting the 5 G. 2. c. 30. § 43.,) the commissioners "before they proceed in the execution "of any commission of bankrupt to them directed, shall each "of them take the following oath. *I* A. B. *do swear, that I "will faithfully, impartially, and honestly, according to the best "of my skill and knowledge, execute the several powers and trusts "reposed in me as a commissioner in a commission of bankrupt "against ——, and that without favour or affection, prejudice or "malice.* Which oath any two or more of the said commissioners are empowered and required to administer to each "in the same commission named and authorized, of which they "are to enter a memorial, signed by them respectively, among "their other proceedings."‖

Their commission and power is by force of the several acts of parliament which ought to be pursued, else they are subject to the action of the party grieved; for he hath no other remedy. 4 Inst. 277.

[If sufficient evidence is given to satisfy the commissioners (for they are not bound to believe all that is sworn,) that the party is a bankrupt, they declare him a bankrupt *generally*, to prevent disputes about the time when he became such.]

Ex parte Simpson, 1 Atk. 72. *Ex parte* Groome, *Id.* 119. De Golls v. Ward, Ca. temp. Talb. 243.

‖The 6 G. 4. c. 16. § 33. enacts, "that after adjudication it shall "be lawful for the commissioners, by writing under their hands, "to summon before them any person known or suspected to "have any of the estate of the bankrupt in his possession, or "who is supposed to be indebted to the bankrupt, or any person "whom the commissioners believe capable of giving information "concerning

6 G. 4. c. 16. § 33. Though such persons have been examined by the commissioners, yet a bill for dis-

covery of the same matters may be filed against them in Chancery. 2 Chan. Ca. 73. Must disclose and answer directly to the question put to him. Vent. 324.

" concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt, and it shall be lawful for the said commissioners to require of such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the commissioners necessary to the verification of the depositions of such persons, or to the full disclosure of any of the matters which the commissioners are authorized to enquire into; and if such person so summoned as aforesaid shall not come before the commissioners at the time appointed, having no lawful impediment, (made known to the said commissioners at the time of their meeting, and allowed by them) it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct the person or persons therein named for that purpose to apprehend and arrest such person, and bring him before them to be examined as aforesaid.

6 G. 4. c. 16. § 34. [The commissioners had no authority under the former act, to commit a person suspected to detain effects of the bankrupt for not attending to be examined, upon their first summons. Dyer v. Missing, 2 Black. R. 1035.] ‖But see 8 East, 519.; and § 33. of the present statute expressly gives such a power. See page 561.‖

" § 34. And be it enacted, that upon the appearance of any person so summoned or brought before the commissioners as aforesaid, or if any person be present at any meeting of the commissioners, it shall be lawful for them to examine every such person upon oath, either by word of mouth or by interrogatories in writing, concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy by such bankrupt committed, and to reduce into writing the answers of every such person, and such answers so reduced into writing the party examined is hereby required to sign and subscribe, and if any such person shall refuse to be sworn, or shall refuse to answer any lawful question put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissionerss any such lawful question, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), or shall not produce any books, papers, deeds, and writings, and other documents in his custody or power relating to any of the matters aforesaid, which such person was required by the commissioners to produce, and to the production of which he shall not state any objection allowed by the said commissioners, it shall be lawful for them, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to them to be sworn, and full answers make to their satisfaction to all such lawful questions as shall be put to him, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents as aforesaid, in his custody or power, to the production of which no such objection as aforesaid has been allowed.

§ 35.

" § 35. And be it further enacted, that where *any person known or suspected to have any of the estate of the bankrupt in his* " *possession*,

" *possession, or who is supposed to be indebted to the bankrupt* (*a*), " shall be summoned to attend before the said commissioners " every such person shall have every such costs and charges as " the said commissioners in their discretion shall think fit, " and *every witness* summoned to attend before the commis- " sioners shall have his necessary expenses tendered to him in " like manner as is now by law required upon service of a sub- " pœna to a witness in an action at law."

(*a*) The words in italics are instead of the word " witnesses " in 5 G. 4. c. 81. § 2.

And by § 120. it is enacted, " that *any person* wilfully conceal- " ing any real or personal estate of the bankrupt, and who shall " not, within forty-two days after the issuing of the commission " discover such estate to one or more of the commissioners or " assignees, shall forfeit the sum of 100*l.* and double the value of " the estate so concealed; and any person who shall, after the " time allowed to the bankrupt to surrender, voluntarily dis- " cover to one or more of the commissioners or assignees any " part of such bankrupt's estate not before come to the know- " ledge of the assignees, shall be allowed 5*l.* per cent. thereon, " and such further reward as the major part in value of the " creditors present at a meeting called for that purpose shall think " fit to be paid out of the estate recovered on such discovery.

6 G. 4. § 120. c. 16.

And by § 36. it is enacted, " that it shall be lawful for the " commissioners by writing under their hands to summon any " bankrupt before them, whether such bankrupt shall have ob- " tained his certificate or not, and in case he shall not come at " the time by them appointed (having no lawful impediment " made known to them at such time and allowed by them), it " shall be lawful for the said commissioners, by warrant under " their hands and seals, to authorize and direct any person or " persons they shall think fit to apprehend and arrest such bank- " rupt and bring him before them; and upon the appearance of " such bankrupt, or if such bankrupt be present at any meeting " of the said commissioners, it shall be lawful for them to ex- " amine such bankrupt upon oath, either by word of mouth or " on interrogatories in writing, touching all matters relating " to his trade, dealings, or estate, or which may tend to dis- " close any secret grant, conveyance, or concealment of his lands, " tenements, goods, money, or debts, and to reduce his answers " into writing, which examination so reduced into writing the " said bankrupt shall sign and subscribe, and if such bankrupt " shall refuse to be sworn, or shall refuse to answer any ques- " tion put to him by the said commissioners touching any of the " matters aforesaid, or shall not fully answer to the satisfaction " of the said commissioners any such questions, or shall refuse " to sign and subscribe his examination so reduced into writing " as aforesaid (not having any lawful objection allowed by the said " commissioners), it shall be lawful for the said commissioners, " by warrant under their hands and seals, to commit him to such " prison as they shall think fit, there to remain without bail " until he shall submit himself to the said commissioners to be " sworn, and full answers make to their satisfaction to such

§ 36.

" questions as shall be put to him, and sign and subscribe such " examination."

6 G. 4. c. 16. § 37. By § 37. the commissioners are authorized to summon and examine the bankrupt's wife for the discovery of the estate, goods, and chattels of the bankrupt, and she shall incur the same penalties as other witnesses for not coming or refusing to be sworn, *&c.*(*a*)

(*a*) But the wife cannot be examined as to the act of bankruptcy, for she cannot be a witness for or against her husband, and the examination under the statute is confined to *property*. *Ex parte* James, 1 P. Wms. 611.

§ 39. In place of § 17, 18. of 5 G. 2. c. 30. The proviso commencing at the * is new. " § 39. And be it further enacted, that if any person be committed by the commissioners for refusing to answer or for not " fully answering any question put to him by the said commissioners, they shall in their warrant of commitment specify " every such question: provided that if any person committed by " the commissioners shall bring any *habeas corpus* in order to " be discharged from such commitment, and there shall appear, " on the return of such *habeas corpus*, any such insufficiency in " the form of the warrant whereby such person was committed " by reason whereof he might be discharged, it shall be lawful " for the court or judge before whom such party shall be " brought by *habeas corpus*, and such court or judge is hereby " required to commit such person to the same prison, there to " remain until he shall conform, unless it shall be shewn to such " court or judge by the party committed that he has fully " answered all lawful questions put to him by the commissioners; or if such person was committed for refusing to be " sworn or for not signing his examination, unless it shall appear to such court or judge that he had a sufficient reason for " the same. * Provided also, that such court or judge, shall if " required thereto by the party committed, in case the whole " of the examination of the party so committed shall not have " been stated in the warrant of commitment, *inspect and consider* " *the whole of the examination of such party* whereof any such " question was a part, and if it shall appear from the whole " examination that the answer or answers of the party committed is or are satisfactory, such court or judge shall or may " order the party so committed to be discharged.

§ 40. This section is new. " § 40. And be it enacted, that in every action in respect of " any such committment brought by any bankrupt or other " person committed, the court or judge before which or whom " such action is tried shall, if thereto required by the defendant " or defendants in such action (in case the whole of the examination of the party so committed shall not have been stated " in the warrant of commitment), inspect and consider the whole " of such examination, and if upon such inspection and consideration it shall appear to such court or judge that the " party was lawfully committed, the defendant or defendants in " such action shall have the same benefit therefrom as if the " whole of such examination had been therein stated."

§ 119. This clause re-enacts and extends the By § 119. it is enacted, " that whenever any bankrupt is in " prison or in custody under any *process*, *attachment*, *execution*, " *commitment*, *or sentence*, the commissioners may, by warrant " under

" under their hands directed to the person in whose custody " such bankrupt is confined, cause such bankrupt to be brought " before them at any meeting either public or private, and if " any such bankrupt is desirous to surrender, he shall be so " brought up and the expense thereof shall be paid out of his " estate, and such person shall be indemnified by the warrant " of the commissioners for bringing up such bankrupt: pro- " vided that the assignees may appoint any persons to attend " such bankrupt from time to time, and to produce to him his " books, papers, and writings, in order to prepare an abstract " of his accounts, and a statement to shew the particulars of his " estate and effects previous to his final examination and dis- " covery thereof, a copy of which abstract and statement the " said bankrupt shall deliver to them ten days at least before " his last examination."

5 G. 2. c. 30. and 49 G. 3. c. 121. § 13. The former act did not extend to custody in execution, this was remedied by the latter. The words of the present statute are very general as to the custody, and also as to the time. See Spence v. Jones, 5 Barn. & A. 705.

decided on the 49 G. 3. c. 121. § 13.

By § 27. " it is lawful for any person appointed by the com- " missioners, by their warrant under their hands and seals, to " break open any house, chamber, shop, warehouse, door, trunk, " or chest of any bankrupt, where such bankrupt or any of his " property shall be reputed to be, and seize upon the body " or property of such bankrupt; and if the bankrupt be in " prison or in custody, it shall be lawful for the person so " appointed as aforesaid to seize any property (his necessary " wearing apparel only excepted) in the custody or possession " of such bankrupt or of any other person, in any prison or " place where such bankrupt is in custody."

6 G. 4. c. 16. § 27.

By § 28. a similar power is given of seizing property in *Ireland.*

§ 28.

By § 29. Justices of the peace in *England* and *Ireland* are authorized and directed to grant search-warrants, where the property of the bankrupt is suspected to be concealed in any house or premises or place *not belonging* to the bankrupt.

§ 29.

By § 30. a mode of seizing the bankrupt's property in *Scotland* is provided similar to that given by §§ 27. and 28., but it does not extend to searching or seizing in any premises not belonging to the bankrupt.

§ 30. [Where goods had been sent by the bankrupt on board a ship to be conveyed to his correspondents abroad, it was holden, that the commissioners could not seize and take them away without paying the freight. Molloy, 253. Where the party refuses obedience to the commissioners' warrant, it seems that the chancellor will attach him as for a contempt. *Ex parte* Titner, 1 Atk. 136. *Vide* Molloy, 253. *contr.*] ‖It is now settled to be a contempt. *Ex parte* Page, 17 Ves. 59.; and if a party indemnify against the consequences, he is involved in the contempt. *Ex parte* Dixon, 8 Ves. 104.‖

[The commissioners, if they have reason to apprehend that the bankrupt is making away with, and concealing his effects, or preparing to depart the kingdom to avoid surrendering, may summon him to appear before them to examine him immediately; and, upon his refusal to attend to the summons, may certify to a judge under this clause.

Ex parte Lingood, 1 Atk. 240. ‖See § 36. of 6 G. 4. c. 16.; *antè*, 562.‖

The commissioners may examine the bankrupt to all matters that are requisite to a full disclosure of his estate and effects, and the manner he has disposed of them, notwithstanding such ex-

Ex parte Meymot, 1 Atk. 200.

Ex parte Burr. 1793. Co. Bankrupt Laws, 526. ‖*Vide infrà.*‖

amination should subject him to penalties, as in the case of smuggling or gambling; for that is no reason why the commission should not proceed: and if the bankrupt has any objection to the question, he must demur to the interrogatories, and the Lord Chancellor will judge of the question upon a petition; or if the bankrupt refuse to answer any question, and the commissioners commit him, and the delinquent bring an *habeas corpus*, the question must be set forth particularly in the return to the *habeas corpus*, that the judges may judge whether it was a lawful question or not.

1 Salk. 348. Miller v. Scare, 2 Black. 1144.

As the commissioners in the commitment of the bankrupt and others have but a special authority, they must be careful not to exceed it; for an action will lie against them, in case of an illegal commitment.]

Doswell v. Impey, 1 Barn. & C. 163. Where the witness was required by the Commissioners to read entries in a ledger, and was committed for refusing, the commitment was held illegal, for this was not refusing to answer a question, and was not within the powers of the act. Isaac v. Impey, 10 Barn. & C. 442. See 1 Mont. & Mac. 271.

‖But it has been solemnly decided, that the commissioners are not liable to an action of *trespass* and false imprisonment for committing a party who does not answer *to their satisfaction* when examined touching the bankrupt's estate; notwithstanding, the party has been discharged on *habeas corpus* on the ground of the court thinking the answers satisfactory; for the commissioners, in so committing, are acting within their authority, the statute authorizing them to commit the bankrupt or any other person who shall not fully answer to the *satisfaction of the commissioners*, all lawful questions, *&c. Quære.* Whether an action on the case will lie in such circumstances?

Crowley v. Impey, 2 Stark. 261.

Where the party is in custody upon previous process, the issuing of the warrant of the commissioners does not amount to an imprisonment, unless the party is in consequence of it confined within narrower limits, as within the prison instead of the rules.

6 G. 4. c. 16. § 41, 42, 43, 44.

By sections 41 and 42 of the present statute, the commissioner is entitled to have one month's notice of the action, setting forth the cause of action. By section 43. he is empowered to tender amends and plead it. By section 44. actions against the commissioners must be commenced within three months after the fact committed; and the commissioners may plead the general issue, and give the special matter in evidence; and are entitled to double costs on nonsuit, or verdict for defendant, or discontinuance after appearance, or judgment for defendant on demurrer.‖

2 Stra. 880.

Bracy's case, 1 Salk. 348.; ‖and see 9 Barn. & C. 234.‖

[The commitment must pursue the words of the act of parliament; and in this the superior courts have been very strict in their construction. A commitment of a bankrupt by commissioners to prison, there to remain *till he conformed to their authority*, was holden ill, because the statute empowers them to commit in that case, till he submit himself to be by them examined. And the court said, the word *conform*, instead of the word *submit*, was well enough, because it was of the same sense; but as the commissioners had other authorities besides that of examining, and it did not appear but it might require a submission to them in other respects, and for that, all powers given in

in restraint of liberty must be strictly pursued, the commitment was bad.

So where a bankrupt was committed for refusing to be examined, and the conclusion of the warrant was *or otherwise discharged by due course of law*, it was holden bad. Hollingshed's case, 1 Salk. 351. 2 Ld. Raym. 851. S. C.

Again, a warrant reciting that the bankrupt had been examined before the commissioners, upon his oath, upon which examination he had notoriously prevaricated, and therefore that they had committed him without bail or mainprize, until he should make a full and true disclosure of his estate and effects, *or be otherwise delivered by due course of law*, was holden ill; because the commitment did not pursue the words of the statute. Rex v. Nathan, 2 Stra. 880.

And upon the same principle, a commitment till the bankrupt shall *full answer make to all such questions as shall be put to him as aforesaid* was considered as clearly bad.] Miller's case, 2 Black. 882. 1144.

‖But where the bankrupt refused to be sworn, a commitment, until such time as he should submit to take the oath prescribed by law for that purpose, and full answer make, to the satisfaction of the commissioners, to the questions which might be put to him by virtue of the commission, was held good; for by such questions must be intended lawful questions. Nobes v. Mountain, 3 Bro. & Bing. 233. *Vide Ex parte* Leake, 9 Barn. & C. 234.

Where the bankrupt was committed for not giving information *to the assignees* as to certain debtors of his estate, the commitment was held bad; for he could not be committed for not satisfactorily answering the assignees, but only the commissioners. *Ex parte* Cassidy, 2 Rose, 217.

With respect to the satisfactoriness of the bankrupt's answers, it was formerly held, that if the bankrupt (and the same reason would apply to any other party examined), swore fully and roundly to such an answer as, if true, would be satisfactory, the commissioners must take it to be satisfactory, whatever reason they might see to disbelieve it; but this doctrine is now exploded, and it is settled, that if the commissioners disbelieve the bankrupt's story, they are bound to commit him as not answering satisfactorily. And if the answer is incredible to any other jurisdiction, before which the bankrupt may be brought on *habeas corpus*, the bankrupt will be remanded. The answer must be *full* in this sense — that it must be reasonably satisfactory to the mind that is to decide.‖ Pedley's case, Leach Ca. 361. *Ex parte* Nowlan, 6 Term R. 118. 2 Rose, 401. Taylor's case, 8 Ves. 328. *Ex parte* Oliver, 1 Rose, 407. 2 Ves. & Bea. 244.; and see 1 Deacon, 523.

[It has been holden, that a person examined before commissioners of bankrupt is not bound to answer any thing which tends to accuse himself; he is not to answer any thing criminal.] 5 Mod. 309. Comb. 391. ‖see 1 Mont. & Mac. 212.‖

‖But he may be compelled to disclose the infirmity of his title to an estate. *Ex parte* Herbert, 13 Ves. 183.

And a bankrupt is bound to disclose the particulars and disposition of his property, although he may thereby prove an act of bankruptcy against himself. Thus, he may be compelled to state whether a deed executed by him was voluntary or not. Pratt's case, 1 Glyn & Jam. 58.

And though he may refuse to answer a question, whether he has done an act clearly criminal, yet if he refuse to discover any particulars of his estate, he is liable to the consequences of *Ex parte* Cossens, Buck, 531.

answering unsatisfactorily, although the information sought may shew that he has committed a criminal act.

Smith v. Beadwell, 1 Camp. 30.

If a party, on his examination, unguardedly answer questions which render him liable to penalties, his examination is evidence against him in a court of justice.

Stockfleth v. De Tastet, 4 Camp. 10. *Sed vide* 7 Barn. & C. 625.

And this, although the authority of the commissioners has been abused by an examination on matters unconnected with the bankrupts' estate, for the purpose of procuring evidence for an action in which the bankrupt has no interest.

It seems that the bankrupt is bound to render to the commissioners, if required, an account in writing of his estate and effects.

Davie v. Mitford, 4 Barn. & Ald. 356.; and see Goddard's ca. Buck, 45.

Where he promised to produce a balance-sheet, and represented an account in writing to be necessary to make the discovery of his estate and effects, and adjournments from time to time took place, in order to enable him to make out one, and on the last adjournment he gave no satisfactory reason for not producing it; it was held, that the commissioners were justified in committing him.

Ex parte Vogel, 2 Barn. & Ald. 219. See *Ex parte* Baxter, 7 Barn. & C. 673.

The commissioners are authorized to examine a witness concerning the person, trade, dealings, estate, and effects of the bankrupt; and, incidentally to this power, they may examine him respecting other individuals, through whom they may be likely to obtain information on those points: therefore, a question, where the witness last saw the bankrupt's wife, was held legal and material; and the commissioners were held justified in committing the witness for unsatisfactorily answering it.‖

Sed quære? and *vide Ex parte* Bland, 1 Atk. 204.

[The Lord Chancellor has power to limit the commissioners of bankrupts, to make particular enquiries.

Ex parte Parsons, 1 Atk. 204.

Thus, the Lord Chancellor, upon a petition, limited the examination of a mother to her son's trading, but would not restrain the commissioners from asking any question that might be relevant thereto.]

Ex parte Burlton, 1 Glyn & J. 30.; and see Buck. 337.

‖But in a recent case the Vice Chancellor refused, on petition, to restrain the commissioners from putting questions respecting a gaming debt, for which an action had been brought against the petitioner by the assignees; since it must be presumed that the commissioners would do their duty, and that the party would be protected from answering questions subjecting him to penalties.‖

Bracy's case, 1 Ld. Raym. 153. The court has refused

[The depositions taken before commissioners of bankrupts are not of a public nature, but taken by commissioners to defend themselves; therefore the court will not order a copy of them. persons summoned before the commissioners a copy of the interrogatories, or their former depositions. *Ex parte* Bland, 1 Atk. 205. Bowden v. Dellow, *Id.* 289. ‖Buck, 290.‖

Coomb's ca. 2 Rose, 396. Brown's case, *Id.* 400.; but see § 39. of

‖Where the bankrupt is committed for not fully answering to the satisfaction of the commissioners, the courts have been strict in requiring all the questions and answers put to him, applicable to the subject of commitment, to be stated at length on the warrant,

in

in order that the court, before which the bankrupt may be brought on *habeas corpus*, may be enabled to judge whether the commissioners have rightly understood the effect of such questions and answers.

the new act, *infrà*.

And if the commissioners commit the bankrupt on the evidence of third parties (*a*), such evidence must be stated on the warrant in *hæc verba*. And if the bankrupt is recommitted after re-examination, the re-examination must be stated in a supplemental warrant.

Crowley's case, 2 Swanst. 1. (*a*) Whether the commissioners can receive such evidence in deciding whether the answers are satisfactory, is doubtful.

A single question, followed by a direct answer, with no further examination on the subject of it, cannot be the ground of a valid commitment, as the judge would have no means of deciding whether or not the answer was satisfactory.

Walker's case, 1 Glyn & J. 371.; and see 2 Jac. & W. 467.

If the bankrupt refuse to be sworn (*b*) or give any account of his property, this is a refusal to answer all questions, and a warrant of commitment is good in such case, though it state no specific question put to the bankrupt.

Ex parte Page, 1 Barn. & Ald. 568. (*b*) Refusing to be sworn is now a specific ground of committal. § 34.

But by the present statute (§ 39.) *ante* 564, an important alteration is made (*c*), and it is provided, that the court before which the bankrupt is brought may, if required, *inspect and consider the whole examination of the party*, although the whole is not stated in the warrant of commitment.

6 G. 4. c. 16. § 39. (*c*) *Qu.* Whether since this provision the warrant will be bad for not stating all the questions and answers relative to the subject of commitment. See 9 Barn. & C. 236.

If, on the return to the *habeas corpus*, there appears any insufficiency in point of *mere form* in the warrant, the court cannot, on that ground alone, discharge the bankrupt, but are bound to recommit.

6 G. 4. c. 16. § 39. 1 Barn. & Ald. 568. 2 *Id.* 219.

If the bankrupt committed is desirous to conform, he must send word to the commissioners; and they will be directed by the court to appoint a meeting for a further examination; and in some cases the Court of King's Bench will grant a *mandamus* to the commissioners.

1 Term R. 651. 2 Bro. C. C. 48. 18 Ves. 294. 33 Dow. & Ry. 310.

But in a late case, the court refused a *mandamus* where the object of the application seemed to be to avoid the expense of a *habeas corpus*, saying they had no authority to throw on the estate the expense of bringing up the party.‖

Ex parte Baxter, 8 Barn. & C. 344.

[A question was raised, whether a bankrupt, under examination, was protected from arrests at the time, and *eundo et redeundo?* The fact was, that the bankrupt was arrested upon an extent. Lord *Hardwicke* held, that the king was not bound by the bankrupt acts; therefore, that it was merely a question at common law: and certainly, at common law, the commissioners have no authority; and that their authority is not judicial, but ministerial.

Ex parte Dick, 2 Black. 1142.

In a subsequent case, Lord *Henley* said, that the commissioners are a court of justice, sufficient for the purpose of having their witnesses protected, at least by the Court of Chancery, if not by themselves; else witnesses would be in a strange dilemma.

Ex parte Stow, 2 Black. 1142. And see *acc. Ex parte* Kerney, 1 Atk.

If

55. But see Kinder v. Williams, 4 Term. R. 376. *contr.*

If they do not appear, they are liable to be committed by the court for their contempt; if they do, they are liable to arrests, which would be absurd, and therefore impossible.]

Ex parte King, 7 Ves. 312.

‖The witness is privileged, whether he attend under a summons from the commissioners, or voluntarily.

Ex parte Byne, 1 Ves. & Bea. 316.

Ex parte Bryant, 1 Madd. R. 49. *Ex parte* List, 2 Rose, 24.

So also a creditor, attending to prove his own debt, is privileged.

Arding v. Flower, 8 Term R. 534.

A bankrupt attending, upon notice, a meeting of the commissioners to declare a dividend, is protected from arrest, although such meeting is several years after his last examination.

1 Ves. & Bea. 316. 11 Ves. 556.

The proper application for discharge in such case, is by motion to the Lord Chancellor; though in some cases it has been done by petition.

16 Ves. 413. 1 Mont. Dig. 104. Kinder v. Williams, *suprà*; and see 1 Deacon, 160.

The contempt is against the commissioners; and the Court of King's Bench refused to discharge the party; since it was not the court of which the contempt was committed.‖

(D) Of the Assignees; and herein of the Manner and Time of choosing them, ‖of their Removal,‖ and Nature of their Trust, ‖Rights and Duties.‖

‖6 G. 4. c. 16. § 61. The words in Italics are new. (*a*) See *Ex parte* Jarland, 2 Rose, 361. *Ex parte* Butterfield, 1 Rose, 192. (*b*) This power was before confined to creditors living remote from the place of meeting. See 2 Rose, 361. One partner may execute a power on behalf of the firm. 14 Ves. 597.

‖ "BY the sixty-first section of the 6 G. 4. c. 16. it is enacted, that at the second meeting appointed by the commissioners as aforesaid, *or any adjournment thereof* (*a*), assignees of the bankrupt's estate and effects shall be chosen; and all creditors who have proved debts under the commission, to the amount of 10*l.* and upwards, shall be entitled to vote in such choice; and also any person authorized by letter of attorney (*b*) from any such creditor or creditors, upon proof of the execution thereof, either by affidavit sworn before a master in Chancery, ordinary or extraordinary, or by oath before the commissioners *viva voce*; and *in case of creditors residing out of* England, *by oath, before a magistrate where the party shall be residing, duly attested by a notary public*, British *minister or consul*; and the choice shall be made by the major part in value of the creditors so entitled to vote; *provided that the commissioners shall have power to reject any person so chosen, who shall appear to them unfit to be such assignee as aforesaid* (*c*); *and upon such rejection, a new choice of another assignee or assignees shall be made as aforesaid.*"

In those cases where parties are admitted to prove under a special order of the court, they cannot vote in the choice of assignees. *Ex parte* Shaw, 1 Glyn & Ja. 163. Commissioners on the day for choosing assignees are not to examine critically into the debt, but to admit creditors for what they swear is due to them, as they are liable to an account afterwards. 1 Atk. 68.‖ [But if any obvious objection appears to the debt, it is the constant practice to suffer the creditor only to claim, till he makes out his demand to the satisfaction of the commissioners. *Id.* 71.] ‖(*c*) The rejection by the commissioners is not final. There is an appeal to the chancellor. 1 Mont. & Mac. 197.‖

§ 62.

§ 62. "And be it enacted, that in all commissions against "one or more of the partners of a firm, any creditor to whom "the bankrupt or bankrupts is or are indebted, jointly with the "other partner or partners of the said firm, or any of them, "shall be entitled to prove his debt under such commission, "for the purpose only of voting in the choice of assignees under "such commission, and of assenting to or dissenting from the "certificate of such bankrupt or bankrupts, or of either of such "purposes; but such creditor shall not receive any dividend out "of the separate estate of the bankrupt or bankrupts, until all "the separate creditors shall have received the full amount of "their respective debts, *unless such creditor shall be a petitioning "creditor in a commission against one member of a firm.*" § 62. The words in italics are new.

§ 63. "And be it further enacted, that the commissioners "shall assign to the assignees, for the benefit of the creditors of "the bankrupt, all the present and future personal estate of "such bankrupt, wheresoever the same may be found or known, "and all property which he may purchase, or which may revert, "descend, be devised, or bequeathed, or come to him, before "he shall have obtained his certificate; and the commissioners "shall also assign as aforesaid all debts due or to be due to the "bankrupt, wheresoever the same may be found or known; and "such assignment shall vest the property, right, and interest in "such debts in such assignees as fully as if the assurance "whereby they are secured had been made to such assignees; "and after such assignment, neither the bankrupt nor any "person claiming through or under him, shall have power "to recover the same, nor to make any release or discharge "thereof; neither shall the same be attached as the debt of the "bankrupt by any person, according to the custom of the city of "*London* or otherwise; but such assignees shall have like remedy "to recover the same in their own names, as the bankrupt him-"self might have had if he had not been adjudged bankrupt." 6 G. 4. c. 16. § 63.

§ 64. "And be it enacted, that the commissioners shall, by "deed indented and rolled in any of his majesty's courts of record, "convey to the said assignees, for the benefit of the creditors as "aforesaid, all lands, tenements, and hereditaments, *except copy "or customaryhold in* England, Scotland, Ireland, *or in any of "the dominions, plantations, colonies, belonging to his majesty,* to "which any bankrupt is entitled, and all interest to which such "bankrupt is entitled in any of such lands, tenements, here-"ditaments, and of which he might, according to the laws of "the several countries, dominions, plantations, colonies, have "disposed; and all such lands, tenements, and hereditaments as "he shall purchase, or shall descend, be devised, or revert to or "come to such bankrupt before he shall have obtained his cer-"tificate, and all deeds, papers, and writings respecting the "same; and every such deed, shall be valid against the bank-"rupt and against all persons claiming under him; *provided "that where, according to the laws of any such plantation or* § 64. The words in italics are new.

"*colony,*

" *colony, such deed would require registration, enrolment, or re-*
" *cording, the same shall be so registered, enrolled, or recorded*
" *according to the laws of such plantation or colony; and no such*
" *deed shall invalidate the title of any purchaser for valuable con-*
" *sideration prior to such registration, enrolment, or recording,*
" *without notice that the commission has issued.*"

6 G. 4. c. 16. § 65.

§ 65. " And be it enacted, that the commissioners shall, by " deed indented and enrolled as aforesaid, make sale, for the " benefit of the creditors as aforesaid, of any lands, tenements, " and hereditaments, situate either in *England* or *Ireland*, " whereof the bankrupt is seised of any estate-tail in posses- " sion, reversion, or remainder, and whereof no reversion or " remainder is in the crown, the gift or provision of the crown; " and every such deed shall be good against the said bankrupt, " and the issue of his body, and against all persons claiming " under him after he became bankrupt, and against all persons " whom the said bankrupt, by fine, common recovery, or any " other means, might cut off or debar from any remainder or " reversion, or other interest in or out of the said lands, tene- " ments and hereditaments."

§ 66. [It is no ground for removing assignees that some of the creditors lived at a distance, and had not an opportunity of being present at their election: a want of substance or integrity is the true ground on which to make such an application. *Ex parte* Gregnier, 1 Atk. 91. ‖See 5 Ves. 707. 12 Ves. 13.‖ [If the assignee becomes bankrupt he may be removed. *Ex parte* Newton, 1 Atk. 97.; ‖but see 1 Rose, 236.‖ Or if the commissioners act

§ 66. " And be it enacted, that the Lord Chancellor may, on " petition, order any conveyance or assignment, either of the real " or personal estate of the bankrupt, made either to assignees " appointed by the commissioners or chosen by the creditors, " and any enrolment thereof to be vacated, provided that no title " of any purchaser under any conveyance prior to such order be " thereby affected, and that no estate previously barred be thereby " revived: and the Lord Chancellor may order the commis- " sioners to execute a new assignment or assignments of the debts " and effects unreceived and not disposed of by the then assignee " or assignees to any other person or persons to be chosen by " the creditors as aforesaid, or to execute a new conveyance of the " real estate unsold or not conveyed to such person or persons, " and in such manner as the Lord Chancellor shall direct; and if " such new assignment shall be ordered, the debts and personal " estate of the bankrupt shall be thereby vested in such new " assignees; and it shall be lawful for them to sue for the same " and to discharge any action or suit, or to give any acquittance " for such debt, as effectually as the former assignees might " have done; and the commissioners shall, in the two *London* " *Gazettes* next after the removal of such assignee or assignees " and such new appointment as aforesaid, cause advertisements " to be inserted, giving notice of such removal and appointment, " and directing persons indebted to the bankrupt's estate not to " pay any debt to the assignee or assignees so removed; and if " such new conveyance as aforesaid shall be ordered as afore- " said, it shall be valid without any conveyance from any former " assignee or assignees, or his or their heirs or assigns, provided " that the order so made for vacating any bargain and sale be " enrolled; and any bargain and sale to be executed in pursuance

" thereof,

" thereof, shall be enrolled in the same court as the first bargain " and sale of the same estate was enrolled."

improperly at the time of choosing him. Vin. Abr. tit. Creditor and Bankrupt (O), pl. 3.] ‖The choice of assignees is not to be disturbed on the ground that creditors were prevented by accident from voting if they were not kept back by fraud. *Ex parte* Surtees, 12 Ves. 10.; nor because the commissioners have improperly excluded the proof of a debt that would have turned the scale unless the rejection were fraudulent. *Ex parte* Durent, Buck. 201. *Ex parte* Shaw, 1 Glyn & Ja. 129. A creditor having adverse interests to the rest of the creditors, and choosing himself sole assignee, would probably be removed. *Ex parte* Martell, 1 Rose, 325.; and see 1 Ves. & B. 280. 3 Ves. & B. 139. And an assignee may be removed if permanently residing out of the jurisdiction, as the court has no hold upon him. *Ex parte* Grey, 13 Ves. 274. *Qu.* How far the interference of the bankrupt in the choice will render it void? *Ex parte* Shaw, 1 Glyn & Ja. 127. If several assignees are chosen jointly, and one is ineligible, the whole choice will be set aside. *Ibid.*‖ [When an assignee is removed, he must join with the old assignee and the commissioners in making an assignment to the new assignee. Vin. Abr. tit. Creditor and Bankrupt (O), pl. 3. And where an assignee is removed on account of his own bankruptcy, Lord *Hardwicke* was of opinion that he and his assignees must join with the commissioners in executing an assignment to the new assignee. 1 Atk. 97.] ‖But where the assignee has absconded, or from other cause could not execute the assignment to the new assignee, the Lord Chancellor has directed the first assignment to be vacated, and ordered an immediate assignment from the commissioners to the new assignee. *Ex parte* Bainbridge, 6 Ves. 451. *Ex parte* Leman, 13 Ves. 271. *Ex parte* Cooke, *Ibid.*; and see the sixty-sixth section of the present statute, which is extended to assignments, in order to obviate doubts on the thirty-first section of 5 G. 2. c. 30. An order for removal of one assignee, unless followed up by a release or assignment from him to his co-assignees, or by a new assignment from the commissioners to the new assignee, does not devest the estate out of such assignee. Bloxam v. Hubbard, 5 East, 407. By the present statute, section 66. no purchaser under any conveyance prior to the order to vacate, shall be thereby affected. An assignee retiring on his own request must give security to be approved by the Master against costs to be incurred in any action by reason of his retiring, and must also pay the costs of his removal and of the new choice. 5 Madd. 273. Buck. 465. 5 Madd. 76.‖

§ 67.

§ 67. " And be it enacted, that whenever any assignee shall " die, or a new assignee or assignees shall be chosen as aforesaid, " no action at law or suit in equity shall be thereby abated; but " the court in which any action or suit is depending, may, upon " the suggestion of such death or removal, and new choice, allow " the name of the surviving or new assignee or assignees to be " substituted in the place of the former; and such action or suit " shall be prosecuted in the name or names of the said surviving " or new assignee or assignees, in the same manner as if he or " they had originally commenced the same."‖

In re Earl of Litchfield, 1 Atk. 88.

Assignees are in the nature of trustees; and where they employ an agent to receive or pay money, who abuses their confidence, they must, like other trustees, answer over to the *cestui que trusts.* But when they employ an agent (*a*), either from necessity, or conformably to the common usage of mankind, they have been holden not liable, provided they have used due precaution in the choice of the person employed.

(*a*) *Ex parte* Belchier, Ambl. 218. ‖See *Ex parte* Wilkinson, Buck, 197.‖

From their being considered as mere trustees, it follows, that each is separately answerable only for what he receives; and the negligence of one shall not hurt any of the others (*b*), provided they be not at all privy to any private and personal agreement entered into by their co-assignee.

1 Atk. 89.

(*b*) But Lord *Hardwicke* recommends the insertion of the words "*jointly and severally*" in the assignment, for the security of each assignee. 1 Atk. 90.

‖If a judgment is obtained against two assignees for a joint debt, and one of them pays the whole sum, he may recover a moiety

Hart v. Biggs, Holt Ca. 245.

moiety as contribution from the other, without shewing that the defendant has any money of the estate in his hands.

Lingard v. Bromley, 1 Ves. & Bea. 114.

And if one assignee pay the whole of a loss occasioned by the joint act of himself and the other assignee, the other cannot defend himself in an action for contribution on the ground that he acted for conformity on the advice of the plaintiff.‖

Can v. Read, 3 Atk. 695.

Another consequence is, that payment of a debt to one assignee will not be good.

‖See 1 Esp. N. P. C. 114. 4 Esp. N. P. C. 220.‖

Primrose v. Bromley, 1 Atk. 89.

If an assignee becomes insolvent, and has applied any of the money received by him in that capacity to his own use, the commissioners are to be considered as specialty creditors, because the commissioners executed a counterpart of the assignment to them; and the agreement, being under hand and seal, makes it in the nature of a specialty debt, and therefore they may come upon his real estate.

‖But the penalty of 20 per cent. under the 104th section, is not a specialty debt. Buck. Ca. 495.‖

Ex parte Graham, 3 Ves. & Bea. 130. *Ex parte* Bebb, 19 Ves. 222. *Ex parte* Bignold, 2 Madd. 470.

‖And where an assignee becomes bankrupt with money of the estate in his hands, his own estate is held not entitled to receive any of the dividends due on the assignee's proof under the commission of which he was assignee, until they have reimbursed in full the money in the assignee's hands belonging to the estate of which he was assignee.

6 G. 4. c. 16. § 106. This clause is new; and see § 101. as to assignees' accounts, and 1 Mont. & Mac. 289.

By the 6 G. 4. c. 16. § 106. the commissioners shall, at the last examination of the bankrupt, appoint a meeting, not sooner than four months from the issuing of the commission, nor later than six months after the last examination, and give twenty-one days' notice in the *London Gazette* to audit the accounts of the assignees, when the assignees shall deliver a true statement, in writing, of all money received by them (*a*), and on what account and how employed; and the commissioners shall examine the account, and enquire whether any sum appearing to be in the hands of the assignees ought to be retained, and may examine the assignees upon oath touching the truth of such accounts; and the assignees shall be allowed to retain all such money as they have expended in suing out and prosecuting such commission, and all other just allowances.‖

(*a*) See Buck's Ca. 92. 304.

Ex parte Goreing, 12th *June* 1790, Co. Bankrupt Laws, 325. ‖See 6 Ves. 622. 17 Ves. 514. 15 Ves. 228.‖

It is the duty of the assignees to sell all the bankrupt's property as soon as it can be done with advantage; and if they neglect to dispose of it, the Chancellor, upon petition of a creditor, will order a sale, notwithstanding the assignees should be desirous of keeping the estate, as conceiving it to be more beneficial for the creditors than a sale.

Ex parte Lewis, 1 Glyn & Ja. 69. *Ex parte* Buxton, *Id.* 55.

‖If an assignee buys in the property without the authority of the creditors, it is at his peril, and if a loss arises on a re-sale he must bear it.

Ex parte Dunman, 2 Rose, 66.

There is nothing in the statute to prevent assignees selling by private contract, and with consent of creditors it is unobjectionable; but if done without consent, it is a circumstance not to be disregarded

disregarded on a complaint that the property, by a different mode of disposing of it, might have been rendered more productive.

It is an established rule that an assignee, commissioner, or solicitor to the commission, is incapable of purchasing property of the bankrupt, or dividends under the commission, and such purchase is ground of removal of an assignee.

Ex parte Reynolds, 5 Ves. 707. *Ex parte* Lacey, 6 Ves. 625. *Ex parte* James, 8 Ves. 337. *Ex parte* Bennett, 10 Ves. 381. *Ex parte* Wright, 2 Rose, 244. *Ex parte* Badcock, 1 Mont. & Mac. 231.

And unless the creditors expressly assent, the Court of Chancery will not permit an assignee or solicitor to divest himself of his character of trustee, so as to be entitled to purchase; since it would lead to mischief if a person in this situation might act up to the period of the sale, getting all the information that could be useful to him, and then discharge himself from his character, and buy the property.

8 Ves. 352. *Ex parte* Hodgson, 1 Glyn & Ja. 12. *Ex parte* Page, 4 Madd. 459. *Ex parte* Searle, 1 Glyn & Ja. 187.

It is now settled that assignees are in the situation of ordinary vendors, and are bound to make a good title to the bankrupt's estate sold, unless they expressly stipulate that the purchaser is to have only such a title as the bankrupt had.

5 Ves. 145. 11 Ves. 337. Macdonald v. Hanson, 12 Ves. 277. Freme v. Wright, 4 Madd. 364. See 1 Deacon, 333.

Assignees selling a leasehold estate of the bankrupt are not entitled to a covenant of indemnity from the vendee against the rent and covenants in the lease; as the assignees' liability to the lessor is at an end when they assign over the lease, such indemnity is unnecessary.

Wilkins v. Fry, 1 Meriv. R. 244.

By the 78th section of the 6 G. 4. c. 16., (which is altered from the 3 G. 4. c. 81. § 4.,) the Lord Chancellor may, on petition of the assignees, or of any purchaser, *if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity*, order the bankrupt to join in a conveyance; and if he shall not execute within the time directed by the order, he and all persons claiming under him are estopped from objecting to the validity of the conveyance, and all estate in him shall be as effectually barred as if he had executed.

6 G. 4. c. 16. § 78. These words are instead of the words "at the time of the allowance of, or after he has obtained his certificate."

By the 87th section (which is new) no title to property sold under the commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the commission or proceedings under it, unless the bankrupt shall have commenced proceedings to supersede the commission and duly prosecuted the same, within twelve calendar months from the issuing of the commission.‖

§ 87.

The creditors and assignees stand in the place of the bankrupt, and are subject to the same equity, and bound by all acts fairly done by him; for although the court will favour creditors as much as they can, it must be where they have a superior right to other persons.

Brown v. Jones, 1 Atk. 188. Tyrrell v. Hope, 2 Atk. 562.

Where a mortgage is made on a lease pledged by a bankrupt, equity will supply a defect in the conveyance against the assignees.

Russell v. Russell, 1 Brown Chan. R. 269. Taylor v. Wheeler, 2 Vern. 564.

If

Buckley v. Taylor, 2 Term R. 600.

If there is a custom in the country that half-a-year's rent should become due on the day the tenant enters upon the premises, the assignees are bound by it, notwithstanding the tenant had committed an act of bankruptcy before he took the premises, and made the agreement to pay half-a-year's rent in advance.

Ashbrooke v. Manley, Comb. 70.

The statute of limitations will run against the assignees from the time of the original promise to the bankrupt.

Grey v. Bendish, Cases in Equity, 171.

So where in an action brought against the defendant by an assignee, he pleaded the statute of limitations; the court resolved that the statutes of bankrupts transfer the right to the assignee, but it is no more than the old right which the bankrupt had before he had committed any act of bankruptcy, and therefore the assignee must take it in the same plight and condition as the bankrupt himself had it; and that the statute of limitation was a bar.

3 P. Wms. 144.

Ex parte Bennet, 2 Atk. 528.

Where a creditor before bankruptcy agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails of payment, he cannot be relieved; and if the debtor becomes bankrupt, the assignees will not be entitled to bind the creditor by his composition, but he has a right to prove his whole debt.

Ex parte Lane, 1 Atk. 90. Treves v. Townshend, in Chan. *Nov.* 17. 1783. Co. Bankrupt Laws, 344.

It is the duty of the assignees to make a dividend as early as possible after the time given by the statute for creditors to come in and prove their debts: and if they neglect making a dividend, and keep the money in their own hands, they will be liable to interest for it.]

‖*Ex parte* Edwards, 6 Ves. 3. *Ex parte* Townsend, 15 Ves. 470.‖

6 G. 4. c. 16. § 102. The 102d section omits any express injunction on the assignees to conform to the direction of the creditors or the commissioners. The words "or assignee" are new; see *Ex parte* Baker, 18 Ves. 246.

‖By the 102d section of the 6 G. 4. c. 16., it is enacted, that at the meeting for the choice of assignees, the major part in value of the creditors, may direct how, and with whom, and where money received out of the estate shall be paid in and remain until divided; and if the creditors shall not make such direction, the commissioners shall immediately after such choice, and at such meeting do so; but no money shall be directed to be paid into the hands of any commissioner, or of the solicitor, or to any banking-house or house of trade, in which any such commissioner, or the solicitor, *or assignee*, is interested.

The 103d section empowers the commissioners to invest, without any application by the assignees, or by five or more creditors, which was before necessary.

By the 103d section the commissioners may, when expedient, direct any money, part of such estate, to be invested in exchequer bills, and may direct where such bills shall be kept, and cause them to be sold when expedient, and the proceeds to be again laid out in the purchase of exchequer bills, or applied for the benefit of the creditors, subject to the controul of the Lord Chancellor.

The penalty extends to

By the 104th section, if any assignee shall retain or employ for his own benefit, or knowingly permit any co-assignee so to retain

retain or employ any sum to the amount of 100*l.*, part of the estate of the bankrupt, or shall neglect to invest any money in the purchase of exchequer bills, when so directed as aforesaid, such assignee shall be charged with interest thereon, at 20*l. per cent.*, and the commissioners shall charge every such assignee in his accounts accordingly.

"*knowingly permitting any co-assignee,*" &c. &c., which was not the case under the former statute; and also to "*neglecting to invest,*" as well as "retaining" any sum, and the word "*wilfully*" before "retain" is omitted. See Buck Ca. 197.

The act is imperative on the commissioners to charge 20*l. per cent.* in the cases enumerated. *Ex parte* Bray, 1 Rose, 144.

The penalty does not apply to the case of a bankrupt assignee, having previous to his bankruptcy misemployed money, this case being provided for by the 49 G. 3. c. 121. § 4. (now re-enacted by § 105. of 6 G. 4. c. 16.), which enacts that the certificate of a bankrupt assignee, who is indebted to the estate of which he is assignee, for money so retained or employed for his own benefit, shall only free his person from arrest, but his future effects shall remain liable for such debt to the estate. Wackerbarth v. Powell, Buck 495. *Ex parte* Goldsmith, 1 Glyn & Ja. 405.

Neither the commissioners nor the Lord Chancellor can allow travelling expenses to the assignees, however proper it may be for the creditors to make such allowance; and where an assignee happens to be an accountant, he is not allowed to charge the estate for business done in that character. *Ex parte* Bray, 1 Rose, 145. *Ex parte* Read, 1 Glyn & Ja. 77.

(E) Of the Creditors, who are such; and herein of proving their Debts.

BY 6 G. 4. c. 16. § 46., it is enacted, "that at the three "several meetings so appointed by the commissioners as "aforesaid, and at every other meeting by them appointed for "proof of debts, whereof and of the purport whereof ten days' "notice shall have been given in the *London Gazette*, every "creditor of the bankrupt may prove his debt by his own oath; "*and all bodies politic and public companies incorporated, or* "*authorized to sue or bring actions either by charter or act of* "*parliament, may prove by an agent, provided such agent shall* "*in his deposition swear that he is such agent as aforesaid, and* "*that he is authorized to make such proof;* and if any creditor "shall live remote from the place of the meeting of the com-"missioners, he may prove by affidavit, sworn before a Master "in Chancery, ordinary or extraordinary; or if such creditor "shall live out of *England*, by affidavit sworn before a magi-"strate where such creditor shall be residing, and attested by a "notary public, *British* minister or consul; and no creditor "shall pay any contribution on account of any such debt, "provided that it shall be lawful for the said commissioners to "examine upon oath, either by word of mouth, or by interro-"gatories in writing, every person claiming to prove a debt "under the said commission, or to require such further proof, "and to examine such other person in relation thereto, as they "shall think fit." 6 G. 4. c. 16. § 46. This is new.

§ 47. § 47. "And be it enacted, that every person with whom any "bankrupt shall have really and *bonâ fide* contracted any debt or "demand, before the issuing of the commission against him, "shall, notwithstanding any prior act of bankruptcy committed "by such bankrupt, be admitted to prove the same, and be a "creditor under such commission, as if no such act of bank- "ruptcy had been committed; provided such person had not, at "the time the same was contracted, notice of any act of bank- "ruptcy by such bankrupt committed."

§ 48. This is new A traveller at an annual salary is within this section. By § 48. the commissioners may order wages or salary due to any clerk or servant of the bankrupt to be paid, (not exceeding six months on salary) and the clerk or servant may prove for the amount. As to Apprentices, see *post*, 586.

1 Mont. & Mac. 194.; and see *Id.* 95.

The first part of this section is from the 21 Jac. c. 19. § 9. The clause in italics is new; its language is very obscure; but the construction put upon the section is, that a creditor, suing out execution on judgment obtained on verdict, is entitled to retain the goods seized, provided the *seizure* takes place before the act of bankruptcy; but that a creditor suing execution on a judgment by default, &c. will not be entitled to retain the goods unless the *sale* as well as *seizure* are complete before the bankruptcy. Where the creditor has completed his execution by seizure and sale, he is no longer "a creditor having security for his debt," within the section; and therefore if a creditor after the seizure buys the goods himself of the sheriff, and the assignees afterwards take possession of them, he may maintain trover against them. Wymer v. Kemble, 6 Barn. & C. 479.; and see Morland v. Pellatt, 8 Barn. & C. 722. If a creditor on judgment by *nil dicit* sues out execution, and the sheriff seizes the debtor's goods, and the debtor becomes bankrupt, and the sheriff after notice of the bankruptcy and commission, sells the goods and pays the proceeds to the creditor, the sheriff is liable to the assignees for the amount in an action for money had and received. Notley v. Buck, 8 Barn. & C. 160. But the court will not in such case compel the sheriff by rule to pay over the proceeds of the sale to the assignees of the bankrupt. *In re* Washbourn, *Id.* 444. Nor will they set aside the execution, for the statute does not render the execution void, but merely enacts that the plaintiff in such execution shall share rateably with the other creditors. Taylor v. Taylor, 5 Barn. & C. 392. An execution on a *final* judgment following a judgment by default in *assumpsit* is within the proviso. Cuming v. Welsford, 6 Bing. 502. And it applies to judgments obtained before the act took effect. *Ibid.*

By § 108. it is enacted, "that no creditor having security for his "debt, or having made any attachment in *London*, or any other "place, by virtue of any custom there used, of the goods and "chattels of the bankrupt, shall receive upon any such security or "attachment, more than a rateable part of such debt, except in "respect of any execution or extent served and levied by seizure "upon, or any mortgage of or lien upon any part of the property "of such bankrupt before the bankruptcy; *provided that no creditor, "though for a valuable consideration, who shall sue out execution "upon any judgment obtained by default, confession, or* nil dicit, "*shall avail himself of such execution, to the prejudice of other fair "creditors, but shall be paid rateable with such creditors.*"‖

‖*Ex parte* Stanborough, 5 Madd. 89.‖ Creditors, upon what security soever they be, come in all equal, unless such as have obtained actual execution before the bankruptcy, or have taken pledges for their just debts; and the reason is, because, from the act of bankruptcy, all the bankrupt's estate is vested in the commissioners, who are established as courts of justice touching the bankrupt's estate, and before whom the creditors must authenticate their debts, in order to receive their dividends; and therefore they must equally admit all persons to make proof of their debts: but such as have pawns or mortgages have a property in the thing so pledged, precedent to

to the translation of the property to the commissioners; in which case they have only an equity of redemption, and are in no better condition than the bankrupt himself. [When a creditor comes to prove his debt, he is obliged to swear, whether he has a security or not; and if he has, and insists upon proving, he must deliver it up for the benefit of his creditors (*a*): unless it be a joint security from the bankrupt and another person; in which case he may come in for his whole debt under the commission, without being compelled to deliver up the joint-security, as he is entitled to recover what he can from the co-security, and take his dividend upon the whole of his demand upon the bankrupt's estate, provided he does not receive more than 20*s.* in the pound on the whole. (*b*)]

(*a*) 1 Atk. 105. (*b*) *Ex parte* Bennet, 2 Atk. 528. ‖ *Ex parte* Parr, 1 Rose, 76. *Ex parte* Goodman, 3 Madd. 373.‖

‖If a bill is lost, the proof may be admitted on an indemnity.‖ *Ex parte* Greenway, 6 Ves. 812.; and see *Ex parte* Hossack, Buck, 390.

[When a creditor has a mortgage, or other pledge, which he apprehends is not equal to the payment of his debt, he must apply to the Chancellor to have the pledge sold, and that he may be admitted a creditor for the residue; and the commissioners may direct the sale to be before them, or by public auction.] *Ex parte* Coming, 20th *April* 1790. Co. Bankrupt Laws, 149.

‖The Lord Chancellor has no authority to compel a second mortgagee, who rests on his security, to join in a sale obtained by a prior mortgagee. *Ex parte* Jackson, 5 Ves. 357. *Ex parte* Topham, 1 Madd. 38. 2 Christ. 323.

And the commissioners cannot under the general order sell an equitable mortgage, but there must be a petition. 15 Ves. 434.

Where the mortgagee wishes to bid for the mortgaged estate, it is usual for him to apply for leave to do so, though this does not seem absolutely necessary. *Ex parte* Marsh, 1 Madd. R. *Ex parte* Ducane, Buck, 18. *Ex parte* Hammond, Buck, 464.

Although in general a mortgagee, with a power of sale, is a trustee for the party making the conveyance, and as such disabled from purchasing himself, yet it has been determined, in bankruptcy, that he may waive his special power of sale under the deed, and come in for a sale in his general character of mortgagee. Downes v. Grazebrook, 3 Mer. 200. *Ex parte* Hodgson, 1 Glyn & Ja. 12.

By the 98th section of 6 G. 4. c. 16. it is declared that *all* sales of real or personal estate of the bankrupt shall be free from auction duty. See 2 Espin. 699. 3 Price, 178. 1 Deacon B. L. 201.

Where a creditor holding a security is desirous of voting in the choice of assignees, the court will sometimes permit proof of the debt, deducting the value of the pledge, and imposing such terms that justice may be done to the estate. *Ex parte* Hopley, 2 Jac. & Walk. 221. *Ex parte* De Tastet, 1 Rose, 322. 324, 325. 2 Rose, 63. 1 Ves. & Bea. 518. Buck, 323. 1 Glyn & Ja. 391.

But where the right to the security held is contested, or where it is held under a *preference* given by the bankrupt, the court will not order the security to be valued, and the creditor to prove for the difference. *Ex parte* Hopley, 1 Jac. & Walk. 423. 2 Jac. & Walk. 220. 1 Glyn & Ja. 65. 272.

Ex parte Geller, 2 Madd. R. 262. 2 Bos. & Pull. 191. n.

The mere selling of a pledge by a creditor, without application to the commissioners, does not, if there is no fraud in the transaction, destroy his right to prove the remainder of his debt.‖

Ex parte Hillier, 19th *July* 1788. Co. Bankrupt Laws, 149.

[Bonds, bills of exchange, and other personal securities, pledged or deposited with a creditor, may be directed to be sold before the commissioners in the same manner as an estate.

Ex parte Smith, 19th *Dec.* 1784. *Ibid.*

If a debtor, by way of collateral security, deliver a bill of exchange or promissory note to his creditor, without his name appearing on the paper, it must be disposed of as a pledge, and the produce applied to reduce the debt, the residue only of the demand being proveable under the commission.

Ex parte Whitter, 6th *Feb.* 1790. *Ex parte* Roberts, 21st *June* 1789.

Where, indeed, a person takes a bill without the name of the party from whom he receives it, it may be a pledge, or a purchase, according to the agreement of the parties. If it is taken as a pledge, it must be sold; but if as a purchase, it liquidates the debt to the full amount of the bill.

Ex parte Smith, 18th *Nov.* 1789. *Ibid.* 150. Bank of England v. Newman, 1 Ld. Raym. 442.

Ex parte Howard, 14th *June* 1790. *Ex parte* Arkley, 26th *Nov.* 1791. Co. Bankrupt Laws, 150. 155.

Where a creditor has two demands, one proveable under the commission, the other not, he may apply his security, in the first place, to reduce that demand which is not proveable.]

Ex parte Downes, 18 Ves. 290. *Ex parte* Solomon, 1 Glyn & Ja. 25.

‖Where a creditor elects to prove under the estate, in preference to resting on his mortgage or lien, he cannot afterwards withdraw his proof, and have the benefit of his security.‖ *Ex parte* Hornby, Buck, 351. *Ex parte* Burn, 2 Rose, 55.

Chapman v. Turner, 1 Vern. 267.

If *A.* sells lands to *B.*, who afterwards becomes a bankrupt, and part of the purchase-money is not paid, *A.* shall not be obliged to come in as a creditor under the statute of bankrupt, but the land shall stand charged with the money unpaid, though there be no agreement for that purpose.

Co. Bankrupt Laws, 155. ‖(*a*) Now unnecessary; it is sufficient if he swear that he is agent, and authorized to prove. 6 G. 4. c. 16. § 46.‖

Corporations usually appoint a clerk or treasurer, who is the person to prove debts due to them; he must, however, produce his appointment, under seal, to the commissioners. (*a*)

Ex parte Clarke, 2 Russ. 575.; and see 1 Rose, 387.

‖Where the creditor is aged and imbecile, the commissioners will be directed to admit the proof on such evidence as is satisfactory to them.‖

Ex parte Child, 1 Atk. 111. If there are two collectors, who divide the money received between them, and one of them becomes bankrupt, the other shall prove on behalf of the parish the whole sum remaining in their hands not paid over. *Ex parte* Moggeridge and Clarke, 4th *Feb.* 1790. Co. Bankrupt Laws, 156.

If the bankrupt's estate is in arrear for taxes, the collector seems the proper person to prove the debts, and he ought to produce his appointment, that the commissioners may judge of the legality of it: but if the collector himself should become bankrupt, having received the taxes from the inhabitants, but not paid the money over, one of the inhabitants may prove for himself and the rest.

‖Where a navy agent was bankrupt, an admiral was allowed to prove for himself and the crew. 1 Mont. Dig. 145. For an assessment for church and highway rates the assessor

assessor must prove. Lloyd v. Heathcote, 2 Bro. & Bing. 388. Where a debt is due to an infant, the guardian on petition will be allowed to prove. 2 Bro. C. C. 306. And where a creditor was deranged, the court permitted a friend to prove on his behalf. *Ex parte* Maltby, 1 Rose, 387.; and see 2 Russ. 575.‖

The privilege of creditors to come in and prove their debts, and bankrupts to be discharged therefrom, is said to be co-extensive and commensurate. However, the court will not absolutely stop a creditor from bringing an action, but put him to his election; and should he elect to proceed at law, he will still be allowed to prove his debt, for the purpose of assenting to or dissenting from the certificate, which permission is absolutely requisite to make his remedy at law of any avail; for should the bankrupt procure his certificate, he will be thereby discharged from that action, as well as from all debts contracted before the act of bankruptcy.

Ex parte Groom, 1 Atk. 119. *Ex parte* Williamson, 1 Atk. 83. *Ex parte* Capot, 1 Atk. 220.

Where a creditor has proceeded at law, before he applies to prove his debt under the commission, he ought not to be permitted to prove without relinquishing his proceedings at law, unless by order from the Great Seal, for the purpose of signifying his assent to, or dissent from, the certificate.

Ex parte Williamson, 1 Atk. 83. Some doubts have been entertained of this; but see *Ex parte* Botteril, 1 Atk. 109., where the commissioners refused.

But the circumstance of a creditor proving his debts previously to proceeding at law against the bankrupt, does not amount to a conclusive election to take under the commission; for a creditor has been suffered to make his election of proceeding at law against the *bankrupt himself*, after having proved his debt, and received two dividends, upon condition of refunding what he had received. But the case, perhaps, might be different, if the creditor had in view the charging *a third person*, as the security, or the bail of the bankrupt.

Ex parte Dorvilliers, 1 Atk. 221. *Ex parte* Lindsay, *Id.* 220. *Ex parte* Capot, *Id.* 219.

Therefore, where a creditor had proved his debt, and *signed an agreement to permit the bankrupt to keep his house still open for trade, and to make him an annual allowance*; and the bankrupt afterwards deserted his house and absconded; upon which the creditor proceeded to fix the bail, and served execution upon them: the court said, there were some instances, in which the Court of Chancery permits a creditor to do certain acts, such as proving his debt, and voting for assignees, without binding him to come in under the commission, and renounce his legal remedy. But the creditor here has gone much farther, — *he has made his election*, has acquiesced under the commission, and shall not, on a subsequent unforeseen event, at the distance of a twelvemonth, desert the commission, and come upon the bail by surprise.

Aylett v. Harford, 2 Black. R. 1317.

The being chosen *assignee* will not prevent the creditor from suing the bankrupt at law if he has not proved his debt, for in that case he can only be considered as a creditor at large; and even if he has proved his debt, and chosen himself assignee, he *may still elect to proceed at law*, and be discharged as a creditor under the commission.

Ex parte Ward, 1 Atk. 153. *Ex parte* Dorvilliers, *Id.* 221.

1 Atk. 152. 1 Bro. C. C. 270. 8 Term R. 344. 3 Ves. 1. 1 Ves. & Bea. 315. 1 Glyn & Ja. 92. 2 Rose, 8.

‖A petitioning creditor has always been considered as having made his election; and though the commission be not opened the petitioning creditor cannot proceed at law, if the commission be capable of prosecution. But the petitioning creditor need not relinquish his action before presenting his petition. The statute applies only to proof or claim under the commission.‖

Ex parte Hinklin, 2d *Feb.* 1775. *Ex parte* Warder, 22d *Dec.* 1790. *Ex parte* Caton, 21st *Dec.* 1790. *Ex parte* Rattray, 10th *August* 1791.

If a creditor, *at the time the commission issues*, has the bankrupt in execution, he may prove his debt under the commission, and elect to discharge the bankrupt. But if *after* the commission has issued, a creditor proceeds at law against the bankrupt, and takes his body in execution, it is a conclusive election, and he will not be entitled to prove so as to receive a dividend, although he should afterwards discharge the bankrupt out of custody.

Ex parte Bisson, 23d *March* 1792. Creditor having taken bankrupt in execution subsequent to the commission, afterwards released him, and was permitted to prove: Debt expunged. So *Ex parte* Hewitt, 21st *Jan.* 1789. Co. Bankrupt Laws, 160, 161, 162, 163.

Ex parte Benjamin, Buck Ca. 41.

‖An attachment after the commission issued for nonpayment of money *into court* under an order is not such an election. *Quære* as to an attachment for nonpayment of money to *the party*.

Ex parte Cundall, 6 Ves. 446. *Ex parte* Arundel, 18 Ves. 231.; see Deacon B. L. ch. 9. § 2.

And if the bankrupt after judgment and a *ca. sa.* issued, surrender in discharge of his bail, but is never charged in execution by the creditor, this is no election by the creditor so as to preclude his proving.‖

Ex parte Hopkinson, 3d *June* 1790. 1 Ves. jun. 159. *Vide* Co. Bankrupt Laws, 163, 164, 165.

If a creditor is proceeding at law, the bankrupt is entitled by petition to put the creditor to his election, either to abide by the commission and waive the proceedings at law, or relinquish all benefit under it; but whether the creditor can be compelled to elect *before* a dividend, seems to be somewhat unsettled: though the modern determinations, supported by some of an earlier date, have mostly put him to his election before a dividend, provided the application was not made before he had a reasonable time of examining into the bankrupt's affairs.

Ex parte Crinsoz, 1 Bro. 270.

If a creditor has demands upon the bankrupt of distinct natures, or in different rights, he is at liberty to prove one under the commission, and proceed at law for the recovery of the other.

Ex parte Botteril, 1 Atk. 109.

Therefore, where a bankrupt had borrowed 100*l.* upon bond of a near relation, who had arrested him upon the bond and charged him in execution; and had another demand for a year's rent, which he offered to prove under the commission, but would not waive his execution upon the bond debt; and the commissioners, therefore, refused to admit him to prove: Lord *Hardwicke* said, that though it was a hard case upon the bankrupt, yet, as the debts were entirely distinct, he should be allowed to prove.

Ex parte Matthews, 3 Atk. 817.

So, on a petition *Ex parte Matthews*, where it appeared that Mr. *Gary* had proved a debt under the commission in right of his wife, amounting to 5000*l.*, being her fortune under a marriage settlement, and also brought an action at law in his own right

right for a debt due to him for goods sold and delivered; the Lord Chancellor observed, the court would never suffer a creditor to split a demand, and prove part under the commission, and prosecute at the same time a bankrupt for the remainder at law. But that in this case there are two remedies and different rights; and he even thought he might have done it, if the debts had been both in his own right. Suppose one debt had been due to Mr. *Gary* by bond, and another upon an account current, and he had brought a bill here for the account, and an action at law upon the bond; these are two distinct things, and therefore the court will let him go on, both in law and equity. If indeed, he was to bring a bill in equity for an account current, and an action at law for a particular *item* in that account, the court would, in that case, oblige the plaintiff to make an election.

6 G. 4. c. 16. § 59.

‖Important alterations were made respecting the creditors' election, by proving or by proceeding at law, by 49 G. 3. c. 121. § 14., which has been re-enacted with some additions by the 59th section of the present statute.

By this section it is enacted, "that no creditor who has brought "any action, or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might "have been proved as a debt under the commission against such "bankrupt, shall prove a debt under such commission, or have "any claim entered upon the proceedings under such commission "without relinquishing such action or suit. *And in case such "bankrupt shall be in prison or custody at the suit of or detained "by such creditor, he shall not prove or claim as aforesaid without "giving a sufficient authority in writing for the discharge of such "bankrupt(a);* and the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed: provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him, and that where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: *provided also, that any creditor who shall "so have elected to prove or claim as aforesaid, if the commission "be afterwards superseded, may proceed in the action as if he had "not so elected, and in bailable actions shall be at liberty to "arrest the defendant* de novo *if he has not put in bail below or "perfected bail above, or if the defendant has put in or perfected "such bail, to have recourse against such bail by requiring the "bail below to put in and perfect bail above within the first eight "days in term, after notice in the* London Gazette *of the superseding such commission, and by suing the bail upon their recognizance if the condition thereof is broken."*

The clauses in italics are new.

(a) Formerly an application to the Lord Chancellor was in general necessary.

The proof under the commission is only an election to take

Watson v.

Medex, 1 Barn. & A. 121. Harley v. Greenwood, 5 Barn. & Ald. 95. Howell v. College, 5 Taunt. 174. Bridget v. Mills, 4 Bing. 19. *Ex parte* Dickson, 1 Rose, 98. *Ex parte* Hardenberg, *Ibid.* 204. *Ex parte* Glover, 1 Glyn & Ja. 270. *Ex parte* Edwards, 1 Mont. & Mac. 116.

the benefit of the commission as to that particular debt, and such proof does not preclude the creditor from bringing an action or suit for a distinct debt: but the former part of the section, prohibiting a creditor who has brought an action or instituted a suit from "proving *a* debt," or "having *any* claim entered" under such commission, without relinquishing such action or suit, applies to prevent a creditor from proving *any* distinct demand whatever under the commission without relinquishing his action.

5 Barn. & Ald. 95.

And although the proof of a debt is an election to take the benefit of the commission as to the particular debt, yet if an action is afterwards brought for that debt the proof cannot be pleaded in bar, but the bankrupt must either apply for a stay of proceedings to the court in which the action is brought, or to the Lord Chancellor to expunge the debt.

Heath v. Hall, 4 Taunt. 326. Young v. Glass, 16 East, 252. *Sed vide* 1 Gow. 199.

A creditor proving a joint debt under a separate commission against one of the partners is not prevented from proceeding at law against the others; for the statute only relates to cases where the party having proved his debt sues the *same* person under whose commission he has proved.

Mead v. Braham, 3 Maule & S. 91.; and see 14 East, 565. *Ex parte* Lobbon, 17 Ves. 334.; and see 5 Barn. & Ald. 482.

It has been decided by the Court of King's Bench, that where the holder of a bill proves under a commission against the acceptor, and afterwards receives the amount of the bill from the drawer, the drawer is not bound by the election of the holder to come in under the commission, but may proceed at law and arrest the bankrupt for the debt. Lord *Eldon* in a prior case had decided the contrary. But that case is perhaps distinguishable on the ground that the drawer had received a dividend on the holder's proof before he proceeded at law, and might perhaps therefore be considered as having personally elected to take the benefit of the commission.

Ex parte Taylor, 1 Glyn & Ja. 599. As to what acts will amount to an election within the statute, see 1 Rose, 204. *Id.* 181.

A party who accepts an assignment of a debt proved is substantially a creditor proving, and thereby relinquishes an action brought against the bankrupt.

Read v. Sowerby, 3 Maule & S. 78.; but see § 127. of the present statute, which in such case vests the future estate in the assignees under the commission with power to seize, &c. &c.

Proof of a debt under a second commission, or under a commission against a bankrupt who has before compounded with his creditors, is such an election to take the benefit of the commission as deprives the creditor of his remedy against the bankrupt's future effects in case of his estate not paying 15*s.* in the pound.

Linging v. Comyn, 2 Taunt. 246.

If a creditor, after judgment obtained, proves under the commission, and then proceeds against the bail of the bankrupt, the court in which the action is brought will discharge them.

Ex parte Woolley, 1 Rose, 394.

A creditor on proving is not bound to produce the rule for discontinuance of the action at law, for the proof itself is a discontinuance. But by the clause in the present statute where the

the bankrupt is in execution, the creditor is bound to give a written authority for his discharge.

And where a creditor sues the bankrupt, and then comes in under the commission, the bankrupt is entitled to have some entry or suggestion put upon the record showing the election of the plaintiff.‖ *Kemp* v. Potter, 6 Taunt. 549.

If an executor becomes bankrupt, as he acts in *auter droit*, his bankruptcy does not take away the legal right of executorship, nor does the commissioners' assignment affect the testator's assets, except as to such beneficial interest as the bankrupt may himself be entitled to. But though a bankrupt executor may strictly be the proper hand to receive the assets, yet if his assignees have received any of the property, a court of equity will, for the benefit of creditors and legatees, appoint a receiver, with whom the assignees shall account. And the court will do so upon petition. *Ex parte* Ellis, 1 Atk. 101. *Ex parte* Llewellyn, in the matter of William Moseley, a bankrupt, *Aug.* 10. 1784.

As bankruptcy does not affect the right of an executor, in strictness he is himself the proper person to be admitted to prove against his own estate; which is not incongruous, as he does it in *auter droit*, and the danger of embezzlement may be prevented by ordering the dividend to be paid into court: and this was done in a case where the petitioner was a creditor of the bankrupt's testator to the amount of 286*l.*: part of the effects of the deceased, to the amount of 432*l.*, were in the bankrupt's hands; and, on petition to be permitted to prove this demand against the bankrupt's estate, Lord *Thurlow* ordered that the bankrupt, as executor, should be admitted a creditor under the commission issued against him for the sum of 432*l.* 7*s.* 1½*d.* in the petition mentioned, and that the assignees should pay the dividends into the bank, in the name, and with the privity of the accountant-general, in trust, in the matter of *A. B.* the bankrupt, subject to further order. *Ex parte* Leeke, 2 Bro. Chan. R. 596. *Ex parte* Brooke, 1st *June* 1793. like order. If the property be considerable, Lord *Thurlow* said, he would not proceed without bill. 2 P. Wms. 547. ‖See *Ex parte* Shakeshaft, 3 Bro. C. C. 198. *Ex parte* Moody, 2 Rose, 413. It is settled that a bankrupt executor cannot prove without an order. *Ex parte* Shaw, 1 Glyn & Ja. 127.‖

A creditor by an annuity, where the annuity is *merely personal*, is entitled to come in under the commission, provided the penalty of the bond be forfeited *prior* to the bankruptcy. (*a*) In order to prevent, on the one hand, the injustice of admitting him to prove only the arrears accrued due before the bankruptcy, and, on the other, the great inconvenience that would ensue if the annuity should be received from time to time as an accruing debt on the estate, a value is set upon the annuity, and he is admitted a creditor for the sum at which it is valued. *Ex parte* Artis, 2 Ves. 490. *Ex parte* Le Compte, 1 Atk. 251. Perkins v. Kempland, 2 Black. R. 1106. (*a*) If a forfeiture has been incurred, no act of the annuitant shall amount to a waver of it, for it is for the benefit of both parties that it should be so. Wyllir v. Wilkes, Dougl. 523.

If the annuity is secured by a deed of covenant, and a bond is likewise given as an additional security, which is forfeited for nonpayment before the bankruptcy, the creditor in that case is not obliged to prove under the commission, but may proceed at law for the breach of covenant, notwithstanding the bankrupt has obtained his certificate. Fletcher v. Bathurst, Vin. Abr. tit. Creditor and Bankrupt (I), pl. 4. 4 Burr. 2446. Cottrel v. Hooke, Dougl. 95.

‖But

6 G. 4. c. 16. § 54. The clause in italics is new. The clause has been held to apply to annuities granted before the passing of the act. Bell v. Bilton, 4 Bing. 618.; and see 5 Russ. 422. See as to fixing the value, 19 Ves. 557. 1 Rose, 101. 1 Meriv. 10. In valuing the annuity the commissioners cannot consider the altered state of the annuitant's health. 2 Glyn & Ja. 102. Nor the state of the money market. *Id.* 29.

‖But by the 54th section of the present statute, (which re-enacts, with a slight addition, the 49 G. 3. c. 121. § 17.,) it is enacted, "that any annuity creditor of any bankrupt, by what-"ever assurance the same may be secured, and whether there "were or not any arrears of such annuity due at the bankruptcy, "shall be entitled to prove for the value of such annuity, which "value the commissioners shall ascertain, *regard being had to* "*the original price given for the said annuity, deducting there-*"*from such diminution in the value thereof as shall have been* "*caused by the lapse of time since the grant thereof to the date of* "*the commission.*" And by § 55. (see *post*, 604.) the certificate is made a discharge from all claims either of the annuitant or the surety in respect of the annuity; and see § 121.

Winter v. Mouseley, 2 Barn. & A. 802.

A bond for the payment of half-yearly interest on a principal sum of money is not an annuity bond within the meaning of the statute, capable of being valued and proved.‖

Ex parte Sandby, 1 Atk. 149. Barwell v. Ward, 1 Atk. 261.

An apprentice can come in as a creditor only for the sum remaining due, after deducting for the time he has lived with the bankrupt. It is usual, indeed, for the commissioners to recommend it to the creditors to allow him a gross sum out of the estate, for the purpose of binding him to another master; but this, though equitable and just, is not what he is entitled to *de jure*, nor, of course, what the court can order.

6 G. 4. c. 16. § 49. See 2 Glyn & Ja. 122.

‖By the 49th section of the present statute the issuing of the commission shall be a complete discharge of the indentures; and, on proof of the fee paid, the commissioners may order any sum to be paid to the use of the apprentice as they shall think reasonable; regard being had to the amount of the fee paid, and to the time during which the apprentice has resided with the bankrupt.‖

Ex parte Macklin, 2 Ves. 675.

A petition was preferred on the part of a daughter, to be let in as a creditor on the estate of her father, a bankrupt, for the money he had received from the managers of the theatre on her account, offering an allowance thereout for living with and being maintained by him, during her acting on the stage. It was alleged on her part, that the court is so far from giving the father all the earnings of the child, that it will not suffer the father to be eased of the maintenance of a child who has a fortune; but will let the whole interest accumulate, and the father maintain the child, unless unable to do so.

Lord Chancellor said, he was under some difficulty for the sake of the precedent; for it is true that this question is the same as it would have been between the daughter and the father, if he had not been a bankrupt, and could answer to an action for himself; whether after all this transaction the daughter could in an action have recovered against the father all this money, as money had and received to her use? He said, it might be dangerous in *London* to lay it down as a general rule, that if a father having several children, who earn money which he receives, becomes bankrupt,

bankrupt, every child can come in and claim his debt for that money so had and received while they lived together, and were part of his family. A father frequently sends out his son to work as journeyman, and his earnings are taken to be the father's. Here, said his lordship, the father, mother, and daughter were all actors, and lived together; the father received the whole. It is extraordinary to say, that after a length of time this shall be all called back, because of an act of bankruptcy. He referred it therefore to the commissioners to enquire, how much the father received to the child's use, unless as to so much as was a covenant with the daughter herself. But, to avoid the expense of an account, it was agreed that the petitioner should be admitted as a creditor for a particular sum; but no allowance to be made for maintenance.

‖Where the son lives with his father as clerk, and only receives board and lodging, if there is no contract for wages he cannot prove, although the father swear it was his intention to give wages, and his assignees do not object.‖ *Ex parte* Glover, 1 Mont. Dig. 165.; and see 1 Ves. & B. 48. and § 48. of the new act, *antè*, p. 578.

A landlord having a legal right to distrain goods while they remain on the premises, the issuing of a commission of bankrupt against the tenant, and the messenger's possession of the goods of the tenant, will not hinder him from distraining for the whole rent in arrear; for it is not such a *custodia legis* as an execution; and even there the law allows the landlord a year's rent. And though, by the assignment by the commissioners of the bankrupt's estate and effects, the property of the goods is changed, yet the assignees take them subject to every thing which they are subject to in the hands of the bankrupt; and while upon the premises they remain liable to be distrained. 1 Atk. 102, 103, 104.

But if the landlord neglects to distrain, and suffers the goods to be sold by the assignees, he can only come in with the rest of the creditors *pro ratâ*. 1 Atk. 102.

A commission issued against *A.*, who was a tenant of *B.*, and owed him twelve years' rent. *B.*, the landlord, came in, and proved his debt under the commission, and the assignees sold the whole goods to *Grove* the petitioner, who lived in the tenant's house. The landlord, three years after proving his debt, distrained upon those goods as being still upon the premises. *Ex parte* Grove, 1 Atk. 103.

Lord *Hardwicke*, upon the second hearing of the petition, determined that the vendee of the goods under the assignees was entitled to the goods; and ordered, that the proceedings of the landlord should be restrained, and confined him to his remedy under the commission. See *Ex parte* Devine and Mary his wife, 15th Jan. 1776. Co. Bankrupt Laws, 221. Bradyll v. Ball, 1 Bro. Chan. R. 427. S. P.

‖A commission of bankrupt is decided not to be an execution within the meaning of the statute 8 Ann. c. 14., and therefore a landlord is not entitled to a year's rent, in preference to the other creditors. *Ex parte* Devisne, Cooke's B. Law, 177. Lee v. Lopes, 15 East, 231.; but see Duck v. Braddyl, 13 Price, 455.

The landlord was formerly entitled to distrain for any amount of 6 G. 4. c. 16. § 74.

of rent; but, by the 74th section of the present statute, no distress for rent made and levied after an act of bankruptcy, whether before or after the issuing of the commission, shall be available for more than one year's rent accrued prior to the date of the commission; but the landlord shall come in as a creditor for the overplus.

Buckley v. Taylor, 2 Term R. 605.

As the landlord has a right to distrain on the bankrupt's goods, notwithstanding the bankruptcy, so it has been held that if he buy the goods of the assignee he may deduct from the price the debt due to him for rent.

Stevenson v. Wood, 5 Esp. Ca. 200. Mayor v. Croome, 1 Bing. R. 261.

So also if the bankrupt, after an act of bankruptcy, pay rent to the landlord under a threat of distress, this money cannot be recovered back by the assignees; for if the landlord chooses to waive his legal lien, and take the money instead, he has a right to retain it, as if he had made an actual distress.‖

Co. Bankrupt Laws, 225.

It is stated in 1 Atk. 103., that a mortgagee of a bankrupt's estate, although he pays the arrears of rent that is due to the bankrupt's landlord, shall not be preferred to the creditors under the commission, unless he applies to the court for an order that he may stand in the place of the landlord; but, from the cases above referred to, it rather seems that no such order could be obtained, because, unless the landlord *actually* distrains, he has himself no lien upon the goods.

‖*Sed vide supra.*‖

Ex parte Dobson, 7 Vin. Abr. 74.

On a distress for rent, goods were sold, and 77*l.* 3*s.* remained in the constable's hands, who became a bankrupt. The tenant dies, and his executor prays to be paid this money by the assignees, in preference to the other creditors.

It was argued, that this comes to the hands of the constable by due course of law; and the case of *Wright* v. *Dixon* was cited, where goods were taken in execution by *Wilcox*, bailiff of *Westminster*, who died; and the judgment and execution being afterwards set aside, the court ruled, that the widow and executrix of *Wilcox* should refund the money, though she alleged she had not assets to pay specialties.

But the Lord Chancellor said, that case was against an executrix; and, though the law makes a difference between one creditor and another, yet in case of bankruptcy all creditors are upon an equal footing. If any thing *remained in specie*, it might be different; but here the money is embezzled by the constable. He therefore ordered the petitioner to come in as a creditor with the rest.

Ex parte Bennet, 2 Atk. 528. Bromley v. Goodere, 1 Atk. 79. *Ex parte* Rooke, 1 Atk. 244. ‖See 1 Rose, 173. where interest was allowed subsequent to the commission under a special act of Parliament.‖

Commissioners, after a man becomes a bankrupt, compute interest upon debts no lower than the date of the commission, because it is a dead fund; and in such a shipwreck, if there is a salvage of part to each person, it is as much as can be expected. But there is no direction in the act for that purpose; and it has been used only as the best method of settling the proportion among the creditors, that they may have a rate-like satisfaction; nor does the certificate operate as a discharge of the fund before vested in the assignees, thereby to deprive the creditors of subsequent interest; but extends only to any remedy to be taken against the person of the bankrupt, or his future effects.

If

If an estate mortgaged is not adequate to the payment of principal and interest, the interest is only to be calculated to the date of the commission. *Ex parte* Wardell, 29th *March* 1787, cited and confirmed. *Ex parte*, Hevey, 10th *Nov.* 1792. Co. Bankrupt Laws, 227. ‖*Ex parte* Badger, 4 Ves. 165.‖

But, if it is sufficient for that purpose, the assignees cannot redeem without paying interest to the time of redemption. 7 Vin. Abr. 110.

A special creditor cannot have interest beyond the penalty contained in his security; but a creditor by note carrying interest may receive the full amount. However, if the bearing of interest is not specified in the note, it will not of itself entitle the holder to claim any; but he may prove the whole sum specified in the note, notwithstanding he deducted the discount at the time of receiving it. 1 Atk. 75. *Ex parte* Marlar, 1 Atk. 151.

‖By the 6 G. 4. c. 16. § 57. it is enacted, that in all future commissions against any person liable upon any bill of exchange or promissory note, whereupon interest is not reserved, over due at the issuing the commission, the holder of such bill or note may prove for interest on the same to the date of the commission, at such rate as is allowed by the Court of King's Bench on bills or notes. 6 G. 4. c. 16. § 57.

The general principle is, that interest is only provable under the commission when it arises by contract. *Ex parte* Furneaux, 2 Cox. Ca. 219.

If it is merely claimable as damages, it might be recovered in an action; still, as it is unliquidated, it is not a debt proveable. *Ex parte* Champion, 3 Bro. C. C. 436.

The custom of trade is received as evidence of a contract between the parties that the debt should carry interest. *Ex parte* Hankey, 3 Bro. C. C. 504. *Ex parte* Mills, 2 Ves. 295. Dornford v. Dornford, 12 Ves. 127. *Ex parte* Boyd, 1 Glyn & J. 285.

Where goods are sold upon an agreement to deduct a certain per centage for discount for prompt payment, the vendor can only prove for the reduced price, although prompt payment is not made.‖ *Ex parte* Ainsworth, 4 Ves. 678. *Ex parte* Pigou, 3 Madd. 156.

There is a difference between debts that carry interest and a special deposit of goods and stock; for in the former, the interest shall be continued down to the date of the commission, but in the latter it is otherwise, for the interest stops from the time of the deposit; and a calculation shall be made of the value of the whole entire thing deposited, both principal and interest, be it stock or goods, according to the market price at the time of the deposit. Bromley v. Child, 1 Atk. 259.

Where a joint commission is taken out, and the usual order obtained, for keeping distinct accounts of the separate estates of each partner, the creditors of the separate estates are not entitled to interest upon their debts after the payment of twenty shillings in the pound, unless the joint creditors have also received twenty shillings in the pound; but the overplus of the separate estate must be applied to increase the joint fund.

Thus

Ex parte Boardman, 2d *August* 1786.

Thus, upon a petition by separate creditors to be allowed interest on their debts carrying interest, before the surplus of the separate estate should be carried over to the joint account, it appeared that a joint commission had been taken out against two bankrupts, and an order obtained for keeping distinct accounts, and that there was a surplus of the separate estate of one of them, after paying his separate creditors twenty shillings in the pound; but the Lord Chancellor was of opinion, that such separate creditors were not entitled to interest, unless the joint estate had also paid twenty shillings in the pound, and therefore dismissed the petition.

Aylett v. Harford, 2 Black. R. 1317. *Ex parte* Talbot, 4 Burr. 2445. Langford v. Ellis, Easter Term 1785, *B. R.* Co. Bankrupt Laws, 232. *Ex parte* Simpson, 3 Bro. Chan. R. 46. Lewis v. Piercy, 1 H. Black. R. 29. ‖Blandford v. Foote, Cowp. 138.‖

On actions, whether of debt, *assumpsit*, or for a *tort*, the judgment, when signed, relates to the verdict; and the costs *de incremento*, when taxed, are annexed to those assessed by the jury, and become consolidated with them by a fair and equitable relation of law; and therefore they may be proved as a debt, if the verdict is prior to the bankruptcy.

Ex parte Hill, 11 Ves. 646. *Sed vide* Scott v. Ambrose, 3 Maule & S. 326. Dinsdale v. James, 2 Brod. & B. 8.

‖It seems now settled, after an elaborate and profound examination of the previous authorities by Lord *Eldon*, that where the act of bankruptcy happens before verdict, the costs are not proveable as a debt under the commission, whatever may be the nature of the action.

Robinson v. Vale, 2 Barn. & C. 762.; and see 4 Barn. & C. 880. 7 Barn. & C. 436.

Where the verdict is before the act of bankruptcy, and the judgment is entered up before the issuing of the commission, then, whatever may be the form of action, the costs may be proved as being a debt contracted *before the issuing of the commission*; provided the creditor, when judgment was obtained, had no notice of the act of bankruptcy.

Ex parte Poucher, 1 Glyn & Ja. 385. See Deacon's Law of Bankrupt, vol. i. 277.

Where the action is in *contract* for a debt due, and the verdict is found before the bankruptcy, although judgment is not entered up till afterwards, and after the issuing of the commission, there the costs are now settled to be incorporated with the original debt by the verdict, and to be consequently proveable under the commission.

Buss v. Gilbert, 2 Maule & S. 70.

But in actions of *tort*, there is no *debt* until the judgment is completed; and consequently, although a verdict is obtained in such an action before the bankruptcy, if the judgment is entered after the issuing of the commission, the costs do not, by the mere verdict, become a debt, and are not proveable under the commission.

In re Charles, 14 East, 197.

And the rule appears the same (as the principle certainly is) in case of actions of contract for *unliquidated damages*.

Sed vide Beeston v. White, 7 Price, 209. It is to be observed that the question in 14 East, 197. was as to a petitioning creditor's debt, not as to a debt proveable. The question whether costs are a debt proveable, and whether they are barred by the certificate, are not identical. On the contrary, Lord *Eldon*, in *Ex parte* Hill, 11 Ves. 656. treats them as distinct; and the Vice-Chancellor, in 1 Glyn & James, 387., expresses the inclination of his opinion, "that the costs of proceedings in an action of contract which, for want of previous

vious verdict, are not proveable under the commission, are yet barred by the certificate with the original debt." The courts in these latter cases appear to lean in favour of a party whose whole property has been taken from him by the bankrupt laws, and are thus disposed to consider such costs as merely incidental to the debt existing before the bankruptcy; and that the bankrupt being discharged from the principal debt due, it is reasonable he should be discharged from the accessorial debt. By this distinction the above cases of Langford v. Ellis, Lewis v. Piercy, Blandford v. Foote, Scott v. Ambrose, Dimsdale v. Eames, and Beeston v. White, which were decided on applications to give effect to the certificate by discharging the bankrupt or setting aside an execution, may be reconciled with the authorities in the text as to costs proveable under the commission.

Where a plaintiff is nonsuited at *nisi prius*, and before the judgment of nonsuit is signed becomes bankrupt, it seems that the costs are a debt proveable under the commission.

Hunt v. Mead, 5 Term R. 565. Watts v. Hart, 1 Bos. & Pull.

134. *Sed vide Ex parte* Todd, cited 3 Wils. 270.

This doctrine has, however, been often doubted; and the case of *Watts* v. *Hart* was decided contrary to the inclination of the court upon the subject.

And where the defendant has a verdict at *nisi prius*, and the plaintiff becomes bankrupt, and a commission issues before judgment is signed, it is decided that the costs are not a debt proveable.

Walker v. Barnes, 1 Marsh. 346.

And so where a cause was referred at *nisi prius* to an arbitrator, and he found that a sum was due from the plaintiff to the defendant, and ordered it to be paid, and the plaintiff became bankrupt between the order of reference and the taxing costs and signing judgment; it was held, that the taxed costs were not proveable, and were not barred by the certificate.

Haswell v. Thorogood, 7 Barn. & C. 705.

But if the judgment was signed before the commission, though after a secret act of bankruptcy, they would be provable. See 6 G. 4. c. 16. § 47.

Robinson v. Vale, 2 Barn. & C. 762.

Until the late statute, costs incurred in equity could not be proved unless they had been taxed before the bankruptcy.

Ex parte Sneaps, Co. B. Law, 192.

But now, by the 6 G. 4. c. 16. § 58. if any plaintiff in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs incurred in obtaining the same, although not taxed at the time of the bankruptcy.‖

6 G. 4. c. 16. § 58.; and see Rex v. Davis, 9 East, 320.

A bond, though it is not assignable at law, may be proved by the assignee under the commission; but the assignor must join in the deposition that he hath not received the debt, or any part thereof, or any security or satisfaction for the same.

Co. Bankrupt Laws, 182.

‖And a trustee cannot prove without the *cestui que trust* joining him in the proof: unless a special order for the purpose is obtained.

Ex parte Dubois, 1 Cox R. 310. 1 Deacon, 224.

By § 53. of the present statute (taken from 49 G. 3. c. 121. § 16.), under a commission against an underwriter, the proof may be made by the person who effected the policy, though not beneficially interested, provided the person interested is in *England;*

6 G. 4. c. 16. § 53.

land; and the assured in a policy and the obligee in a bottomry bond, may make a claim before a loss, and prove after the loss.

Toussaint v. Martinnant, 2 Term R. 100.

If a person gives an absolute bond to another who became surety for him, or who accepted bills of exchange drawn upon him by the obligor, not having effects in his own hand to answer them, it is a good consideration for the bond, and he is entitled to prove it as a debt under the commission, although he has not himself paid the money at the time.

Ex parte Cockshot, in Chan. 23d *March* 1792. Co Bankrupt Laws, 187.

If a bond, given by a trader to indemnify another who has become surety for him, be forfeited before bankruptcy, the surety may prove payments made by him, subsequent as well as prior to the bankruptcy.

The holder of a bill of exchange is entitled to prove his debt under a commission against the drawer, acceptor, and indorser, and to receive a dividend from each upon his whole debt, provided he does not in the whole receive more than twenty shillings in the pound. But there is a distinction in this case, where the creditor applies to prove his debt after having received a part, and where he applies to prove previously to having received any payment or composition; for if the creditor at the time of proving has received any part of the bill, he can only prove for so much as remains; but if, after having proved for the whole, he receives a part of the bill from any of the persons liable to pay it, he is entitled to a dividend upon the whole, provided it does not exceed twenty shillings in the pound upon such part as remains due.

Cooper v. Pepys, 1 Atk. 107. *Ex parte* Wildman, 1 Atk. 109. and 2 Ves. 113. *contrà*. *Ex parte* Lefebre, 2 P. Wms. 407.

Ex parte Leers, 6 Ves. 644.

And where a dividend is declared under another commission, under which the holder has already proved the bill, though the dividend has not been received the amount must be deducted from the sum proved.

Ex parte Worrall, 1 Cox. R. 309. *Ex parte* Bank of Scotland, 2 Rose, 198.

And if the creditor, not being prepared to prove, enters a claim for his whole debt, still, if a dividend is afterwards declared under the other commission, he is only entitled to prove for the residue, deducting such dividend.

Ex parte Walton, 1 Atk. 123. *Ex parte* Ryswicke, 2 P. Wms. 89.

In bills of exchange and promissory notes there is a double contract; the first between the principal debtor and creditor, and also an implied contract, that the principal debtor will indemnify the surety; so that if the creditor (the indorsee) comes upon the surety (the indorsor), the indorser or his assignees may come in against the original or principal debtor. But this, as before observed, must depend upon the time when the surety paid the debt; however, if the holder of the bill prove it under the commission against the person who ultimately ought to pay it, before the surety is called upon, the surety seems to have an equitable right to stand in the place of the holder, and receive the dividends upon his debt.

Ex parte Marshal, 1 Atk. 129.

Co. Bankrupt Laws, 195. *Ex parte* Smith, *in re* Lewis and

If a person discounts several bills for another who afterwards becomes a bankrupt, and the holder proves the aggregate amount of the bills, accepting them as a security, and any of the bills are afterwards paid in full, the amount of the bills paid must be deducted

deducted from the proof, and the future dividends be paid upon the residue of the debt only. In the same manner, where bills of exchange have been given as a security for a general balance, or for a debt exceeding their amount, and upon a bankruptcy the creditor has proved the whole amount of his debt, excepting such bills; if any of them are duly honoured, or by any means fully satisfied, they must be taken as a payment *pro tanto*, and the future dividends made on the residue of the debt. One *Lee* a bankrupt, was indebted to *Welch* and Company, bankers and partners, in 159*l.* 15*s.* 2*d.* for money by them advanced to him, and interest thereon, for securing which he indorsed to them two promissory notes and a bill of exchange. This debt they proved under the commission. After the proof *Welch* and Co. were fully paid one of the notes, amounting to 58*l.* 12*s.* by the drawer, and they delivered up the note to him; by which means the debt from the bankrupt was reduced to 101*l.* 3*s.* 2*d.* *Welch* and Co. insisted upon receiving their dividends upon the whole 159*l.* 15*s.* 2*d.* proved by them, notwithstanding the payment of the said note; upon which the assignees presented a petition to expunge or deduct the sum of 58*l.* 12*s.*, the amount of the note, from their debt, which, after hearing counsel, was ordered; and it was directed that *Welch* and Co. should be paid dividends only on the sum of 101*l.* 3*s.* 2*d.*, residue of the said sum of 159*l.* 15*s.* 2*d.* rateably, and in equal proportions, with the rest of the creditors of the bankrupt.

Potter, 10th *Nov.* and 1st *Dec.* 1789.

Ex parte Wallace, 24th *Dec.* 1788.

If a bill of exchange or promissory note is drawn by way of accommodation, yet the party holding it for a valuable consideration is entitled to prove to the whole extent of the bill or note, and receive the dividends, provided they do not amount to more than twenty shillings in the pound on the consideration which he gave.

Co. Bankrupt Laws, 196, 197, 198. *Ex parte* King, 10th *Nov.* 1786. *Ex parte* Crossley, 3 Bro. Chan. R. 237. ‖*Ex parte* De Tastet, 1 Rose, 10. *Ex parte* Martin, 2 Rose, 87. *Sed vide Ex parte* Reader, Buck, 381. Deacon, ch. 9. § 15.‖

‖But such bill cannot be proved by one of the parties to the accommodation against the other; nor can a person who takes it up for the honour of the drawer prove it against the estate of the acceptor, for he has only the same rights as the drawer.‖

Ex parte Lambert, 13 Ves. 179.

The liability to pay money is a good consideration for a bill of exchange, and will entitle the party to prove it, although the payment is to be made in future, or depends upon contingency. And this does not at all militate against the rule that contingent debts are not proveable (*a*); because the claim under the commission is upon an instrument creating an absolute debt at law, for which the subjecting one's self as a surety, or the delivering of counter-notes is a good consideration.

Toussaint v. Martinnant, *suprà*. *Ex parte* Maydwell, 16th *April* 1785, *in Can. Ex parte* Beaufoy, 22d *Jan.* 1787. *Ex parte* Lord Clanricarde, 27th *July* 1787. Co. Bankrupt Laws, 199, 200, 201, 202, 203. ‖Rolfe v. Caslon, 2 H. Black. 570. Buckler v. Buttivant, 3 East R. 72. (*a*) Contingent debts are now proveable by 6 G. 4. c. 16. § 56.‖

‖But it seems now settled, that a surety, claiming to come in as a creditor on an exchange of notes or acceptances, must, before

Ex parte Bloxham, 8 Ves. 531.

before proof, take up his own bills, or exonerate the bankrupt's estate from any liability on them.

Cowley v. Dunlop, 7 Term R. 565. Buckler v. Buttivant, 3 East R. 72. Chitty on Bills, 444. (6th edit.) Eden's B. L. 143. Deacon's B. L. 258.

Where parties exchange acceptances, the acceptance of one party is a good consideration for the counter-acceptance of the other; and each party's remedy against the other, is on the counter-acceptance of the other. And in such cases, if one party has been compelled to pay his own acceptances, he has no remedy against the other on any implied contract of indemnity, because he does not accept in consideration of a promise of indemnity, but in consideration of an actual executed delivery of other acceptances; and consequently, in case of the bankruptcy of such other he cannot prove the sums paid on his own acceptances; but his proof can only be on the acceptances of the other.

Ibid.

Whether bills are given in consideration of each other, is a question of fact depending on the particular circumstances of each case. The circumstance of a variation in the time or sums is evidence affecting this question, but not conclusive that they were not given in consideration of each other. If it is agreed that each party is to pay his own acceptance, this seems conclusive evidence that the bills were given in consideration of each other.

Cowley v. Dunlop, *supra*.

If the drawer of a bill accepted in consideration of his own acceptance take it up and pay it, after the bankruptcy of the acceptor, and the bill has not been proved by the holder under the commission, such drawer may prove it; but if the holder has proved and received dividends from the acceptor's estate it is otherwise. And therefore, if the assignees of such drawer (who has become bankrupt) pay dividends to the holder, who has also received dividends from the estate of the acceptor, the amount so paid by the assignees of the drawer cannot be proved against the acceptor's estate; for this would be coming upon the acceptor's estate twice for the same debt.

Ibid.

Ex parte Walker, 4 Ves. 373. *Sed vide* *Ex parte* Rawson, Jacob, 274.

Where two parties, holding accommodation acceptances of each other, became bankrupt, it seems settled that the cash balance alone is to be proved by one against the estate of the other, and that the bills are not to be taken into account.

Ex parte Earle, 5 Ves. 833. Lord *Eldon* is said to have observed that these cases cut the knot without untying it. Eden's B. L. 144.; and see Mr. Christian's observations on this intricate point, and his suggestion of another mode of taking the account. 2 Christ. B. L. 390.

Lord *Rosslyn* said, it struck him there were but two ways of taking the account between the two estates; either to consider all the bills as struck out entirely, or to consider them all as good bills: and he pronounced an order that the cash balance only should be proved.

Ex parte Metcalfe, 11 Ves. 404.; and see 1 Deacon's B. L. 260. *Ex parte* Read, 1 Glyn & J. 224.

Where one of two parties, who became bankrupt, owed the other 498*l.*, but the other had in his hands an accommodation bill for above 1000*l.*, which he had negotiated; it was held by Lord *Eldon*, that the cash balance alone was to be proved, and the estate of the party who had advanced the bill might retain the dividends on the proof, to reimburse his estate for the bill which was dishonoured.‖

If

. If the indorsor of a bill is compelled to pay it on account of the failure of the acceptor, he may prove upon the bill under the commission against the acceptor, although he did not take it up till after the commission issued.

The house of *Scott* and *Pearson* having had frequent occasions to get their bills discounted by persons at *Bristol*, and continuing to require a negotiation of paper, they applied to *Wilkins*, the bankrupt, and to one *Forsyth*, to assist them by lending their names to bills, which were to be discounted by *Samuel Span* of *Bristol*, for the use of *Scott* and *Pearson*, whose names were not to appear thereon. Accordingly (amongst others) three bills were drawn by *Forsyth* upon *Wilkins*, dated 28th of *May* 1787, for 800*l.* each, payable three months after date. Two to the order of *Samuel Span*, and the third to the order of the drawer; which last was indorsed in blank by the drawer. They were all accepted by *Wilkins* about the time of their being drawn. The three bills were put into the possession of *Scott* and *Pearson*, and were by them sent down to *Span* at *Bristol*, who indorsed them, and procured them to be discounted by other persons, and remitted the value to *Scott* and *Pearson*, in *Bristol* bank bills. Before the bills became due, both *Scott* and *Wilkins* became bankrupts; and afterwards *Span*, as the indorsor, was obliged to take them up. *Ex parte* Brymer, 30th *May* 1788.

Under these circumstances, *Span* was admitted to prove the bills under *Wilkins*'s commission. And this petition was preferred to have the proof of the debt expunged.

The Lord Chancellor considered it as a very clear point, that a bill of exchange negotiated after the bankruptcy of the acceptor might be proved under his commission, although the party was not possessed of it at the time of the bankruptcy, for the debt accrued by the acceptance; and that, as to the consideration, there was a clear consideration paid in this case, though not to *Wilkins*; and that *Span* became the holder of these bills in a fair manner; his lordship therefore dismissed the petition. See *Ex parte* Thomas, 1 Atk. 73. Bingley v. Maddison, Co. Bankrupt Laws, 24.

A new petition was preferred, praying that the former petition might be reheard and the debt expunged. 18th *July* 1788.

The Lord Chancellor, after hearing counsel, expressed himself to be very clearly of the same opinion. See Brooks v. Rogers, 1 H. Black. R. 640. Howis v. Wiggins, 4 Term R. 714. ‖The case of *Ex parte* Brymer, *suprà*, has been confirmed by the cases of *Ex parte* Seddon, cited 7 Term R. 570. *Ex parte* Hale, 3 Ves. 304. Cowley v. Dunlop, 7 Term R. 565., and Joseph v. Orme, 2 New R. 180. The above cases of Brooks v. Rogers and Howis v. Wiggins have been considered as inconsistent with these decisions; but the bill in Brooks v. Rogers and the note in Howis v. Wiggins, were indorsed by the payee and indorsor as a mere *surety for the accommodation* of the bankrupt, without consideration, and consequently no debt could be due from the bankrupt to such indorsor until the payment of the bill, which took place after the bankruptcy. *Vide* Cullen, p. 98. In the former cases the indorsor on a bill for valuable consideration was considered, on taking up the bill, to be remitted to his old right against the acceptor upon the bill. See also Houle v. Baxter, 3 East, 177.‖

‖But a person thus claiming to prove must have contracted a liability on the bill before the date of the commission; therefore, where a party received a bill indorsed in blank by the payee, and on negotiating it, instead of adding his own indorsement, *Ex parte* Isbester, 1 Rose, 21.

merely wrote above the blank endorsement, — "Pay *M'Cullum*, "or order (*a*)," and passed it to *M'Cullum*; and after the bankruptcy of the acceptor, he took up the bill and paid the money to *M'Cullum*, and struck out the words above the blank indorsement of the payee, and claimed to prove, his petition was dismissed, since he never had been liable on the bill, and could not, by voluntarily taking it up after the bankruptcy, become a creditor.

(*a*) That this does not render the party liable, see Vincent v. Horlock, 1 Camp. 442.

A bill taken without indorsement, is not provable against the estate of the party transferring it; and this, although such party may have made a private mark upon it, and may admit that he considered himself liable on all bills transferred with such mark.

Ex parte Roberts, 2 Cox. R. 171. Fenn v. Harrison, 3 Term R. 759. Fyds v. Clarke, 1 Esp. Ca. 447. *Ex parte* Shuttleworth, 5 Ves. 368.

But if there was an antecedent debt, and the bill is taken without indorsement, if it turns out bad, the demand for the antecedent debt may be resorted to, unless there is an express agreement that the party taking it is to run all risks.

Owenson v. Morse, 7 Term R. 65. *Ex parte* Blackburne, 10 Ves. 204. *Ex parte* Rathbone, Buck, 215.

If the debtor *deposit* a bill with his creditor, as a security, without putting his name to it, the bill is a pledge, and must be sold; and the residue after sale is provable under the commission against the debtor.

Ex parte Whitter, Cooke B. L. 147. *Ex parte* Hustler, 3 Madd. R. 117.

And although the bill is indorsed, still, if the intention is a deposit and not a sale, it will be considered only a pledge; and the party receiving it can only prove for the real amount of his debt.

Ex parte Towgood, 19 Ves. 230. *Ex parte* Burn, 2 Rose, 55.

The indorsee of a bill, indorsed *after* the bankruptcy of the acceptor, can only prove such debt against the acceptor's estate as the indorsor could have proved at the time of the commission.

Ex parte Deey, 2 Cox. R. 423.

So also, notes bought up *after* the bankruptcy of the maker, cannot be proved unless the persons possessing them at the date of the commission were individually entitled to prove in respect of them.

Ex parte Rogers, Buck, 490.; but see Buck, 479.

And a party receiving a bill *after* it is due, takes it subject to all the infirmities affecting it when he received it.

3 Term R. 80. 7 *Id.* 427.

Where the bankrupt employs an agent to get bills discounted, and the agent, for that purpose, indorses them, the estate must relieve the agent from his liability; unless indeed the bankrupt expressly refused an authority to indorse.

Ex parte Robinson, Buck, 113. Fenn v. Harrison, 3 Term R. 757.

Where the bankrupt has delivered a bill or note for valuable consideration, and has forgotten to indorse it, he may do so after his bankruptcy; for the transferree had the equitable claim on the bill, and the bankrupt having no beneficial interest in it, it did not pass to his assignees.‖

Smith v. Pickering, Peake's Ca. 50.; and see 1 Camp. R. 45. 2 Jac. & W. 243. 13 Ves. 206. 1 Jac. & W. 428. 1 Glyn & J. 407.

Where the acceptor of a bill of exchange becomes bankrupt, the holder may prove the amount of the bill under his commission,

Ex parte Smith, 3 Bro.

sion, and also maintain an action against the other parties; but if the acceptor of a bill, or maker of a note, become insolvent, or offer to compound their debts, the holder of a bill or note, according to such composition, thereby discharges the posterior parties, unless they have previously assented to his executing the composition deed.

Chan. R. 1. *Ex parte* Smith and others, 21st *Dec.* 1789. Co. Bankrupt. Laws, 214.

‖Where the drawer of a bill becomes bankrupt, and *his house is kept open by an agent of the assignees*, notice must be given of the dishonour of the bill, or the holder cannot prove upon it.‖

Rohde v. Proctor, 4 Baru. & C. 517.; and see 19 Ves. 216. *Qu.* Whether notice is necessary in all cases where a drawer or indorsor becomes bankrupt?

The costs and charges of protesting bills *before* an act of bankruptcy may be proved; but such costs accrued by protesting bills *after* an act of bankruptcy cannot.

Anon. 1 Atk. 150. *Ex parte* Moore, 2 Bro. Chan. R. 597. See Francis v. Rucker, Ambl. 672.

The 7 G. 1. c. 31. reciting, "Whereas, merchants and other "traders in goods, have been very often obliged, and more "especially of late years, to sell and dispose of their goods and "merchandizes to such persons as have occasion for the same, "upon trust or credit; and to take bills, bonds, promissory "notes, or other persons' securities for their monies, payable at "the end of three, four, or six months, or other future days of "payment; and the buyers of such goods becoming bankrupts, "and commissions of bankruptcy being taken out against them "before the money upon such bonds, notes, or other securities "became payable; it hath been a question, whether such per- "sons giving such credit on such securities should be let in to "prove their debts, or be admitted to have any dividend or "other benefit by the commission, before such time as such "securities became payable? which hath been a great dis- "couragement to trade, and great prejudice to credit within "this realm:" therefore enacts, "that every person who shall "give credit on such securities as aforesaid, to any person who "shall become bankrupt upon a good and valuable consider- "ation *bonâ fide* for any sum of money or other matter or thing "whatsoever, which shall not be due or payable at or before "the time of such persons becoming bankrupts, shall be ad- "mitted to prove his bills, bonds, notes, or other securities, "promise or agreement for the same, in like manner as if they "were made payable presently, and not at a future day; and "shall be entitled unto, and shall have and receive a pro- "portionable part, share, and dividend of such bankrupt's "estate, in proportion to the other creditors of such bankrupts, "deducting only thereout a rebate of interest, and discounting "such securities payable at future times, after the rate of five "pounds *per centum per annum*, for what he shall so receive, to "be computed from the actual payment thereof to the time such "debt, duty, or sum of money should or would have become "due and payable in and by such securities as aforesaid."

7 G. 1. c. 31. 2 Ld. Raym. 1549. 2 P. Wms. 395. 2 Stra. 867. Notwithstanding the preamble makes mention only of "securities "for the sale "of goods "and mer- "chandize," yet it is holden to extend to all sorts of bonds for the payment of money; and that the words "such "security," do not mean security for such a sort of debt, but security by bonds, bills, notes, &c. Pattison v. Bankes, Cowp. 540. Brooks v. Lloyd, 1 Term R. 17. 5 Wils. 17.

"And every person who shall become bankrupt shall be dis- ‖By 6 G. 4.

c. 16. § 53.‖ demands on policies of insurance, *bottomry* and *respondentia* bonds may be claimed before the loss happens, and proved when it does happen: and these debts shall in like manner be discharged by the certificate. It hath been holden, that insurances upon lives are within the 7 G. 1. c. 31., though not mentioned in the preamble. Cox v. Liotard, Dougl. 166.

"charged of and from all and every such bond, note, or other "security as aforesaid, and shall have the benefit of the several "statutes now in force against bankrupts, in like manner to all "intents and purposes as if such sum of money had been due "and payable before the time of his becoming bankrupt."

6 G. 4. c. 16. § 51. The 7 G. 1. c. 31. § 1. was held only to apply to *written* securities. Parslow v. Dearlove, 4 East, 438. Hoskins v. Duperoy, 9 East, 498. Sarratt v. Austin, 4 Taunt. 200. The present law is general in its terms.

‖By the fifty-first section of the 6 G. 4. c. 16. (by which the above act is repealed,) it is enacted, that any person who shall have given credit to the bankrupt, upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five *per cent.*, to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted.‖

Macarty v. Barrow, 2 Stra. 949. 3 Wils. 16.

A bill drawn before the bankruptcy, though not protested till after, is a debt that may be proved under the commission, for the debt accrues immediately upon the drawing.

Starey v. Barns, 7 East, 435.

‖And where a bill of exchange is accepted, and not refused payment by the acceptor till after the bankruptcy of the drawer, it may still be proved under the commission against the drawer. The court, without deciding that such a bill constituted a *debitum in præsenti*, thought it clearly within the words of the 7 G. 1. c. 31.

Clayton v. Gosling, 5 Barn. & C. 360.; and see 2 Glyn & J. 241.

And where a promissory note, payable with interest twelve months *after notice*, was expressed to be for *value received*, and the maker became bankrupt before any notice, it was held clearly within the 7 G. 1. c. 31. and proveable.‖

Ex parte East India Company, 2 P. Wms. 395.

A. having contracted with the *East India* Company at one of their sales for the purchase of a parcel of goods, to be paid for at a future day, before that day became a bankrupt. Lord *King* held this case not within the above statute, because the goods were not delivered, nor was the contract signed by the party.

Tully v. Sparks, 2 Ld. Raym. 1546.

‖*Of contingent debts.*‖ — Contingent debts are said not to be included in the statute 7 G. 1.; because, it being uncertain whether they will ever become due or not, it is impossible to make such abatement of *5l. per cent.* as the act directs. And this doctrine is now constantly followed and admitted. Lord Chancellor *King*, indeed, declared, that though a debt be contingent, when the obligor becomes a bankrupt, yet if the contingency happens before the distribution made, such contingent creditor may come in

Ex parte Caswell, 2 P. Wms. 497. ‖See 6 G. 4. c. 16. § 56. *post*, 601.‖

in for his debt; or if the contingency happen before a second dividend, the creditor may come in for his proportion thereof. But this has been since overruled, and the contrary position established; for Lord *Hardwicke* said, that Lord *King's* was barely an *obiter* opinion; and that Lord *Talbot* afterwards doubted of Lord *King's* assertion, and that he himself had differed from him entirely on a former occasion, and that he still adhered to his opinion.

Ex parte Groome, 1 Atk. 118.

One having only a cause of action, cannot come in and prove it as a debt; because the damages that may be given are considered merely as contingent.

Therefore, if a lessee ploughs up meadow ground, for which he is bound to pay the lessor a certain sum of money, as a penalty, that penalty cannot be proved as a debt under the commission: nor, if a man be bound in an obligation, in a certain sum, to perform covenants, and the obligor, before he becomes a bankrupt, breaks those covenants, can the obligee prove this as debt under the commission.

3 Wils. 270.

So where in an ejectment a verdict was given for the plaintiff with nominal damages, but before the judgment could be entered, the defendant became a bankrupt, and in the term following the plaintiff signed judgment, and had costs *de incremento* then taxed and allowed to him; Lord *Henley* held these costs did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the same as a debt under the commission.

Ex parte Todd, 3 Wils. 270. ‖See as to costs, *antè*, p. 590.‖

And where, in a case of assault and battery before bankruptcy, during the bankruptcy the plaintiff had a verdict with damages, but had not judgment till after the certificate; the court were of opinion the plaintiff could not come in under the commission, that it was not a provable debt, or a debt due at the time of the bankruptcy.

Walter v. Shirock, 3 Wils. 272. ‖See *Ex parte* Hill, 11 Ves. 646. *Ex parte* Charles, 14 East, 197, and *antè*, p. 590.‖

‖Where the creditor's claim may either be the ground of an action of *tort* for damages, or of contract for a liquidated debt, he may, if he please, waive the *tort* and claim on the contract, and prove his debt; but if he does not do so, he may proceed on his claim *in tort* after the bankruptcy of the defendant, and the claim will not be barred.

Thus, where the plaintiff delivered to the defendant a bill to receive payment from the acceptor when due, and the defendant wrongfully discounted the bill and applied the money to his own purposes, and afterwards became bankrupt; it was held, that the bankruptcy was no bar to an action of trover for the bill; for though the plaintiff might have waived the *tort*, and proved for the exact sum received by the defendant, he was not bound to do so.

Parker v. Norton, 6 Term R. 695.; and see Johnson v. Spiller, Dougl. 167. Forster v. Surtees, 12 East, 605. *Ex parte* Dobson, 7 Vin. Abr. 74.

A demand, arising on a breach of a covenant by the bankrupt to build certain houses in a given time, is only for unliquidated damages, and cannot be proved.

Banister v. Scott, 7 Term R. 489.

Hammond v. Toulmin, 7 Term R. 614.

Nor can a claim on a covenant that the defendant had a good title to a frigate sold by him to the plaintiff.‖

Ex parte Sneaps, 4th *March* 1782.

Where one *Sneaps* was committed for a contempt in non-payment of costs, which were taxed subsequent to his bankruptcy, but the order for the taxation was made before it; upon a motion for his discharge, upon the ground of the debt being discharged by his certificate, it became a question, whether this was to be considered as a debt arising *anterior* or *posterior* to the bankruptcy? It was argued, that all proceedings under an order of court were to have relation in point of time to that order; and consequently, that as the order was made before the bankruptcy, the debt was to be considered as having originated in that order, and ought to be discharged by the certificate.

The Lord Chancellor observed, It is generally true, that, where several distinct acts are necessary for the completion of any business, the completion refers to the inchoation. But the question is, whether the making an order can be considered as such inchoation? And he said, he thought it clearly could not; that it might as well be said, the damages assessed in trespass are to have reference to the trespass, which they certainly have not, for they have their origin in the judgment. He took it to be clear, that in all instances in the Court of Chancery, the *taxation* constitutes the demand; and as the taxation was subsequent to the bankruptcy, the debt is therefore so, and consequently he could not discharge the bankrupt.

Cottrell v. Hooke, Dougl. 93. As to covenant to pay rent, see Ludford v. Barber, 1 Term R. 86., and Hornby v. Houlditch, there cited.

Where an annuity is secured by a deed of covenant, the growing payments are contingent; and therefore an action may be brought, notwithstanding the bankruptcy and certificate of the covenantor.

‖But by 6 G. 4. c. 16. § 54. the annuity creditor may prove for the value of the annuity by whatever assurance the annuity is secured, and whether there are or are not arrears due at the time of the bankruptcy; and see 1 Deacon, 228.; and by § 55. (see *post*, 604.) the certificate is made a discharge from all claims, either of the annuitant or the surety, in respect of the annuity; and see § 121. and *antè*, p. 586.‖

Utterson v. Vernon, 3 Term R. 539. and 4 Term R. 570. *Ex parte* Bartlett, 19th *May* 1792, S. P. Co. Bankrupt Laws, 245.

If a person lends a trader stock in the public funds, to be replaced as stock, without naming any particular time at which it is to be invested; if the trader becomes bankrupt before he has been required to replace the stock, it is a contingent debt, and cannot be proved.

‖*Ex parte* Day, 7 Ves. 501. *Ex parte* Alcock, 1 Rose, 523. 1 Ves. & B. 176. *Ex parte* King, 8 Ves. 334.‖

Ex parte Barker, 9 Ves. R. 110.

‖So also a debt payable at a future uncertain period, as within three months after the death of two obligors, or the survivor of them, was held contingent, and could not be proved.

Winter v. Mousely, 2 Barn. & Ald. 802. *Sed vide* 5 Barn. & C. 360.

So also a bond conditioned to pay money to the executors of the obligee, and interest on certain days, or within twenty days next after demand, when no demand was made before the bankruptcy.

So

So also money due on a covenant to pay money on demand, and no demand made before the commission issued, cannot be proved. *Ex parte* Campbell, 16 Ves. 248. *Ex parte* Mare, 8 Ves. 535.

So also where a warrant of attorney was given by a debtor to confess judgment against him, but judgment not to be entered up till a contingency, which had not happened at the time of the bankruptcy; *aliter*, if the judgment had been entered immediately, subject to a defeasance on a contingency, for then the judgment would form a *debitum in præsenti*. Staines v. Planck, 8 Term R. 586. For other instances of debts not proveable by reason of being contingent, see Overseers of St. Martin v. Warren, 1 Barn. & Ald. 491. Miller v. Whittenbury, 1 Camp. 428. Bannister v. Scott, 6 Term R. 489. *Ex parte* Young, 5 Madd. R. 124.; and see Co. Bankrupt Law, 221. *et seq.*

But now, by 6 G. 4. c. 16. § 56., it is enacted, "that if any "bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not "have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think "fit, apply to the commissioners to set a value upon such debt; "and the commissioners are hereby required to ascertain the "value thereof, and to admit such person to prove the amount so "ascertained, and to receive dividends thereon; or if such value "shall not be so ascertained before the contingency shall have "happened, then such person may, after such contingency "shall have happened, prove in respect of such debt, and "receive dividend with the other creditors, not disturbing any "former dividends; provided that such person had not, when "such debt was contracted, notice of any act of bankruptcy by "such bankrupt committed."‖ 6 G. 4. c. 16. § 56. *Qu.* Upon what principle are debts merely contingent to be valued by the commissioners? The section has been held to apply to debts payable on a contingency which happened before the act took effect. 1 Mont. & Mac. 293.

In collateral undertakings, if the party engaging to secure the debt of another, himself becomes bankrupt before that debt is payable by the principal, the creditor cannot prove under his commission. Alsop v. Price, Dougl. 155. *Ex parte* Adney, Cowp. 460. ‖The 49 G. 3. c. 121. in no way affected these collateral undertakings of a bankrupt; and although it has been suggested that the 56th section of the present statute will apply to them, see Eden's B. L. 154., it is difficult to see how they can be considered as "*debts* contracted by the bankrupt payable on a contingency," within the language of that section, at least in cases where the principal debtor has not made default before the bankruptcy of the surety. It is now fully settled that such undertakings must be in writing, and express the consideration on the face of them. Wain v. Walters, 5 East R. 10. Saunders v. Wakefield, 4 Barn. & Ald. 595.‖

‖Thus, where the bankrupt had entered into a covenant that, in case certain instalments of a debt should not be duly paid to *A.* by a third party, he, the bankrupt, would pay them on demand, it was held that the bankruptcy and certificate were no discharge of this covenant as to any instalments growing due after the bankruptcy, since this liability could not be proved as an annuity on a valuation under the 17th section of 49 G. 3. c. 121.; nor was it a credit given to the bankrupt within the ninth section of that act. — *Quære*, whether such a case would be within the fifty-sixth section, *supra*. Hoffham v. Fourdrinier, 5 Maule & S. 21.; and see *Ex parte* Minet, 14 Ves. 189. *Ex parte* Gurdom, 15 Ves. 286.

A mere claim for unliquidated damages for breach of a contract to accept and pay for goods, which contract was not broken till Boorman v. Nash, 9 Barn. & C. 145.;

till after the bankruptcy of the vendee, is not a contingent debt proveable under this section.‖

and see Atwood v. Partridge, 4 Bing. 209.

Hockley v. Merry, 2 Stra. 1045. ‖See the 52d section, p. 603.‖

Where a man becomes bail for another, it is considered as a contingent debt; and if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commission.

Accordingly, where the defendant, the 9th of *May* 1734, was bail on a writ of error, and, on the 25th of *October* 1734, committed an act of bankruptcy, and after a commission obtained his certificate; on the 12th *November* 1735, the judgment was affirmed; and, in an action of debt upon the recognizance, he pleaded his discharge, and that the cause of action arose before his bankruptcy; Lord *Hardwicke* C. J., on the trial, held, that the defendant was not discharged, according to the case of *Tully* v. *Sparkes*, for this was but a contingent debt, for which the plaintiff could not come in under the commission.

Coulson v. Hammon, 2 Barn. & C. 626.; and see 1 Burr. 436. Cowper, 25.

‖Where a commission issued against bail to the sheriff, in an action by original before the *quarto die post* of the return of the writ, the bond was not forfeited at the bankruptcy, and consequently was not proveable; but if it issues after the *quarto die post*, and the defendant has not appeared, it is proveable, since the bond is in such case forfeited *before* the bankruptcy.

Campbell v. Jameson, 1 Bing. R. 320. *Qu.* Whether these two last cases would now fall within the fifty-sixth section?

A bond by a trading member of parliament, pursuant to 4 G. 3. c. 33. was held not proveable when the obligor became bankrupt before judgment in the action in which the bond was obtained; for till the judgment the debt was contingent.‖

Taylor v. Mills, Cowp. 525. Crookshank v. Thompson, 2 Stra. 1160. 3 Wils. 16. Chilton v. Whiffen, 3 Wils. 13. Young v.

Where a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt that he can prove under a commission; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally. But if the party engaging to pay the debt of another is taken in execution for that debt, his imprisonment is considered as a payment and satisfaction of the debt, sufficient to give him a right to prove under the commission.

Hockley, 2 Black. R. 840. Heskuyson v. Woodbridge, Dougl. 166. Taylor v. Mills, Cowp. 525 Kettier v. Raynes, in Canc. *June* 12. 1784. Co. Bankrupt Laws, 258. Paul v. Jones, 1 Term R. 599.

Goddard v. Vanderheyden, 3 Wils. 262.

This principle also extends to the case where one man is bail for another, it having been determined that he cannot prove as a creditor under a commission against the principal, till he has paid the debt for which he became answerable; and that if the act of bankruptcy committed by the principal is prior to the bail's having paid the debt, he cannot prove it under the commission.

Ex parte Atkinson, Baker, and Darling, *in re* Brigham, 28th *July* 1792. Co. Bankrupt Laws, 264.

But the hardship of not admitting a surety to prove a debt which he pays subsequent to the commission, is in some measure relieved when the original creditor has made his proof before he calls upon the surety for payment; because the surety is holden to have an equitable right to stand in the place of the original creditor, and receive dividends upon his proof.

‖And

¶And now, by the 6 G. 4. c. 16. § 52., (which re-enacts the provision of 49 G. 3. c. 121. § 8.) it is enacted, "that any person "who, at the issuing the commission, shall be surety or liable for "any debt of the bankrupt, *or bail for the bankrupt, either to the "sheriff or to the action* (*a*), if he shall have paid the debt, or any "part thereof, in discharge of the whole debt (although he may "have paid the same after the commission issued), if the creditor "shall have proved his debt under the commission, shall be en- "titled to stand in the place of such creditor, as to the dividends, "and all other rights under the said commission which such cre- "ditor possessed or would be entitled to in respect of such proof; "or if the creditor shall not have proved under the commission, "such surety, or person liable, *or bail*, shall be entitled to prove "his demand in respect of such payment, as a debt under the "commission, not disturbing the former dividends, and may re- "ceive dividends with the other creditors, although he may have "become surety, liable, *or bail* as aforesaid, after an act of bank- "ruptcy committed by such bankrupt; provided that such person "had not, when he became such surety *or bail*, or so liable as "aforesaid, notice of any act of bankruptcy by such bankrupt "committed."

6 G. 4. c. 16. § 52. (*a*) This is new.

It had been holden, that neither bail to the sheriff nor bail above were within the operation of 49 G. 3. c. 121. § 8., and, consequently, such bail paying the debt and costs subsequent to the commission were entitled to recover the amount from the bankrupt, notwithstanding his certificate; but they are both expressly included in the above enactment.

Hewes v. Mott, 6 Taunt. 329. Newington v. Keeys, 4 Barn. & Ald. 493.

A person purchasing the debt of one entitled to prove may prove in his place under the statute.

Ex parte Lloyd, 1 Rose, 4.

Where two partners, on dissolving partnership with a third, assigned over to him all the effects, and took from him a covenant to pay all the debts and indemnify the two against them; and the continuing partner becoming bankrupt, the others were obliged to pay some of the partnership debts after the bankruptcy, it was held that they might prove under the commission, as "persons liable," within the 49 G. 3. c. 121.; for though the partners were all jointly liable to the creditors at law, yet in equity the continuing partner was solely liable, and the others were his sureties.

Wood v. Dodgson, 2 Maule & S. 195.

Where a party accepted a bill as security for another, after which a commission issued against such other person, which was superseded, and the acceptor then accepted a second bill for the amount of the former, with the addition of interest and stamp, and a subsequent commission issued, after which the second bill was paid, it was held, that the second bill was only a continuation of the original suretyship, and consequently within the statute. Had it been a new suretyship, the debt could not have been proved, since it was contracted after a commission issued and superseded, which, by the 49 G. 3., is declared notice of the bankrupt's insolvency. — *Note.* The words in the present act

Stedman v. Martinnant, 13 East, 427.

act are merely "notice of an *act of bankruptcy* by such bankrupt committed."

Soutten v. Soutten, 5 Barn. & A. 852.

The statute only applies to cases of a payment of the *whole debt*, or of a part *in discharge of the whole*, and not to a payment of a part in discharge of the personal liability of the surety.

Westcott v. Hodges, 5 Barn. & A. 12.

A surety in a bond to the crown conditioned for the bankrupt's accounting, as a subdistributor of stamps, for all stamped vellum, *&c.* received by him, is within the statute; and having, after the bankrupt had obtained his certificate, paid a sum of money to the crown on the bond, may prove it under the commission.

M'Dougall v. Paton, 8 Taunt. 584.; and see Welsh v. Welsh, 5 Barn. & A. 187. *Ex parte* Serjeant, 2 Glyn & J. 23. Tuck v. Fyson, 6 Bing. 330.

In order to make a case of suretyship within the statute, the debt of the bankrupt must be a debt *actually due at the time of the commission*, and not growing due afterwards: therefore where *A.* was surety for *B.* that he should perform certain articles of agreement, by which an annual rent was payable by *B.*, and rent became due under the agreement *after* the bankruptcy of *B.*, which was paid by *A.*, it was held that this payment was not a debt proveable by *A.* within the statute, and consequently the certificate was no bar to his suing the bankrupt for the money.

Qu. Whether this case would now be affected by the 56th section of the 6 G. 4. c. 16. which enables contingent debts to be proved on a valuation. See 1 Deacon, p. 295. *notâ.*

Ex parte Brooke, 2 Rose, 334. *Sed vide Ex parte* Turner, 5 Ves. 343.

With respect to the extent of the surety's proof, it is settled, that where the creditor has a distinct debt beyond that for which the surety is liable, the surety is entitled to the dividend on the debt for which he was surety, though this diminishes the creditor's dividends on his distinct debt.

Ex parte Rushworth, 10 Ves. 409. Paley v. Field, 12 Ves. 435.

Welsh v. Welsh, 4 Maule & S. 332. Flanagan v. Watkins, 3 Barn. & A. 186.

A surety in an annuity deed was held not within the provisions of 49 G. 3. c. 121.; but the 55th section of the 6 G. 4. c. 16. has provided for this case.

§ 55.

By § 55. "it shall not be lawful for any person entitled to "any annuity granted by any bankrupt to sue any person who "may be collateral surety for the same, until such annuitant shall "have proved under the commission for the value of such annuity, and for the arrears thereof; and if such surety, after such "proof, pay the amount proved as aforesaid, he shall be thereby "discharged from all claims in respect of such annuity; and if "such surety shall not (before any payment of the said annuity "subsequent to the bankruptcy shall have become due), pay the "sum so proved as aforesaid, he may be sued for the accruing "payments, until such annuitant shall have paid or satisfied the "amount so proved, with interest thereon at the rate of four per "cent. per annum, from the time of notice of such proof and of the "amount thereof being given to such surety; and after such "payment or satisfaction such surety shall stand in the place of "such annuitant, in respect of such proof as aforesaid, to the "amount so paid or satisfied as aforesaid by such surety; and the "certificate of the bankrupt shall be a discharge to him from all "claims

See 1 Deacon, 232.; and see *ante*, p. 586.

"claims of such annuitant or of such surety, in respect of such "annuity; provided that such surety shall be entitled to credit in "account with such annuitant for any dividends received by such "annuitant under the commission, before such surety shall have "fully paid or satisfied the amount so proved as aforesaid."‖

Where the contingency, upon which money is made payable to a wife, is *the bankruptcy or insolvency of the husband*, such debt cannot be proved under the commission, ‖since such debt is not only contingent but also a fraud upon the bankrupt laws.‖ *Ex parte* Hill, Co. Bankrupt Laws, 290. *Ex parte* Cooke, 8 Ves. 353. Higinbotham v. Holme, 19 Ves. 88. *In re* Murphy, 1 Scho. & Lef. 44. But the wife's own fortune may be settled on the husband until he fails, and then to her separate use. Lockyer v. Savage, 2 Stra. 947. ‖*In re* Meagher, 1 Scho. & Lef. 179. *Ex parte* Hinton, 14 Ves. 598. *Ex parte* Young, 3 Madd. 124.‖

Though it be established agreeably to the general rule (*a*), that a wife shall not come in as a creditor on a mere contingent provision, yet if the assignees go into equity to enforce the performance of a trust, as they require equity they shall be obliged to do equity, and secure the settlement to her. One *Blanchard*, a cabinet-maker, married the sister of *Calliford*, who had 500*l.* portion secured by land. *Blanchard*, on his marriage, gave a bond to leave his intended wife, if she survived him, 500*l.* or a third of his estate, at her election. *Blanchard* became a bankrupt. A bill was brought by the assignees to have the 500*l.* raised by a sale, and decreed accordingly; but with this, that the wife should come in as a creditor upon the 500*l.* bond, and what should be paid in respect thereof should be put out at interest, and received by the creditors, during the life of the husband; and if the wife survived, then the money should be paid to her. (*a*) *Ex parte* Caswell, 2 P. Wms. 497. *Ex parte* Jefferies, Vin. Abr. tit. Creditor and Bankrupt, pl. 7 *Ex parte* King, Dav. 254. *Ex parte* Smith, *Ex parte* Brown, Co. Bankrupt Laws, 267. 271. Holland v. Calliford, 2 Vern. 662.

A debt contracted subsequent to the bankruptcy, though the creditor have no notice of it, cannot be proved. 2 Vern. 94. ‖2 Bos. & Pull. 1.‖

‖But now by § 47. of 6 G. 4. c. 16. (re-enacting 46 G. 3. c. 135. § 2.) every person with whom a bankrupt has *bonâ fide* contracted any debt or demand before the issuing the commission, shall, notwithstanding a prior act of bankruptcy, be admitted to prove; provided such person had no notice at the time of contracting such debt of any act of bankruptcy committed by such bankrupt. 6 G. 4. c. 16. § 47.

A party whose debt is contracted before the act of bankruptcy *on which the commission issues*, may prove, notwithstanding a prior act of bankruptcy of which he has notice.‖ *Ex parte* Bowness, 2 Maule & S. 479.

A debt made void by statute ought not to be permitted to be proved, as a debt on a usurious contract; and though the rule of the Court of Chancery is, upon a bill to be relieved against demands of usurious interest, not to make void the whole debt, but to make the party pay what is really due; in a commission of bankruptcy the assignees have a right to insist that the whole is void, as an usurious contract. And unless the assignees and creditors submit to pay what is really due, the Lord Chancellor has not power to order it, and applications of this nature have been frequently refused. *Ex parte* Skip, 2 Ves. 489. ‖*Ex parte* Scriviner, 5 Ves. & B. 14.‖

A. gave a note of hand, without consideration, payable to *B.* *Ex parte*

two

Thompson, 1 Atk. 125. ‖As to what transactions are usurious, and what are not, see tit. *Usury*, Vol. VIII.‖

two months from the date, for 100*l.*; *B.* indorsed it over to *C.*, allowing a discount of a guinea and a half, being at the rate of 9*l.* per cent. When the note became due, *C.* took a joint bond from the drawer and indorsor for the 100*l.*, though he paid only 98*l.* 8*s.* 6*d.* The commissioners had admitted him as a creditor under a commission against the drawer; but, finding out this fact afterwards, they ordered his dividend to be stopped. The Lord Chancellor, upon his petition, would not direct him to be admitted to his dividend, but ordered an issue at law to try whether the bond was usurious.

Lowe v. Waller, Dougl. 716. ‖(*a*) But by the 58 G. 3. c. 93. no bill or note,

But whatever were the event of the issue directed by the court in this case, it should seem, if the contract was originally usurious, the note is void, and cannot be proved even in the hands of an innocent indorsee; for, upon an action brought *on it*, the defendant's plea of usury would be a complete bar. (*a*)

though drawn for an usurious consideration, shall be void in the hands of an indorsee for valuable consideration, who has no notice of the usury.‖

Ex parte Moggeridge, Co. B. L. 203.; and see *Ex parte* Daniels, 14 Ves. 191.

‖A debt founded on an illegal contract cannot be proved.‖ [Thus a debt on goods sold to be sent to India, contrary to the statute, cannot be proved unless it appears that the vendor did not know of their destination.]

Ex parte Dyster, 1 Meriv. R. 174. 2 Rose, 245.

‖If a broker act ostensibly as broker, where he is in fact a principal, this is fraudulent, and he cannot prove a debt arising out of such a transaction. But a *London* broker may prove for *bonâ fide* debts due to himself, on transactions in which he appeared as principal, notwithstanding his bond and oath not to deal on his own account; for there is no express statutory prohibition against so dealing.

Ex parte Bell, 1 Maule & S. 751. A seller abroad of contraband goods is entitled to prove unless he *participated* in smuggling them into this country. 2 Glyn & J. 227. And as to illegal contracts, see further, *antè*, tit. *Assumpsit*.

Money advanced on an illegal contract cannot be proved. Thus, if one of several partners engage with *A. B.* in illegal insurances, and advance partnership monies to *A. B.* on account of them, and the partner die, his surviving partners (though innocent of the transaction) cannot prove such monies as a debt against the estate of *A. B.* who has become bankrupt.

Ex parte Mather, 3 Ves. 373. *Ex parte* Bulmer, 13 Ves. 314.

Where the consideration of a contract is partly legal and partly illegal, though the security is void, yet, if the transactions can be separated, so much of the debt as is legal may be proved.

Gray v. Fowler, 1 H. Black. 462. *Sed vide* Scott v. Gillmore, 3 Taunt. 226.

Ex parte Dewdney, 15 Ves. 498.

A debt barred by the statute of limitations cannot be proved.

Ex parte Cator, 1 Bro. C. C. 267.

Nor a debt on insufficient consideration.

2 Scho. & Lef. 228.

But a voluntary bond may be proved, to be payable only out of the surplus.

Gilham v. Lock, 9 Ves. 612.

And a bond given for arrears of a voluntary bond, is a bond for good consideration.‖

[In

[In case of debts uncertain in point of liquidation, as between two merchants in balancing accounts, the matter rests upon a claim, to ascertain the sum that was due at the time of the bankruptcy. So where a creditor cannot ascertain his debt with certainty sufficient to enable him to swear to it, or is not able in other respects satisfactorily to substantiate it; or where the agent of a creditor cannot produce his authority, and in many other cases where there appears a probable foundation of a demand, though not sufficiently made out, it is usual for the commissioners to suffer *a claim to be entered;* but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not substantiated in reasonable time, the commissioners may strike it out, and they generally do so before a dividend is declared, unless sufficient reason is offered to them for prolonging the time; but the creditor is notwithstanding afterwards at liberty to prove his debt and receive his share upon any future dividends. However, in such cases where there has not been gross laches, the Lord Chancellor will make an order that such creditor shall be paid his proportion of the dividend out of the money in the hands of the assignees, upon condition that it does not break in upon any former dividend.] 3 Wils. 271. Co. Bankrupt Laws, 319. ‖See Deacon, ch. 9. § 26.‖

‖Before the late act, where a debt was improperly proved, it was necessary to petition the Chancellor, the commissioners having no power to expunge it. But by the sixtieth section, whenever it shall appear to the assignees, or to two or more creditors, each having proved a debt of 20*l.* or upwards, that a debt proved is not justly due in whole or in part, they may apply to the commissioners to have it expunged. The commissioners are empowered to summon the person having proved, together with any one else whose evidence is material, and may upon the evidence expunge it in whole or in part. Power is reserved to apply in the first instance to the Lord Chancellor, or by way of appeal. 6 G. 4. c. 16. § 60.

By the 6 G. 4. c. 16. § 99. it is enacted, "that any bankrupt or other person who shall in any examination before the commissioners, or in any affidavit or deposition authorized or directed by the present or any act hereby repealed, wilfully and corruptly swear falsely, being convicted thereof, shall suffer the pains and penalties in force against wilful and corrupt perjury, and where any oath is hereby directed or required to be taken or administered, or affidavit to be made by or to any party, such party, if a Quaker, shall or may make solemn affirmation, and such Quaker shall incur such danger or penalty for refusing to make such solemn affirmation in such matters, when thereto required, as is hereby provided against persons refusing to be sworn, and all Quakers who shall in any such affirmation, knowingly and wilfully affirm falsely, shall suffer the same penalties as are provided against persons guilty of wilful and corrupt perjury, and all persons before whom oaths or affidavits are hereby directed to be made, are respectively 6 G. 4. c. 16. § 99.

"empowered

"empowered to administer the same, and also such solemn "affirmation as aforesaid."

Ex parte Bennett, 2 Atk. R. 527. *Ex parte* Vere, 1 Rose, 281. *Ex parte* Richardson, 14 Ves. 184. *Ex parte* Peele, 1 Rose, 435.; and see 1 Deacon, 398.

Where a creditor agrees to take a composition payable by instalments, and the debtor becomes bankrupt, one instalment having been paid, and one remaining due and unpaid, the creditor may retain the instalment paid, and prove for the residue of the original debt. But where there has been no default whatever before the bankruptcy, as where two instalments have been paid and before the third becomes due the bankruptcy intervenes, there the proof can only be for the outstanding instalment.‖

(F) Of the Bankrupt's Estate and Effects, to which the Commissioners or Assignees are entitled, when it shall be said to be vested in them; and herein of fraudulent Dispositions by the Bankrupt.

6 G. 4. c. 16. § 12.

‖BY 6 G. 4. c. 16. § 12. (in lieu of 13 Eliz. c. 7. § 2.) the Lord Chancellor shall have power upon petition in writing against any trader having committed any act of bankruptcy, by any creditor of such trader by commission under the great seal, to appoint such persons as to him shall seem fit, who shall have full power and authority to take such order and direction with the body of such bankrupt as thereinafter mentioned, as also with all his lands, tenements, and hereditaments, both within the realm and abroad, as well copy or customary hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, *&c.* as such bankrupt may lawfully depart with all, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts wheresoever they may be found, and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt.

6 G. 4. c. 16. § 65.

And by § 63. (in place of 1 Jac. 1. c. 15. § 13., 5 G. 2. c. 30. § 26.), the commissioners shall assign to the assignees for the benefit of the creditors, all the present and future personal estate of such bankrupt, wheresoever found; and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, and such assignment shall vest the property in such debts in such assignees as fully as if the assurance whereby they are secured had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover or release the same, neither shall the same be attached as the debt of the bankrupt, according to the custom of London or otherwise, but such assignees shall have like remedy to recover the same as the bankrupt might have had if he had not been bankrupt.

And

§ 64.

And by the 64th section (in lieu of 13 Eliz. c. 7. § 11. 5 G. 2. c. 30. § 26.) the commissioners shall by deed indented and enrolled in any of his majesty's courts of record convey to the assignees for the benefit of the creditors, all lands, *&c.* * except copy or customaryhold in *England*, *Scotland*, *Ireland*, or in any of the dominions, plantations, or colonies belonging to his majesty,* to which any bankrupt is entitled in any of such lands, *&c.* and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, *&c.* as he shall purchase, or shall descend, be devised, revert to, or come to him before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, and every such deed shall be valid against the bankrupt, and against all persons claiming under him: *Provided that where according to the laws of any such plantations or colony such deed would require registration, enrolment, or recording, the same shall be registered, enrolled, or recorded according to the laws of such plantation or colony; and no such deed shall invalidate the title of any purchaser for valuable consideration prior to such registration, enrolment, or recording, without notice that the commission has issued.*

‖The clauses between * * are new. As to copyholds, see *post*, p. 611.‖ The enrolment operates not by relation to the date so as to to pass an estate *ab initio*. Perry v. Bowes, Vent. 360. Sir T. Jones, 196. S. C. Carth. 178. S.C. ‖Nor does it operate by relation to the act of bankruptcy, so as to vest the freehold in the assignees from that time; it remains in the bankrupt till the conveyance. Doe v. Mitchell, 2 Maule & S. 446.; and see Bainbridge v. Pinhorn, Buck, 135.‖ [As to *future* real estates there must be a new bargain and sale. *Ex parte* Proudfoot, 1 Atk. 255.] ‖Carleton v. Leighton, 3 Meriv. R. 667. *Aliter* of personal estate. Kitchen v. Bartsch, 7 East, 53. Nias v. Adamson, 3 Barn. & A. 228.‖

§ 65.

And by the 65th section (in place of 21 Jac. 1. c. 19. § 12.) the commissioners, by deed indented and enrolled as aforesaid, shall make sale for the benefit of the creditors of any lands, *&c.* situate either in *England* or *Ireland*, whereof the bankrupt is seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, and every such deed shall be good against the said bankrupt, and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest, in or out of any of the said lands, *&c.*

§ 66.

And by the 66th section (in lieu of 5 G. 2. c. 30. § 66. and 3 G. 4. c. 81. § 5.) the Lord Chancellor may upon petition order any conveyance or assignment either of the real or personal estate of the bankrupt, made either to assignees appointed by the commissioners or chosen by the creditors, and any enrolment thereof, to be vacated; provided that no title of any purchaser under any conveyance prior to such order be thereby affected, and that no estate previously barred be thereby revived; and the Lord Chancellor may order the commissioners to execute a new assignment or assignments of the debts and effects unreceived and not disposed of by the then assignee or assignees,

to any other person or persons, to be chosen by the creditors as aforesaid, or to execute a new conveyance of the real estate unsold or not conveyed to such person or persons, and in such manner, as the Lord Chancellor shall direct; and if such new assignment shall be ordered, the debts and personal estate of the bankrupt shall be thereby invested in such new assignees, and it shall be lawful for them to sue for the same, and to discharge any action or suit, or to give any acquittance for such debts as effectually as the former assignees might have done; and the commissioners shall in the two *London Gazettes* next after the removal of such assignee or assignees, and such new appointment as aforesaid, cause advertisements to be inserted giving notice of such removal and appointment, and directing persons indebted to the bankrupt's estate not to pay any debts to the assignee or assignees so removed; and if such new conveyance as aforesaid shall be ordered as aforesaid, it shall be valid without any conveyance from any former assignee or assignees, or his or their heir or assigns, provided that the order so made for vacating any bargain and sale be enrolled; and any bargain and sale to be executed in pursuance thereof shall be enrolled in the same court as the first bargain and sale of the same estate was enrolled.‖

In the construction of the former statutes the following opinions have been holden.

Chan. Ca. 71. 2 Vern. 97. S. C. cited.

If a lessor covenants with his lessee to renew his lease, and the lessee becomes a bankrupt, the commissioners cannot assign this covenant.

Chan. Ca. 71. 2 Vern. 91.

The commissioners may sell an equity of redemption.

3 Lev. 13, 14. Keb. 11, 12. 722. 2 Sid. 69. 114. 176. *Vide* Salk. 109. ‖(*a*) Now 12 months. 6 G. 4. c. 16. § 86.‖

If a man commits an act of bankruptcy, and after continues in possession of his lands four years, and then sells, and after commits another act of bankruptcy, and two years after a commission is taken out, *&c.*, this sale shall stand, for the act of bankruptcy by which the sale is to be avoided must be done within five years (*a*), before the commission sued out.

3 Lev. 59. Skin. 22. pl. 22.

If *A.*, having committed an act of bankruptcy, keeps on his trade, and four years after binds his son apprentice with a goldsmith, and pays with him 120*l.*, being the usual sum in such cases, and two years after a commission is taken out against *A.*; this money is not assignable by the commissioners, being paid so long before the commission, and without any fraud.

Lofft. 71.

[A bankrupt having an estate in right of his wife, settled to himself for life, with other intervening uses, remainder to himself in fee, with power to change the uses; it was holden, that the remainder in fee vested in the assignees, and his power of revocation was gone.

Newland v. ——, 1 P. Wms. 92. ‖See Sloper v. Fish, 2 Ves. &

The commissioners may assign lands in fee when the bankrupt owes a debt by statute, if the statute is not sued and executed before the bankruptcy. And the assignment shall prevail against a second mortgagee who purchases the prior mortgage, if the second

second mortgage was made after a commission sued out, although the mortgagee had no notice of the commission. B. 145. Sharp v. Rhoade, 2 Rose Ca. 192.‖ Hitchcox v. Sedgwick, 2 Vern. 156. *Sed quære*, If no commission had been sued, but a secret act of bankruptcy committed? Collet v. De Golls, Ca. temp. Talb. 69. ‖This case of Hitchcox v. Sedgwick was reversed in *Dom. Proc.* See Sugd. Vend. & P. 723. And that a commission of bankrupt is not notice independent of statute, see Sowerby v. Brooks, 4 Barn. & Ald. 523. And as to where a commission shall be notice, see 6 G. 4. c. 16. § 83.‖

If there be two joint-tenants, and the one becomes bankrupt and dies, it is said, the bankrupt's part shall be sold, and that there shall be no survivorship; because the bankrupt's moiety is bound by the statutes; and also the bankrupt had power to sell the same in his life-time, and might depart with it. And, by the 1 Jac. c. 15., the commissioners, after the bankrupt's death, may proceed in execution, in and upon the commission for and concerning the offender's lands, tenements, *&c.*, in such sort as if the offender had been living; which they cannot do if the survivorship is allowed to take place. Billing. 111. Good. 89. 1 Com. Dig. 550. ‖Re-enacted 6 G. 4. c. 16. § 26.‖

Estates tail. — If a mortgage is made by a bankrupt tenant in tail, without suffering a recovery, the assignees shall take advantage of this defect, and hold the land after the death of the bankrupt clear of the mortgage. Beck v. Welsh, 1 Wils. 276. ‖See 6 G. 4. c. 16. § 65.‖

But if the deed contains a covenant for further assurance, the mortgagee will be entitled to retain his security against the creditors under the commission. Edwards v. Applebee, 2 Bro. Chan. R. 652. Pye Daubuz, 2 Bro. Chan. R. 595. ‖As a legal mortgage always contains such a covenant, the distinction is not material. See Evans's Stat. v. 4. 370. note (11).‖

‖Where a remainderman in tail becomes bankrupt, the commissioners can only convey a base remainder in fee, and even under a joint commission against the tenant for life and the remainderman in tail, the assignees only take an estate during the life of the tenant for life, and a base remainder in fee, determinable on the death of the tenant in tail, and failure of his issue.‖ Jervis v. Tayleur, 3 Barn. & Ald. 557.

Copyholds. — The lord is to be compounded with for the admission, by the express provision of the statute; but if the commissioners sell a copyhold, and the vendee tenders to the lord a competent fine, which the lord refuses, and will not admit the vendee, he may enter. ‖*Vide* 6 G. 4. c. 16. § 69.‖ Stone, 127.

Where the commissioners sell the copyhold lands, the bargain and sale binds the copyholder, and bars his estate, and he is no copyholder after the bargain and sale is enrolled; for the bargainee, by the statute, is only barred to take the profits until admittance, which is for the lord's benefit in respect of the fine due to him; and, when te bargainee is admitted by the lord, the estate shall vest in him, and have reference to the bargain and sale, and shall devest the claim of any intermediate estate. As if the bankrupt dies between the bargain and sale and the admittance of the bargainee, his wife (where the custom of the manor is, that the wife of a copyholder dying *tenant* shall be endowed) shall not be endowed. And if the commissioners assign the bankrupt's copyhold estates to the general assignees, they are to be considered as vendees; for if not, the assignee might continue Parker v. Bleeke, Cro. Car. 568. ‖Sir W. Jones, 451.‖ Drury v. Man, 1 Atk. 96.

in possession for years before he made a sale; and yet, by an express provision in the act, he is restrained from receiving the profits till he has compounded with the lord; and therefore the assignee must, upon his admittance, pay a fine to the lord, and upon sale of the estate, another fine must be paid: however this inconvenience may be avoided by excepting copyholds out of the deed of assignment of the bankrupt's estate, for the commissioners may convey to a purchaser in the first instance; and, by leaving out the copyhold estate of a bankrupt in a temporary assignment, the creditors will run no risk with regard to the crown, for an extent will not effect it.

6 G. 4. c. 16. § 68, 69.

‖But copyhold and customary lands are now, by the 64th section of 6 G. 4. c. 16., expressly excepted out of the bargain and sale by the commissioners to the assignees; and by § 68. it is enacted, that the commissioners shall have power, by indenture enrolled, to make sale of such copyhold, *&c.* lands, and to authorize any person, on their behalf, to surrender the same, for the purpose of any purchaser being admitted thereto; and by § 69. such purchaser of the commissioners shall, before he enter or take any profit of the copyhold, compound with the lord for the fines, dues, and services; and the lord, at the next or some subsequent court, shall grant unto the vendee, on request, the copyhold for the estate sold to him, reserving the ancient rents and services, and shall admit him tenant.

Crisp v. Pratt, Cro. Car. 549, Doe dem. Spencer v. Clarke, 5 Barn. & A. 458.

Copyholds, though mentioned expressly only in the 13 Eliz. c. 7., were decided in an early case to be within the purview of all the bankrupt acts; and, in accordance with this case, it was lately decided that copyholds were within the provision of the 1 Jac. c. 15. § 17., that if the bankrupt died after the commission sued forth and dealt in, the commissioners might proceed in execution concerning the bankrupt's goods, *lands, &c.*; and the court held, consequently, that a bargain and sale executed by the commissioners after the death of the bankrupt, of copyhold lands in which the bankrupt had a fee-simple conditional, was valid, and passed the estate to the purchaser. — *Note.* By the 6 G. 4. c. 16. § 26., it is provided, that if the bankrupt die *after adjudication* the commissioners may proceed in the commission as they might have done if he were living.‖

1 Burn's Eccl. Law, (4th ed.) p. 125. ‖The 77th sect. of 6 G. 4. c. 16., which enables assignees to execute all powers legally vested in the bankrupt, expressly excepts the right of nominating to a benefice.‖

ADVOWSONS. — In case of a patron becoming a bankrupt, the commissioners may sell the advowson of the living; but if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of a church is not valuable.

1 Atk. 215. *Ex parte* Lyons, Ambl. 89. Place of Jew-broker not saleable.

OFFICES. — The commissioners may sell offices of inheritance, and for terms of years; but an office concerning the execution of justice (and therefore within 5 & 6 Edw. 6. c. 16.) cannot be sold.

‖See as to sale of offices tit. *Offices and Officers*, (F), Vol. VI.; and see Sir W. Evans's note in his Statutes relating to Bankruptcy, 15.‖

On

On the other hand, a place that does not concern the execution of justice, but only the police, may be sold. *Ex parte* Butler, 1 Atk. 210. 215. Ambl. 73. S.C. 3 Term R. 681. The pay of an officer is not assignable. 4 Term R. 248. 1 H. Black. R. 627. ‖Cathcart v. Blackwood, Co. B.L. 299. *Qu.* Whether he can assign arrears already accrued. 3 Term R. 681. By the last insolvent debtor's act a portion of his pay may be assigned for the benefit of his creditors, 7 G. 4. c. 57. § 29.‖

RIGHTS, POSSIBILITIES, AND POWERS. — The commissioners may assign a possibility of a right belonging to the bankrupt, but it must be such as can be assigned or released (*a*), and disclosed upon the last examination. Higden v. Williamson, 5 P.Wms. 132. 2 Atk. 420. (*a*) Moth v. Frome, Ambl. 394.

‖The expectancy of an heir at law during the life of his ancestor, is not such an interest or possibility as passes to the assignees under a commission of bankrupt against him. But if the estate descends to the bankrupt *before* his certificate, it will pass to the assignees under the sixty-fourth section. Carleton v. Leighton, 3 Meriv. R. 671.

A policy of insurance effected by the bankrupt on his own life, is a possibility of benefit to which his assignees are entitled. (*b*) Schondler v. Wace, 1 Camp. 487. (*b*) This case appears to have been decided on the words "possibility of profit," &c. in the 5 G. 2. c. 30. § 1. as to the bankrupt's disclosure of his effects. These words are not in the present act, but the decision would probably be the same.

It had been decided that a bankrupt having an absolute power of appointment, was not compellable to execute it in favour of his assignees. Thorpe v. Goodall, 17 Ves. 270. *Sed vide* 2 Barn. & A. 93.

Accordingly it is now enacted by the 6 G. 4. c. 16. § 77. (following the 3 G. 4. c. 31. § 3.), that all powers vested in the bankrupt which he might legally execute for his own benefit (except the right of nomination to a benefice), may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same.‖ 6 G. 4. c. 16. § 77.

A commission of bankrupt vests all rights and all possibilities of the bankrupt in the assignees; in which respect it differs from an execution, which passes only what the sheriff seizes. Hence, two commissions of bankrupt for the same purpose cannot subsist together: for the second will be superseded, unless there be some special circumstances, as consent, fraud, or laches in the creditors under the first. Indeed, if the assignees under the second will pay the creditors under the first twenty shillings in the pound, and all the costs, in that case, the first will be instantly superseded. *Ex parte* Brown, 2 Ves. jun. 67.

[The right to bring a real action passeth to the assignees by the usual words of the assignment. The assignees are entitled to recover from the winner money lost at play by the bankrupt before his bankruptcy, in an action of debt upon the statute of 9 Ann. c. 14.; for the money is part of the bankrupt's estate; the statute gives an action to the party grieved, and therefore vests an interest in him.] Smith v. Coffin, 2 H. Black. 462. Brandon v. Pate, 2 Black. R. 308. B onv Sands, 2 Ves. jun. 514.; ‖and see Carter v. Abbott, 1 Barn. & C. 444.‖

Michell v. Hughes, 6 Bing. 689.

‖A right of entry vested in the husband and wife in right of the wife, passes to the assignees of the husband, on his becoming bankrupt.‖

Gerrard v. Aylmer, Palm. 505.

The commissioners may assign an *obligation* taken in another's name to the bankrupt's use.

Com. Dig. tit. Bankrupt (D), 16. Toulson v. Grout, 2 Vern. 432. Tudway v. Bourne, 2 Burr. 718. ‖See 19 Ves. 208. Price 219.‖

They may sell *an heriot, relief*, &c. *due to the bankrupt*, and a legacy given to the bankrupt before his bankruptcy. So where the certificate has been signed by the creditors and commissioners, a legacy left to the bankrupt before the certificate allowed by the Chancellor may be assigned. Many years may intervene between the signing and the allowance of the certificate; and large effects may, in the mean time, come to the bankrupt. And it is not like the relation of a bargain and sale, or the surrender of a copyhold.

Hesse v. Stevenson, 3 Bos. & Pull. 565. and see Bloxam v. Elsee, 6 Barn. & C. 169. Longman v. Tripp, 2 New R. 67. (*a*) Crutwell v. Lye, 17 Ves. 335. 1 Rose, 123.; and see Evans's Bankrupt Statutes, p. 19. note (10).

‖The interest of the bankrupt in a patent passes to his assignees. So also the right to publish a newspaper. *Quære.* Whether the good will of a trade passes under the assignment (*a*).

Chandler v. Gardner, cited 17 Ves. 338.

A claim for compensation, under an act of parliament, as proprietor of an ancient quay, has been decided by Lord *Eldon* to be an interest in the bankrupt which passed to his assignees.

Akhurst v. Jackson, 1 Swanst. R. 85. Wilson, C. R. 47.

Where a trader had agreed to take persons into partnership in consideration of money, payable by instalments, and he became bankrupt five years after the partnership commenced, and when only one instalment had become due; it was held, that the assignees were entitled to receive the remaining instalments.

Cro. Car. 166.; see 1 Deacon 387, and cases there.

No action lies by the assignees for a mere personal tort to the bankrupt, as assault, slander, *&c.*, and in one old case it was held, that the assignees were not entitled to money for which judgment had been given in an action of slander brought by the bankrupt before the bankruptcy, and which had been levied by the sheriff; but it seems clear that by the judgment the damages had become a debt, which must pass to the assignees; and it would seem that the assignees might recover it from the sheriff as money had and received. *Qu.* Whether the assignees can sue for a tort injuring or deteriorating the bankrupt's *property?*

Evan's Stat. 4. 328, n.

6 G. 4. c. 16. § 73. (*a*) These words are new. This section is not retrospective, 2 Sim. 360.

PROPERTY VOLUNTARILY CONVEYED BY BANKRUPT.—By § 73. of the 6 G. 4. c. 16. (which is in place of the 1 Jac. 1. c. 15. § 5.) it is enacted, that if any bankrupt, *being at the time insolvent* (*a*), shall (except on the marriage any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid, and every such sale shall be valid against the bankrupt and such children and persons as aforesaid, and against all persons claiming under him.‖

[*A.* being

[*A.* being about to renew a lease of an estate, at the expense of a fine of 160*l.*, borrowed of *B.* 80*l.* (of which *B.* himself borrowed 50*l.*), and gave a promissory note to repay the money, unless she should bequeath the estate to some or one of his children; she afterwards devised the estate to *B.*'s daughter; but, before the decease of *A.*, *B.* had become a bankrupt. His assignees claimed the 80*l.* or half of the estate, as being purchased by the bankrupt for the advancement of a child under 1 Jac. 1. c. 15. § 5.; and, upon a hearing at the Rolls, obtained a decree, which, upon an appeal to the Chancellor, was affirmed.]

Fryer v. Brown, 1 Bro. Chan. R. 160.

But if *A.* purchases a copyhold to himself and wife for life, remainder to his son and his heirs, and two years after he becomes a trader, and four years after a debtor and bankrupt; there being no fraud in this case, nor any intent to deceive creditors, the interest of the wife and heirs of the bankrupt cannot be defeated by this act of bankruptcy.

Cro. Car. 550. Crisp and Pratt, Jones, 438. S. C. Marsh. 37. S.C. Lilly v. Osborn, 3 P. Wms. 298. S. P. If the father conveys to his children, to secure them money given by their grandfather, if it can be proved the father had effects of the grandfather's in his hands at the time of the execution of the deed, it shall not be avoided. Mod. 76. But if there be no consideration, settlement on his wife and children shall be construed a settlement on himself; and such an interest vests in the assignees. Stile, 289. ‖8 Ves. 195. 9 Ves. 12.‖

[In a case before the Court of Chancery it appeared, that the plaintiffs were assignees under a commission of bankruptcy against the father of the defendant, who, in 1739, conveyed all his shop, goods, *&c.* by bill of sale to the defendant his son, and in 1740 became bankrupt. In the year 1718, he, *after marriage*, conveyed to trustees his real estate in consideration of five shillings, and other valuable considerations, in trust for himself for life, to his wife for life then to his eldest son, if he survived his father and mother, and so to the next son, *&c.*

Lord *Hardwicke* said, as to the first part of the case, there was not a foundation to set aside the assignment of the household goods as fraudulent, because it was made many months before the bankruptcy, and the consideration of the assignment was proved, and also followed by the possession of the son. And as to the second, the trustees under the deed must convey to the assignees under the commission; for it falls directly within the clause 1 Jac. 1. c. 15. § 5.]

Walker v. Burrows, 1 Atk. 93. ‖By 6 G. 4. c. 16. § 73. the trader must be insolvent at the time of the conveyance in order to defeat it.‖

‖A mere gift of money has been decided not to fall within the stat. 1 Jac. 1. c. 15. § 5., which was held to be confined to things the subject of *conveyance*.

Ex parte Shortland, 7 Ves. 88. Kensington v. Chantler, 2 Maule & S. 36. Nor is it within the seventy-third section of the new act. Abel v. Daniell, 1 Moo. & Malk. 370.

Nor is a transfer of a sum to the credit of the trader's son at the father's bank.(*a*)

Ex parte Skerratt, 2 Rose. 384. (*a*) The 73d section of the 6 G. 4. c. 16. which is in place of the 1 Jac. 1. c. 15. § 5. extends to a delivery of "bills, bonds, notes, or other securities."

But stock purchased by a father in the name of his son and a trustee, has been held goods and chattels within the statute.

Brown v. Bellaris, 5 Madd. R. 53.

Miles v. Williams, 1 P. Wms. 249. Bosvil v. Brander, 1 P. Wms. 460.

WIFE'S PROPERTY.‖ —[The commissioners may assign a debt or *chose* in action due to the wife of a bankrupt, and so it is of a mortgage made to her *dum sola;* for the right to the debt is plainly vested in the assignees, though the legal estate of the inheritance of the lands in mortgage continue in the wife.]

Saddington v. Kinsman, 1 Bro. Chan. R. 44.

2 Vern. 96. Vandenaker and Desbrough. If a father agrees to pay his son 15*l.* during his life, and the son becomes a bankrupt, equity will not enforce this agreement in favour of the creditors under the commission of bankruptcy. 2 Vern. 194. But if a father devises a legacy of 600*l.* payable to his son at twenty-one, and the son obtains a decree for it, and a certain sum is reported due for principal and interest, the commissioners may assign this legacy and benefit of the decree. 2 Vern. 432.

But if *A.* devises 800*l.* to be invested in land for the benefit of the wife of *J. S.* for her life, and afterwards for her children, and the interest of the money in the mean time to go to such persons as ought to receive the profits, and *J. S.* becomes a bankrupt, the interest of this 800*l.* shall not be liable to the bankruptcy, this not being any trust created by the bankrupt, but a maintenance intended the wife, and given to her by her relation.

Bennet v. Davies, 2 P. Wms. 316.

[*J. S.* made his will, and devised his estate to his daughter for her separate use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived his wife, but that they should upon his wife's death, go to her heirs. Soon after the testator died, and the husband became a bankrupt. The commissioners assigned the lands devised, upon which the wife brought her bill against the assignees, in order to compel them to assign over the estate to her separate use. The Master of the Rolls held it to be clear, that it was a trust in the husband, and that there was no difference where the trust was created by the act of the party, and where by the act of law. And decreed a conveyance for the separate use of the wife.

Gayer v. Wilkinson, cited in 1 Bro. Chan. R. 50.

If the wife is entitled to a legacy which the husband has not reduced into possession during his life, it seems it will not pass by the commissioners' assignment.]

Mitford v. Mitford, 9 Ves. 87.; and see Hornsby v. Lee, 2 Madd. R. 16.; and Purdew v. Jackson, 1 Russell R. 1. where Sir *Thomas Plumer* M.R. held, after much examination, that the wife's right by survivorship prevails also over the right of a *particular* assignee of the husband for valuable consideration. As to what acts amount to a reduction by the husband, see tit. *Baron and Feme*, (C) *post.*

‖So also, where the wife of a bankrupt was entitled to a legacy of stock left by a relation in trust for her, and her husband died without having reduced the legacy into possession, it was held by Sir *William Grant*, after a luminous examination of the cases, that the assignment under the bankruptcy was distinguishable from an assignment for valuable consideration to a particular assignee, which might, perhaps, prevail over the wife's right; but that, at all events, the assignment, by operation of the bankrupt law, vested the chose in action in the assignees, in the same plight and condition in which the husband had an interest in it; and consequently, that nothing having been done to reduce it to possession during the bankrupt's life, the wife became entitled by survivorship as if there had been no bankruptcy.

And

And so stock, standing in the wife's name, and which the husband has done no act to reduce into possession, survives to the wife on the husband's death. Wildman v. Wildman, 9 Ves. 174.

A legacy given to the bankrupt's wife is, at law, a legacy to the bankrupt; though in equity, subject to the claim of the wife for a provision for herself and children. But if she dies without asserting this claim, the legacy becomes the absolute property of the husband, and passes to his assignees. Ranking v. Barnard, 5 Madd. R. 32.

If a sum is due on bond to the wife of a trader, and is settled in trust by a settlement after marriage upon the wife, the settlement is void as against the assignees of the husband. Wombwell v. Lavor, 2 Sim. 560.

A legacy to a married woman, to and for her own use and benefit, does not give her a separate estate.‖ Roberts v. Spicer, 5 Madd. R.

491. As to what words will give a separate estate to a married woman, see tit. *Baron and Feme, post;* and see 1 Deacon, 377.

A man devises his lands which were in mortgage to be sold, and the surplus of the money to be paid his daughter; the daughter married a man who soon after became a bankrupt, and the commissioners assigned this interest of the wife's; the husband died, and the assignees brought their bill against the wife and trustees, to have the land sold and the surplus of the money paid them: but the court would not assist in stripping the wife (who was wholly unprovided for) of this interest, and dismissed the bill. Abr. Eq. 54. pl. 6.

A. puts out 1000*l.* at interest to the *East India* Company, and takes bond for it in the name of *J. S.* his wife's relation: *A.* becomes bankrupt: *J. S.* is summoned before the commissioners, but before examination he tells the *East India* Company that the money was not his, but that they should pay it to the person that brought the bond: *A.*'s wife brings the bond, and hath the money paid her: equity would not relieve against it. Pr. Ch. 18. *Qu.* of this case?

A legacy of 1000*l.* was given to one after the death of her mother, when she should attain the age of twenty-one years, and the defendant was appointed trustee for the raising and paying thereof out of certain lands: the legatee was drawn into an improvident match with one who soon afterwards became a bankrupt, and the commissioners assigned all his effects, and gave him a certificate of his conformity: the assignees brought a bill for this 1000*l.* against the trustee, who insisted that the assignees could be in no better condition than the husband; and that if he were plaintiff he could not prevail without making a suitable provision for the wife; and that this legacy being liable to a double contingency, *viz.* the death of the mother, and the legatee's arriving at the age of twenty-one years, was not, at the time of the bankruptcy, such an interest as could be assigned: and the court held, that though both contingencies have since happened, yet those being since the assignment of the bankrupt's estate, and since a certificate of his having conformed himself in every thing to the acts, he was now discharged as a bankrupt; and this portion could not pass without a new assignment, which Jacobson v. Williams, 1 Eq. Ca. Abr. 54. 1 P. Wms. 382. S. C. Gilb. Eq. R. 140. S. C.

the

the commissioners could not make, their commission being determined; and so dismissed the bill.

Row v. Dawson, 1 Ves. 331. Pope v. Onslow, 2 Vern. 286. Co. Bankrupt Laws, 326.

If a settlement is made before marriage, though without a portion, it will be good against the assignees; for marriage itself is a consideration, and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if the money be afterwards paid pursuant to the agreement.

Ex parte Cottrell, Cowp. 742.

So if a person give a bond for a sum of money as a marriage portion, and the marriage take effect, it is a good consideration for the bond, and the assignees cannot be relieved against it.

Tyrrell v. Hope, 2 Atk. 558. *Ex parte* Byas, 1 Atk. 124.

Where the bankrupt himself, from the circumstances of the case, would be considered as trustee for another, his assignees will be looked upon in the same light.

Ex parte Coysegame, Co. Bankrupt Laws, 330.

If the wife of a bankrupt prior to her marriage was entitled to a trust estate, the assignees of the husband are not entitled to the property without making a settlement on the wife.

1 Atk. 192. S. C. Grey v. Kentish, 1 Atk. 280. Worrall v. Marlar, Bushnan v. Pell, 1 Cox's P. Wms. 458. ‖Burdon v. Dean, 2 Ves. 607. Oswell v. Probert, *Id.* 680. Brown v. Clark, 3 Ves. 166. Freeman v. Parsley, *Id.* 421. Lumb v. Milnes, 5 Ves. 507. Carr v. Taylor, 10 Ves. 574.; and see 1 Deacon 372. *et seq.*‖

Scriven v. Tapley, 2 Eden, 337. Ambler, 509. Lloyd v. Wil- 1 Madd. 453. Murray v. Lord Elibank, 10 Ves. 88. 91. Rowe v. Jackson, 2 Dick. 604. Steinmetz v. Halthin, 1 Glyn & Ja. 64.

‖The children are entitled to the provision of the wife upon her death; but they have no original title of their own to a provision; therefore, if the wife waive her equity, or die before it has attached, their claim is barred. And she may, at any time before the execution of the settlement, appear in court, and waive the settlement, and bar the children. And it has been held, that the equity of the wife attaches on the property at the filing of the bill, (and not merely on a decree or reference to the master as to a settlement,) whether filed by the wife or by other persons; and that if the wife die after the bill filed, the children will be entitled to the provision.

Green v. Otte, 1 Sim. & Stu. 250. *Ex parte* Newham, 1 Glyn & Ja. 40.

Most frequently the property is equally divided between the wife and assignees; but the proportion depends on the circumstances. The practice is to refer it to the master.‖

Milner v. Colmer, 2 P. Wms. 659. Adams v. Pierce, 3 P. Wms. 11.

But if the husband, or his general assignees, (who stand exactly in the same situation,) can get possession of the wife's property without the aid of equity, it seems doubtful whether the court will interfere to assist the wife.

Willats v. Cay, 2 Atk. 67. Jewson v. Moulson, 2 Atk. 420.

Seers v. Hind, 1 Ves. jun. 294. 2 Eq. Cas. Abr. 100. Philpot v. Hoare, Ambl. 480.

[LEASEHOLD ESTATES.—The commissioners may assign a lease granted to the bankrupt, notwithstanding there be a proviso in it that the lessee, his executors or administrators, shall not assign without the lessor's consent in writing.

‖Doe dem. Goodbehere v. Bevan, 3 Maule & S. 353.; and see Doe v. Powell, 5 Barn. & C. 308.‖

Doe dem. Lockwood v.

‖But where a lease is granted for a term of years, *if the tenant shall so long occupy* the lands, and the tenant becomes bankrupt, and

and the assignees take possession and sell the lease, the term is at an end by the tenant's ceasing to occupy, and the landlord may recover in ejectment. Clarke, 8 East, 185.

And if the lease provide that the landlord shall enter on the tenant's committing an act of bankruptcy, such proviso is valid, and the landlord may enter. Roe v. Galliers, 2 Term R. 133.; and see 15 Ves. 268. 1 Swanst. 481. 3 Maule & S. 357.

A term of years in the bankrupt passes under the bargain and sale to the assignees; but as the commissioners' assignment is to be construed according to the spirit and intent of the bankrupt laws, *viz.* that of providing for the payment of the creditors, the assignees are not bound to accept a term which may be a charge instead of a benefit to the estate; and therefore the operation of the assignment, in vesting the term in the assignees, is held to be suspended till they do some act signifying *their acceptance* of the bankrupt's interest. Bourdillon v. Dalton, 1 Esp Ca. 233. Peake's Ca. 238. Copeland v. Stephens, 1 Barn. & A. 593.

The mere advertising and putting the bankrupt's lease up to sale by the assignees, (not stating themselves to be the owners or possessors,) where no bidder offers, does not amount to an acceptance of the term by the assignees; for it is their duty to ascertain if the lease is beneficial, and this is only an experiment for that purpose. Turner v. Richardson, 7 East, 335.; and see Wheeler v. Bramah, 4 Camp. R. 368.

But if there is a purchaser, and a deposit paid, although the contract go off, it has been held an acceptance. Hastings v. Watson, 1 Holt Ca. 290.

And where the assignees had placed a board on the premises, with a view of disposing of them, this was held an acceptance. Gibson v. Courthope, 1 Dow. & Ry. 205.

The mere giving of a re-lease by the assignees to an under-tenant, does not amount to an acceptance of the original lease. Hill v. Dobie, 8 Taunt. 325.

But intermeddling with and managing the bankrupt's farm amounts to such acceptance. Thomas v. Pemberton, 7 Taunt. 206.

And so also the assignees suffering the bankrupt's cows to remain on the farm, though only for two days, and ordering them to be milked there, is an acceptance by the assignees. Welsh v. Myers, 4 Camp. 368.; and see Clark v. Hume, 1 Ry. & Moo. 207.

And any taking of *actual possession* by the assignees is an acceptance, though they deliver up possession as soon as the bankrupt's goods on the premises are sold; for having once accepted the lease, they cannot afterwards renounce it. Hancock v. Welsh, 1 Stark. 347. Hanson v. Stevenson, 1 Barn. & A. 303.

So where the bankrupt had a lease, and also a reversionary interest in the premises, the sale by the assignees of "all his estate "and reversionary interest," was held an acceptance of the term. Page v. Godden, 2 Stark. 309.

Prior to the passing of the 49 G. 3. c. 121. § 19. the bankrupt remained liable to the landlord on the covenants in the lease, notwithstanding the assignees had accepted the lease. By that statute the bankrupt was discharged from liability in respect of the rents and covenants where the assignees had accepted the lease; Auriol v. Mills, 1 H. Black. 433. 4 Term R. 94. Copeland v. Stephens,

lease; but unless they accepted, the bankrupt still remained liable. By the present statute, 6 G. 4. c. 16., the bankrupt may discharge himself from the rent and covenants, whether they accept or decline the lease.

1 Barn. & A. 593. But debt did not lie against the bankrupt for rent accrued after the commissioners' assignment, the privity of estate being destroyed. Wadham v. Marlowe, 8 East, 314.

6 G. 4. c. 16. § 75. The clause in italics is new.

By the seventy-fifth section, it is enacted, that any bankrupt entitled to any lease or agreement for lease, if the assignees accept the same, shall not be liable for rent after the commission, or to be sued in respect of any subsequent nonobservance of the covenants; *and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid;* and if the assignees shall not (when required,) elect whether they will accept or decline, the lessor or person agreeing, or any person entitled under them, may apply by petition to the Lord Chancellor, who may order them to elect and to deliver up such lease or agreement in case they shall decline the same, and the possession of the premises; or may make such other order as he shall think fit.

Ex parte Sutton, 2 Rose, 86. A parol agreement, though there has been part performance, is not within the intent of the statute.

As to the order to elect and its effect, see Buck, 83. 87. 1 Rose, 57. 445. 1 Madd. 76.

Ex parte Warwick, Buck, 326. *Ex parte* Clunes, 1 Madd. 76.; The Lord Chancellor's jurisdiction under the statute is only when the assignees refuse or neglect either to accept or decline; and where they elect he cannot make an order; and he cannot decide whether they *have elected* or not; he can only send that question to be tried by a jury.

and see 1 Mont. & Mac. 115., and see *post*, p. 664. as to the discharge from rents and covenants under the certificate.

Ex parte Quantock, Buck, 139. Taylor v. Young, 3 Barn. & A. 521. The act only applies to cases between the lessor and lessee or assignee, and not to cases between the lessee and the assignee of the lease.

Dommett v. Bedford, 6 Term R. 684. 3 Ves. 149. Cooper v. Wyatt, 5 Madd. R. 482.; ANNUITIES, &C. VESTED IN BANKRUPT WITH PROVISO AGAINST ALIENATION. — If an annuity is given by will for life, payable to the annuitant *only*, and with a proviso to cease in case of its being alienated, it ceases on the bankruptcy of the annuitant, and the execution of the bargain and sale.

and see Shee v. Halle, 15 Ves. 404.

Brandon v. Robinson, 18 Ves. 429. 1 Rose, 199. But where dividends of stock were bequeathed to trustees to be paid to *A.* into his own proper hands, and on his own receipt, to the intent that they should not be assignable by way of anticipation, it was decided by Lord *Eldon*, that on the bankruptcy of *A.*, his assignees were entitled to them, *there being no limitation over* in the event of *A.*'s bankruptcy.

Wilkinson v. Wilkinson, Cooper R. 259.; and see Holyland v. So also where a testator by will gave the rents and profits of an estate to his son for life, with a proviso, that if he should assign or encumber the life estate, so as not to be entitled to the personal receipt and enjoyment thereof, it should from thence-

forth

forth cease, determine, and be void to all intents, and should devolve on the person next entitled under the limitations of his will; the son having become bankrupt, Sir *W. Grant* held, that the bankruptcy being an assignment by operation of law, was not within the provision against alienation according to the decided cases in courts of law. (*a*)‖

De Mendez, 5 Meriv. 184.

(*a*) In this case there is a disposition over on alienation, and the words are even stronger than in the case of Cooper v. Wyatt, *supra*, with which case and with that of Dommett v. Bedford, *supra*, it is irreconcilable. Cooper v. Wyatt was decided on the ground of the testator's manifest intention, which would appear equally clear in this case. The words in Brandon v. Robinson are less strong, and seem to point to a particular assignment by the son in advance, rather than to any means whatever by which he might be deprived of the personal receipt of the dividends.

PROPERTY ABROAD.—The commissioners here may sell the bankrupt's goods in *Ireland*, and the courts in *Ireland* will take notice of our laws so as to prevent a creditor, attaching property after the commission, from gaining a preference over the assignees of the bankrupt.

Neale v. Cottingham, *in Canc.* in *Ireland*, 16th *Nov.* 1764. 1 H. Black. R. 132. As to the operation of the bankrupt laws abroad, see the case of Cleve v. Mills, at the Cockpit, 27th *July* 1764; and the judgment of the court in the cases of Sill v. Worswick, and Hunter v. Potts, *infra*.

So where the laws of *Holland* have, in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates, the Court of Chancery held, that they have, immediately upon their appointment, a title to recover the debts due to the insolvent in this country, in preference to the particular creditor seeking to attach those debts. The principle upon which these decisions proceed is, that personal property is governed by that law which governs the person of the owner.

Solomons v. Ross, 1 H. Black. 131. Jollet v. Deponthien, 1 H. Bl. 132.

If after an act of bankruptcy, but before the assignment, a creditor, resident in this country at the time of the bankruptcy, and knowing of it, attach money of the bankrupt abroad, he is compellable to refund it to the assignees. But a debtor of the bankrupt before the bankruptcy, whose debt is afterwards *bonâ fide*, and by regular process, attached by a creditor resident abroad at the time of the bankruptcy, is not liable to pay it over again to the assignees.

Sill v. Worswick, 1 H. Black. 694. Hunter v. Potts, 4 Term R. 182. In the case of Sill v. Worswick, the process abroad was founded on an act done in *England*, and under the aid of the law of *England*; a circumstance on which that case immediately turned. The case of Hunter v. Potts was without that circumstance; and it was proposed to argue it on a writ of error before the twelve judges; but no such argument hath taken place.

‖So also, where one of several partners, creditors in *England*, of a bankrupt in *England*, went to *America*, and after an act of bankruptcy and commission issued against the bankrupt in *England*, and with knowledge of such bankruptcy, attached for himself and partners a debt due to the bankrupt in the hands of the debtor in *America*, and obtained the money by judgment in the *American* court; it was held, by the Court of K. B., that the partnership could not retain the money thus obtained in satisfaction of the bankrupt's debt, but were liable to refund it in an action for money had and received at the suit of the assignees. And this judgment was affirmed in the Court of Exchequer-chamber; *Eyre* C. J. delivering his opinion to the contrary in a profound and learned judgment.

Philips v. Hunter, 2 H. Black. 402.; and see Mackintosh v. Ogilvie, 4 Term R. 195. n.

And

Barker v. Goodair, 11 Ves. 78. Dutton v. Morrison, 17 Ves. 193. *Sed vide* Bristow v. Potts, 11 Ves. 81. n.

And where one of several partners becomes bankrupt, Lord *Eldon* has held, that his share in the joint effects is devested, and becomes vested in the assignees from the act of bankruptcy; and consequently, the joint creditors cannot proceed, after such act of bankruptcy, to attach a joint debt in the hands of the debtor of the partnership by attachment in the Lord Mayor's Court; but they will be restrained by a court of equity.

and see *post* as to partners.

Brickwood v. Miller, 3 Meriv. R. 279.

By sections 12 & 64 of 6 G. 4. c. 16. the bankrupt's property in the colonies passes to the assignees.

But in a subsequent case, where there were two firms originally formed in the *West Indies*, and the bankrupt was a member of both, and three years before his bankruptcy established himself in *London*, for the purpose of managing the *English* branch of the business of the firms, and a creditor of the firms attached their property in the *West Indies* for his debt, on a bill filed by the assignees of the bankrupt partner against such creditor, for an account of what he had received on the attachments, Sir *William Grant* held, that he was entitled to retain to the extent of what was due to him from the two firms, distinguishing this from the cases of *Barker* v. *Goodair* and *Dutton* v. *Morrison*, since there the commercial establishment was in this country alone, and the attachments were laid in *London*; but here the partnerships were at least as much *West Indian* as *English* establishments, and it was in the *West Indies* the attachments were laid. And his Honour added, that even in the less difficult case of the attachment abroad of the property of a sole debtor residing and becoming a bankrupt in this country, he doubted whether all the reasoning of Lord Chief Justice *Eyre* in *Hunter* v. *Potts* (*a*), had ever received a completely satisfactory answer.

(*a*) Meaning Philips v. Hunter.

Ex parte Dobree, *Ex parte* Le Mesurier, 8 Ves. 82.

But if the attachment is complete before the act of bankruptcy takes place, the attaching creditor may retain the property against the assignees; and this although the act of bankruptcy occur on the same day, provided it is subsequent to the time when, by the law of the place, the property attached vests in the party attaching.

Bank of Scotland v. Cuthbert, 1 Rose, 462.

The assignment under an *English* commission of bankrupt vests in the assignees all the bankrupt's personal estate in *Scotland*, and indeed in all other countries, so as to do away the effect of any subsequent diligence by any *Scotch* or other creditor.

Selkrig v. Davies, 2 Dow. R. 230. And the courts of *Scotland* recognise the effect of an *English* commission on the bankrupt's property in *Scotland*, and they will not grant a sequestration against a person declared bankrupt under a valid *English* commission, since such commission attaches on the property in *Scotland* as well as in *England*. See decision of Court of Sessions, Bank of Scotland v. Cuthbert, 1 Rose, 462.

Thus, where a commission issued against a bankrupt, part of whose property consisted of shares of *Carron* stock, and a creditor in *Scotland* subsequently arrested those shares; it was held by the Court of Session, and afterwards, on appeal, by the House of Lords, that the title of the assignees was preferable.

Per Ld. *Eldon*, *Ibid.*

And although no authority is given by the bankrupt statutes to compel the bankrupt to convey his *Scotch* real or heritable property to the assignees, yet it has been sometimes made available by the creditors assigning their debts to an individual, who proceeded against the heritage according to *Scotch* law, or by refusing

refusing to sign the bankrupt's certificate till he consented to convey.

But by the twelfth section 6 G. 4. c. 16. the commissioners are to take order of the bankrupt's property, both within the realm and *abroad*. And by the sixty-fourth section they are directed to convey to the assignees "all lands, tenements, and hereditaments of the bankrupt in *England*, *Scotland*, *Ireland*, or any of the dominions, plantations, or colonies belonging to his majesty."‖

Quære, What effect this provision will have on the bankrupt's real estate in *Scotland*. It is not by virtue of any statute but by the universal principle of law that moveables follow the person, that the *personal* property in a foreign country vests in the assignees.

PROPERTY DELIVERED VOLUNTARILY TO PREFER A PARTICULAR CREDITOR. — The delivery of property to a creditor in contemplation of immediate bankruptcy is considered as fraudulent, notwithstanding the delivery is made in satisfaction of a *bonâ fide* debt, for it disappoints the equality which the bankrupt laws aim at. 4 Burr. 2235. 1 Black. R. 441. Harman v. Fisher, Cowp. 117. ‖Singleton v. Butler, 2 Bos. & Pull. 283. Wilson v. Balfour, 2 Camp. 579.‖

Hinton's case, Freem. 270. Rust v. Cooper, Cowp. 629. Alderson v. Temple,

‖The delivery must be made in contemplation of bankruptcy, and not of mere insolvency, or at least under such circumstances as render bankruptcy probable though not inevitable. Sharpe, 5 Taunt. 539. 1 Marsh. R. 196. Poland v. Glyn, 2 Dow. & Ry. 310

Hartshorn v. Slodden, 2 Bos. & Pull. 582. Fidgeon v.

And therefore a delivery of bills to a creditor in contemplation of a deed of composition, and to induce him to accede to it, was held not a preference in fraud of the bankrupt laws, so as to entitle the assignees to the bills on the composition going off and a commission issuing.

Wheelwright v. Jackson, 5 Taunt. 109.; and see Moore v. Barthrup, 1 Barn. & C. 5.

And a restoration by the bankrupt, though at the time of bankruptcy, of bills fraudulently obtained by him on a false representation from a creditor, has been held not a fraudulent preference.

Gladstone v. Hadwen, 1 Maule & S. 517.

A bill of exchange is decided to come within the words "goods and chattels" in the third section (see *antè*, p. 537.), so that the fraudulent delivery of it will constitute an act of bankruptcy.

Cumming v. Baily, 6 Bing. 363.

A gift of *money* has been held not within the seventy-third section.‖

Abel v. Daniell, 1 Moo. & Mal. 370.

And if a trader, under an apprehension of legal process, deliver property to his creditor, or give him a power to receive it, such act is valid, notwithstanding the bankrupt knows himself to be insolvent.

Thompson v. Freeman, 1 Term R. 155. ‖De Tastet v. Carrol, 1 Stark. Ca. 88.‖

So if a debtor, upon being pressed by his creditor, who knows him to be insolvent, gives an order upon a person, having his property, to pay out of the proceeds, it hath been determined not to affect the payment.

Yeats v. Grove, 1 Ves. jun. 280.

‖And where the delivery is obtained by the importunity of the creditor, though the bankrupt is not under terror of legal process, and though he contemplate bankruptcy, the delivery in general is valid, since the circumstances shew it not to be voluntary. And as terror of process is not necessary, it matters not that the debt to

Smith v. Payne, 6 Term R. 152. Arbouin v. Hanbury, 1 Holt Ca. 575.; and

see the cases collected in note. Crossby v. Crouch, 2 Camp. 165. 11 East, 256. *Ex parte* Scudamore, 3 Ves. 85. Bayley v. Ballard, 1 Camp. 416.; and see Churchill v. Crease, 5 Bing. 177. Hunt v. Mortimer, 10 Barn. & C. 44.; and see 1 Barn. & Adol. 145.

to secure which the creditor demands the goods, *&c.* is not due at the time. The circumstance of the proposal to make the delivery coming from the creditor, and not the bankrupt, is also held to rebut the inference of voluntariness; and if the goods, *&c.* are delivered on the creditor's *bonâ fide* importunity, secrecy in the delivery is immaterial. Where the bankrupt unsolicited sent checks to a creditor, but before his clerk delivered them the creditor called for his debt, it was held that this intervening demand prevented the delivery of the checks being a voluntary preference.

Thornton v. Hargreaves, 7 East, 544.; and see Morgan v. Horseman, 5 Taunt. 241. Cook v. Rogers, 7 Bing. R. 438. Most or all of the above cases of fraudulent preference would now be held acts of bankruptcy under the words "make any fraudulent gift, delivery, "or transfer of any of his goods or chattels with intent to defeat or delay his creditors." 6 G. 4. c. 16. § 3.; and see *antè*, p. 537. 614.

But where the trader under pressure of a creditor gave him a bill of sale, of apparently *the whole* of his stock, and immediately left business and became a bankrupt, the court held, that as this transfer did not relieve the bankrupt from any present difficulty, it must be considered as done voluntarily to prefer the creditor.‖

Wiseman v. Vandeput, 2 Vern. 203. [*Vide* Snee v. Prescot, 2 Atk. 245. and *Ex parte* Walker and Woodbridge, after Trin. Term, 1755. Co. Bankrupt Laws, 483.

STOPPAGE IN TRANSITU.—If *A.*, being beyond sea, consigns goods to *B.*, then in good circumstances in *London*, and before the goods arrive *B.* becomes a bankrupt, whereupon *A.* consigns them to another, and the assignees under the commission pray relief and a discovery, and a trial at law is directed, whether such consignment vested a property in *B.*, and a verdict is found for the assignees (*a*); yet equity will not oblige *B.* to come in as creditor, it being allowable by any means, short of actual violence, to prevent the goods from coming into the hands of the bankrupt or the assignees. (*b*)

(*a*) This right of the consignor to stop *in transitu* in case of bankruptcy, when the question is merely between the consignor and consignee, is now established at law. Biskett v. Jenkins, cited in Cowp. 296. Solomons v. Nissen, 2 Term R. 674. Lickbarrow v. Mason, 2 Term R. 63. But whether such right exist, as between the consignor and the assignee of the consignee, under an indorsement of the bill of lading for a valuable consideration, is a point as yet unsettled. The Court of King's Bench have negatived any such right. Lickbarrow v. Mason, 2 Term R. 63. Their judgment was reversed in the Exchequer-chamber. H. Black. 357.; but the House of Lords not thinking the evidence on the record (for the question was brought forward on a demurrer to evidence) sufficient to maintain the plaintiff's action, awarded a *venire facias de novo*. *Dom. Proc.* 14th *June* 1793.] ‖Although the assignee of the bill, of lading take it knowing that the goods are not paid for by the consignee, still if there is no fraud the assignment prevents the vendor from stopping *in transitu*. Cuming v. Brown 9 East R. 506. But it is otherwise if the assignee knows that the consignee is insolvent. Vertue v. Jewell, 4 Camp. Ca. 31. And if the consignor take a receipt expressing that the goods are received for and on his account, then no one is entitled to them who has not this receipt, and the vendor may stop them *in transitu* against any one not possessing it. Craven v. Ryder, 1 Holt N. P. C. 100.; and see further as to the right of stoppage *in transitu*, Abbott on Shipping (5th ed.), part iii. c. ix. Eden's B. Law, 300. Cook's B. Law (8th ed.), 398. 1 Deacon, 449. The right existing in cases of mere insolvency of the vendee as well as of bankruptcy, the law upon it is only incidentally connected with the title of "*Bankruptcy*." Where the right exists the assignment by the commissioners cannot affect the property.‖ [(*b*) But if they once get into the hands of either the right is gone. Ellis v. Hunt, 3 Term R. 464.

Atkin v. Barwick, 1 Stra.

‖GOODS SENT BUT NOT ACCEPTED BY THE BANKRUPT &c.—[Goods that have been delivered on a precedent consideration cannot

cannot be assigned, though the acceptance be after the bankruptcy.] 165. 10 Mod. 432. S. C. 4 Burr. 2239. ‖See observations of Lord *Mansfield* on this case, 4 Burr. 2239., and of Lord *Kenyon* in Neat v. Ball, 2 East, 117.‖

‖So goods returned by a trader before an act of bankruptcy to a creditor from whom he purchased them, though not received by the creditor, or agreed to be accepted by him, till after the act of bankruptcy, will not pass under the assignment to the assignees. Fidgeon v. Sharpe, 1 Marsh. R. 196.

But where a trader, on the receipt of goods, did not immediately exercise his option of returning them, but kept them for above a fortnight, though without opening them or entering them in his books, and then returned them when in a state of insolvency and on the eve of bankruptcy, though without fraudulent concealment, it was held that he ought to have exercised his power of restoring them immediately, and that they passed to his assignees. Neate v. Ball, 2 East R. 117.; and see Salte v. Field, 5 Term R. 211. Graffe v. Greffuhle, 1 Camp. 89. Moor v. Barthrop, 1 Barn. & C. 5. Barnes v. Freeland, 6 Term R. 80. Dixon v. Baldwin, 5 East, 175.

Goods bought by the bankrupt but not delivered, and in which he has only a right of *property* but not of *possession*, do not pass to the assignees — as *e. g.* goods contracted for by the bankrupt, but not paid for by him according to the custom of the trade, and remaining in the vendor's warehouse at the time of the bankruptcy. Bloxam v. Sanders, 4 Barn. & C. 911; and see Bloxam v. Morley, *Id.* 951.

And goods ordered by a bankrupt *to be made* or manufactured for him, do not vest in him so as to pass to his assignees till they are finished and delivered, or till the maker has done some act assenting to the property vesting in the bankrupt: and this although the bankrupt may have paid money on account equal to the value of the work and materials. Mucklow v. Mangles, 1 Taunt. 318.; and see Woods v. Russell, 5 Barn. & A. 942. Bishop v. Crawshay, 3 Barn. & C. 415.

‖Goods subject to lien.‖ — The assignment doth not devest an equitable lien. By an equitable lien, however, we are not to understand a right attaching upon the property in whatsoever hands it may be; for there can be no lien distinct from possession. Cowp. 125. As to what persons are entitled to such lien, see Ambl. 252. Cowp. 251. 1 Burr. 493. 2 Burr. 931. Pr. Ch. 580. 4 Burr. 2214. 1 Black. R. 654. 4 Term R. 123. 1 Atk. 235. 2 Cox's P. Wms. 367. Dougl. 97. *Ex parte* Andrews, Co. Bankrupt Laws, 515. ‖See the cases as to *liens* collected, Cook's B. Law (8th edit.) 398. Eden's B. Law, 279. 1 Deacon's B. Law, 476.‖

‖Executory contracts.‖ — The defendant on the marriage of his son settled lands on himself for life, remainder to his son for life, *&c.*, and covenanted during his own life to pay his son 15*l. per annum*; the son became a bankrupt: the plaintiff as assignee brought a bill against the father, to have the benefit of this agreement, and to compel payment of the 15*l. per annum*. *Per Cur.* — An assignee, under a statute of bankruptcy, is not entitled to have the performance of an agreement made with the bankrupt; and it was so adjudged in the case of *Drake* v. *The Mayor of Exeter*, where the court held, that if a lessor covenants with his lessee and his assigns to renew his lease, Moyses v. Little, 2 Vern. 194. *Sed quære*, Vandenanker v. Desbrough, 2 Vern. 96. Drake v. The Mayor of Exeter, 1 Chan. Ca. 71. ‖*Sed vide* Freem. 183. S. C. *cont.*‖

and the lessee becomes a bankrupt, and the commissioners assign this covenant, the assignee cannot have any relief against the lessor.

(a) Smith v. Coffin, 2 H. B. 444. Brooke v. Hewitt, 3 Ves. 253.

‖This last case has been questioned (a), and the report of it in Freem. p. 183. is the other way; and the general question whether assignees can compel a specific performance of an agreement *to grant a lease* to the bankrupt has only very lately been decided. (b) Lord *Rosslyn* refused to determine the point on demurrer in a case of complex circumstances, but did not say that the assignees' claim would be improper on a hearing, though he admitted that there was much force in the distinction between such a case and that of enforcing an agreement for a purchase, where the assignees must first do equity by paying the purchase money, but here the consideration was the covenants of the bankrupt.

(b) With respect to contracts by bankrupt to *purchase* lands, there is no doubt assignees can enforce performance of them; see section 76 of the new act, and so also as to contracts by bankrupt to sell lands, see Sharpe v. Rhoahde, 2 Rose, 192. Goodwin v. Lightbody, 1 Daniel, 155.

Weatherall v. Geering, 12 Ves. 504.; and see Flood v. Finlay, 2 Ball & Beatty, 9.; and see 4 Evans's Stat. 328. note.

Where a person who took the benefit of an insolvent act had previously obtained an agreement for a lease, with a proviso against assignments, on a bill filed by a party to whom the insolvent had assigned his interest against his assignees for a specific performance, Sir *Will. Grant* dismissed the bill principally on the ground of the proviso against assignments, saying that it was very disputable whether the assignee of the insolvent himself could enforce a performance, but not deciding the general question.

1 Christ. B. L. 256. n. 1 Deacon, B. L. 368.

Powell v. Lloyd, 2 Younge & J. 372.

The Court of Exchequer have, however, lately held, that the assignees are entitled to specific performance of an agreement for a lease, they *personally* entering into those covenants which the bankrupt, if solvent, would have been bound to enter into: and the court said, that if injustice would be done by it, the court would, in their discretion, refuse a decree.

Chippendale v. Tomlinson, Trin. 25 G. 3. *B. R.*

PROPERTY ACQUIRED AFTER BANKRUPTCY.‖ — [*Chippendale* brought an action of *assumpsit* for work and labour as an attorney. The defendant pleaded, that the plaintiff was a bankrupt, and averred, that the commission was still in force. The plaintiff replied, that the work and labour was done after the commissioners' assignment, and for the necessary support and maintenance of himself and his family. Rejoinder, that the plaintiff had not obtained his certificate; and thereupon a demurrer. Lord *Mansfield* said, — The only question is, Whether the assignees of a bankrupt are entitled to the profits arising from his personal labour? The assignees cannot let out the bankrupt; they cannot contract for his labour. And Mr. Justice *Buller* observed, that when Lord *Hardwicke* said, that "all the "bankrupt's future personal estate is affected by the assignment," he evidently meant, that if the assignees claim it, the bankrupt must deliver it up; and so far the assignment affects it: but no other person can have the same plea.]

1 Atk. 253.

See *acc.* Ashley v. Kell. 2 Stra. 1207.

Webb v. Fox, 7 Term R.

‖It is fully established that an uncertificated bankrupt has a right to property acquired subsequent to his bankruptcy against all

all the world except his assignees, and may maintain actions in respect of such property, unless the assignees interpose. 391. Fowler v. Down, 1 Bos. & Pull.

44. Cumming v. Roebuck, 1 Holt Ca. 172. Clark v. Calvert, 3 Moo. 96. Drayton v. Dale, 2 Barn. & C. 293.

But the bankrupt cannot retain any such property against the assignees. And accordingly, to an action by a bankrupt on a promissory note, it was holden a good plea that the assignees had required the defendant to pay the money to them. Kitchen v. Barsch, 7 East, 53.

And so also where the assignees had, for a valuable consideration paid by a third party, left the bankrupt's furniture, *&c.* in his possession, and afterwards, notwithstanding such agreement, they seized it, it was held that the bankrupt could not maintain trespass for such seizure, since he could not retain any property against his assignees. Nias v. Adamson, 3 Barn. & A. 225.

And where the seizure of an uncertificated bankrupt's effects was made by the creditors without authority from the assignees, a subsequent surrender of the assignees' interest to them was held a sufficient ratification to justify the seizure.‖ Hull v. Pickersgill, 1 Bro. & B. 282. See Coles v. Barrow, 4 Taunt.

754., where it was held (*Mansfield* C. J. *dis.*), that a bankrupt might recover a reasonable compensation from his assignees for work and labour done in carrying on business for the benefit of the estate under the employment of the assignees.

‖(G) Of Property passing to the Assignees as being in the reputed Ownership of the Bankrupt.‖

THE enacting part of 21 Jac. 1. c. 19. § 11. has been held not restrained by the preamble, but to extend to other persons' goods, as well as those which were originally the bankrupt's property. Cowp. 233.

‖The preamble is altogether omitted in the late statute, which enacts that "if any bankrupt shall by consent and permission "of the true owner have in his possession, order, or disposition "any goods or chattels whereof he was reputed owner, *or* "*whereof he had taken* upon him the sale, alteration, or dis- "position as owner, the commissioners shall have power to sell "and dispose of the same for the benefit of the creditors under "the commission. * Provided that nothing herein contained "shall invalidate or affect any transfer or assignment of any "ship or vessel, or any share thereof made as a security for any "debt or debts, either by way of mortgage or assignment, duly "registered according to the provisions of an act of parliament "made in the 4 Geo. 4. (*a*), intituled *An Act for registering of* "*vessels.*"‖ 6 G. 14. c. 16. § 72. The word *or* is in place of *and* in the former statute, and the words *or whereof he had taken*, instead of *and take*. See 5 Taunt. 490. The clause after the * is new. (*a*) The 6 G. 4. c. 110. is the registry act now in force.

One *Mace* kept a public house, had a licence, and said she was married to *Penrice*. It was proved she went to the Excise-office, had his name entered in the books, with a note in the margin, "married." *Penrice* had the licence, and continued in possession of the house and goods from that time till he absconded and went to *Pimlico*, which was an act of bankruptcy. *Mace*, the plaintiff, first claimed the goods in question under a bill Mace v. Cadell, Cowp. 232.

a bill of sale from *Penrice*, but afterwards as her own original property, and denied that *Penrice* and she were married. Upon a question, Whether this was within the statute? the court held that it was.

Bryson v. Wylie, Hil. 24 G. 3. *B. R.* ‖Reported rather more fully, 1 Bos. & Pull. 83.‖

In another case, *Bryson* being possessed of a dyer's plant, sold it to *Simpson* for 165*l.* 16*s.* 6*d.*; and *Simpson* gave *Bryson* two promissory notes dated the 19th. day of *January* 1780, one for the sum of 82*l.* 13*s.* 6*d.*, payable on the 6th of *January* 1781, and the other for the sum of 82*l.* 13*s.*, payable on the 6th *January* 1782. When the first note became due, *Simpson* could not take it up, and *Bryson* offered to take back the plant, and return the notes, and agreed that he would let him the plant at the rent of 5*l.* a year, upon the valuation amounting to 8*l.* 5*s.* 6*d.* per ann., for the term of three years. To this proposal *Simpson* very readily agreed, and a deed was accordingly executed; by which it was agreed, that *Bryson* should let the plant to *Simpson*, and that if he should make default in any of the quarterly payments, or in the performance of any of the covenants, then the term granted should cease, and *Simpson* should deliver up the plant, *&c.*, and it should be lawful for *Bryson* to take immediate possession of the same. There was a memorandum at the foot of the deed, that *Simpson* had put *Bryson* in full possession of the plant, by delivering to him one winch in the name of the whole. On the 5th of *July* 1783, a commission of bankruptcy issued against *Simpson*, and the messenger took possession of the plant.

The question was, Whether this was within the stat. 21 Jac. 1.? The court held clearly that it was.

The bare leaving goods in possession of the bankrupt without power to dispose, will not be within the statute. West v. Skip, 1 Ves. 243. *Ex parte* Flyn, 1 Atk. 185. The sort of possession, disposition, &c. are, in general, facts for the determination of a jury. Walker v. Burnell, Dougl. 303. Copeman v. Gallant, 1 P. Wms. 314. Collins v. Forbes, 3 Term R. 316.

Horn v. Baker 9 East R. 215.

‖So where a distillery with coppers, vats, stills, *&c.* was let on lease to traders who became bankrupt, it was holden that the stills, *&c.* which were fixed to the freehold did not pass to the assignees, but that the vats and other things which were movable did pass as being in the reputed ownership of the bankrupts.

Storer v. Hunter, 3 Barn. & C. 368.

But where a colliery was demised to the bankrupt, with engines, machinery, and implements, to be rendered up to the lessor at the expiration or other sooner determination of the term; it was held, that the tenant never had, under this demise, the possession, order, or disposition of the engines, *&c.* within the meaning of the statute, but only a qualified right to use them.

Lingham v. Biggs, 1 Bos. & Pull. 82. Lingard v. Messiter, 1 Barn. & C. 308.

If goods taken in execution are let by the execution creditor to the debtor, and he is suffered to remain in possession of them till he becomes bankrupt, he must be considered as reputed owner, and they pass to his assignees, and the marking the creditor's initials on the goods will not prevent the effect of the statute.

Where

Where the goods have once been in the ostensible ownership of the bankrupt, his possession of them at his bankruptcy is *primâ facie* evidence of his being still the reputed owner; but this evidence may be rebutted by circumstances. Where the bankrupt was not the original owner, the mere possession of the goods will not be evidence of his being reputed owner. Evidence of reputation of ownership is receivable in such case, and also evidence of contrary reputation. 1 Barn. & C. 312. Oliver v. Bartlett, 1 Bro. & B. 269. Gurr v. Rutton, 1 Holt, 527.

Furniture in a ready-furnished house will not it seems pass to the assignees of the occupier unless there are circumstances to shew a reputed ownership. *Per Eyre* C. J. 1 Bos. & Pull. 88.

So also goods let to hire, and which by custom are so let out, as a stocking-frame let to a working hosier in a manufacturing district, will not it seems pass to the assignees. *Per Laurence* J. 3 Taunt. 490. And so perhaps as to job horses. *Ibid.*

Where an officer in the *East India* Company's service, having the privilege of shipping a certain quantity of goods from the *East Indies* to *England*, assigned it for a valuable consideration to *A. B.* but the goods were shipped and brought to *England* and sold in the name of the officer, who became bankrupt before *A. B.* could receive the proceeds of the goods; it was held that the officer being the reputed owner the proceeds passed to his assignees.‖ Gordon v. East India Company, 7 Term R. 228.; and see Collins v. Forbes, 5 Term R. 316.

In mortgages of land or chattels real, the nondelivery of possession does not amount to that species of fraud intended to be checked by the statute, the title deeds, and not the possession, being the evidence of such species of property, Creditors, therefore, cannot be deceived and deluded by the possession of property of that nature. But, where goods are pawned or mortgaged, it is very different; for possession and a power of disposal of such property are the only evidences of ownership to which the creditor can look: an assignment therefore of such property, unaccompanied by possession, is fraudulent and void. Stephens v. Sole, 1 Ves. 352. Bourne v. Dodson, 1 Atk. 154. Ryal v. Rowles, 1 Atk. 165. 1 Ves. 348. Bamford v. Baron, 2 Term R. 594. Edwards v. Haben, 2 Term R. 587.

‖And accordingly where the printer and publisher of a newspaper assigned over all his interest to a creditor as a security, but continued to print and publish as before, and no affidavit of the change of interest was delivered to the stamp office, and the printer became bankrupt; the interest in the paper was held to pass to his assignees.‖ Longman v. Tripp, 2 New R. 67.: and see 2 Sim. & Stu. 292.

But, if the property cannot be delivered at the time of the contract, it will be sufficient if the mortgagee has the documents and muniments delivered to him, in order to reduce it into possession. A mortgage, therefore, of a ship, or goods at sea, if the mortgagee has taken all methods in his power to get possession, such as the bill of sale, bills of lading, *&c.* will be valid, for otherwise no security could be made of such things at sea. But if the creditor were to suffer the ship to come back and go upon another voyage, the case would be very different. For the delivery of the grand bill of sale will not be sufficient, if there is an opportunity of taking actual possession. Brown v. Heathcote, 1 Atk. 160. *Ex parte* Mathews, 2 Ves. 272. Hall v. Gurney, Hil. 24. G. 3. *B. R.* Co. Bankrupt Laws, 401. Atkinson v. Maling, 2 Term R. 462.

‖Mair v. Glennie, 4 Maule & S. 240.‖ By the 26 G. 3. c. 60. § 17. the bill of sale must recite the certificate of the registry of the ship, notwithstanding it be intended only as a security for money

money lent, else it is void; and being void the vendee, though he take possession of the ship immediately upon her return, cannot retain it against the assignees of the vendor. Rolleston v. Hibbert, 3 Term R. 406.

Robinson v. Macdonnell, 5 Maule & S. 228. Hay v. Fairburn, 2 Barn. & A. 193. Monkhouse v. Hay, 2 Bro. & B. 114. 8 Price, 256. Kirkley v. Hodgson, 1 Barn. & C. 588.

‖Before the late registry act it was settled that where the owner of a ship assigned over his interest, and the transfer was complete according to the registry acts, so that the assignee became the registered owner, still if the original owner continued to have the ship in his possession, order, and disposition by the permission of the assignee, the property passed to the assignees of the owner on his becoming bankrupt.

6 G. 4. c. 110. § 46.

But now, by the registry act, 6 G. 4. c. 110. § 46., it is provided, that when any transfer of any ship or vessel, or of any share thereof, shall have been made as a security for payment of any debt, either by way of mortgage or of any assignment to a trustee for the purpose of selling for the payment of any debt, if such transfer shall have been duly registered according to the provisions of the act, the interest of the mortgagee shall not be affected by the bankruptcy of the mortgagor, notwithstanding the ship was at the time in the possession, order, and disposition of the bankrupt, and that he was the reputed owner. And see 6 G. 4. c. 16. § 72. (pa. 627.)

Ex parte Burn, 1 Jac. & W. 378.; and see 4 Barn. & C. 120.

Before this statute it had been decided that ships registered in the name of one partner, but in the order and disposition of the whole partnership, passed to the assignees of the joint estate: and this decision is not affected by the above clause, which applies only to cases of transfers by way of security or mortgage.

Mucklow v. Mangles, 1 Taunt. 318. See this authority doubted, 5 Bing. 276, 277.

Where a party contracted with a builder for a barge, and agreed to pay him the value in advance, and the builder became bankrupt before the barge was *completed*, it was holden that the purchaser had acquired no property in the barge, and that it passed to the assignees of the builder.

Woods v. Russell, 5 Barn. & A. 942.; and see Carruthers v. Payne, 5 Bing. 270.

But where the price of the ship to be built was payable by instalments, and the builder, after payment of some only of the instalments, signed a certificate, according to the registry act, to enable the purchaser to have the ship duly registered in his name, and the builder afterwards became bankrupt; it was held, that the payment of the instalments vested the specific property in the buyer, and that at all events the signing the certificate by the builder was a consent that the property should pass to the buyer.‖

Ex parte Batson, 8th *Aug.* 1791. Co. Bankrupt Laws, 406.

If a ship is in a foreign port, where the mortgagee might take possession of her, and this be known to him, yet he is not obliged to take possession until her arrival in *Great Britain*.

Gillespy v. Coutts, Ambl. 652. *Ex parte* Standgroom, 2d *Aug.* 1790.

Where a share of a ship is mortgaged or pledged, the delivering of the bill of sale of that share is sufficient, for the mortgagee cannot in such case take actual possession of the ship. Co. Bankrupt Laws, 410. 1 Ves. jun. 163.

¶*Choses in action* are holden within the statute, for although they are only assignable in equity, equity will follow the law in such case. Falkener v. Case, Co. Bankrupt Laws, 412.

1 Bro. Chan. R. 125. S.C. 2 Term R. 491. S.C. Rowe v. Dawson, 1 Ves. 331.

¶So government stock (*a*) is also within the statute, and bills of exchange (*b*), policies of insurance (*c*), a share in a newspaper (*d*), share in a public company. (*e*)

(*a*) Brown v. Bellaris, 5 Madd. 53. *Ex parte* Richardson, Buck, 480.; and see 80th section of 6 G. 4. c. 16. (*b*) Hornblower v. Proud, 2 Barn. & Ald. 327. *Ex parte* Burton, 1 Glyn & Ja. 207. (*c*) *Ex parte* North, Buck, 149. 3 Madd. 63. (*d*) Longman v. Tripp, 2 New R. 67. (*e*) Nelson v. London Association Company, 2 Sim. & Stu. 292.

But stock of a company seised of real estate is not a chattel within the statute. *Ex parte* Vauxhall Bridge Company, 1 Glyn & Ja. 101.

Nor are chattels fixed to the freehold. ¶ 1 Atk. 161. Horn v. Baker, 9 East, 215.

If a bond is assigned, the bond must be delivered and notice must be given to the debtor; but in assignment of book-debts notice alone is sufficient, because there can be no delivery, and such acts are equal to a delivery of goods, which are capable of being delivered. Ryall v. Rowles, 1 Ves. 372. 1 Atk. 171. 177. A chose in action may be assigned without deed. Howell v. M'Ivers, 4 Term R. 690.

¶The assignment of a bond and delivery of it to the assignee, are not sufficient to take the bond out of the operation of the bankruptcy, unless notice is also given to the debtor. *Ex parte* Monro, Buck, 300.

And so also where, on the dissolution of a partnership, debts due to it are assigned to the continuing partner, unless notice is given to the debtors, the debts still remain in the order and disposition of the partnership. *Ex parte* Burton, 1 Glyn & Ja. 207.

And so also as to assignment of a policy, unless notice is given to the insurers. Williams v. Thorp, 2 Sim. 257.

And notice in the Gazette is not sufficient unless the debtors have seen it. ¶ *Ex parte* Usborne, 1 Glyn & Ja. 358.

Where a trader makes a settlement of personal property upon his marriage, for the separate use of his wife, and to be by her employed in a trade, his living with the wife, if he do not intermeddle in the business, will not be a possession of the property within the statute of 21 Jac. 1.; for he hath not the *order and disposition with the consent of the real owner.* Haselinton v. Gill, 3 Term R. 620. n. Jarman v. Woolloton, *Ibid.*

¶But goods, the property of the wife, assigned on the marriage to trustees on trust to permit her husband to enjoy them, on condition of his paying a sum of money by instalments to the trustees for the use of the wife's children by a former husband, were held to fall within the statute, the trustees having permitted them to remain in the husband's hands after default made in the instalments, and until the day before his bankruptcy. Darby v. Smith, 8 Term R. 82.

In the above case, the possession taken by the trustees on the night before the bankruptcy, was considered by the court as no alteration of the bankrupt's possession, so that he was still in possession "at the time." This case is not to be considered as

carrying the words of the statute, "at such time as they shall become bankrupt" beyond their ordinary import.

Jones v. Dwyer, 15 East, 21.; and see *acc.* Arbouin v. Williams, 1 Ry. & Moo. N. P. C. 72. where the transfer was only the day before the bankruptcy.

Therefore, in a subsequent case, where the purchaser of goods received from the seller an order on the wharfinger for delivery, but suffered the goods to remain some months in the seller's name, and the seller disposed of part, and on notice of the seller's insolvency, and *nine days before* his bankruptcy, the purchaser procured the goods to be transferred to his name, it was held that there was a complete transfer to the buyer before the bankruptcy, and consequently the assignees of the seller were not entitled to the goods.

Ex parte Smith, Buck, 149. 3 Mad. 63. Robinson v. Macdonnell, 2 Barn. & A. 134.

Manton v. Moore, 7 Term R. 67.

In order to bring the case within the statute, the bankrupt must have the possession, order, and disposition of the goods. The bankrupt was an engineer employed by a canal company to build locks, *&c.* on the canal, and on his purchasing materials for that purpose, they were laid on the company's premises, and the company advanced money to the engineer, taking a bill of sale of the goods, and a symbolical delivery from the engineer by a halfpenny. The engineer afterwards becoming bankrupt, the assignees were held not entitled to the goods, the sheriff having previously seized them under an execution against the engineer at the suit of the company; for the best delivery of the goods was made that the nature of the case admitted, the goods being on the company's premises; and the goods appearing to be the goods of the company, no false credit could be obtained by the bankrupt.

Jones v. Dwyer, *suprà.*

But if a trader sell goods lying on his wharf, and the buyer neglect to have them trasferred into his name in the wharfinger's books, they will pass to the trader's assignees under his bankruptcy.

Lucas v. Dorrien, 1 Moo. R. 29. 7 Taunt. 278. S. C. Harman v. Anderson, 2 Camp. 245. Spear v. Travers, 4 Camp. 251.; and see Greening v. Clark, 4 Barn. & C. 316. Winks v. Hassall, 9 Barn. & C. 376.

But the transfer in the wharfinger's books passes the possession to the vendee. And so also the delivery by the bankrupt of warrants for delivery of goods in dock warehouses duly indorsed is such a transference of the possession to the party receiving the warrants, that the goods do not remain in the possession, order, and disposition of the bankrupt. In this case, an assent on the part of the dock company to the transfer was proved; but it seems that possession is changed without such assent.

Knowles v. Horsfall, 5 Barn. & A. 134.

But where there is no warrant or order for delivery, the mere marking the goods with the initials of the vendee will not alter the possession so as to prevent the goods passing under the statute to the vendor's assignees; and this, notwithstanding the sale may be notorious in the *particular trade* of the parties. But if notice is given to the warehouse-keeper of the sale, it seems the possession will be passed to the vendee.

Thwackthwaite v. Cock, 3 Taunt. 486.; but see Flinn v. Mathews, 1 Atk. 185.

Goods sold and remaining undistinguished in the vendor's warehouse for re-sale by the vendee, under a rent to the vendor, will pass to the vendor's assignees under his bankruptcy, notwithstanding a custom in the particular trade that goods shall so remain after sale without any mark.

But

But wine purchased of a wine merchant, and remaining in the merchant's cellars, set apart in a particular bin, and marked with the purchaser's seal, and entered as his in the merchant's books, is not in the order and disposition of the merchant so as to pass to his assignees. *Ex parte* Marrable, 1 Glyn & Ja. 402.

Where a trader's shopman and another were the special bailiffs in a warrant under an execution against the trader, and they seized the goods and remained in possession till his bankruptcy; it was held, that the possession of the servant was the possession of the master, and that the assignees were consequently entitled to the goods. Jackson v. Irvin, 2 Camp. R. 48.

And so also where the warrant was directed to a regular bailiff, but the creditor ordered him not to sell, and the bailiff left a man in possession, and the trader was suffered to carry on business and to have the visible ownership of the goods till his bankruptcy. Toussaint v. Hartop, 1 Holt R. 335.

So also, where the goods seized were left in possession of the bankrupt, after the execution under a demise, at a rent from the creditor, and though the creditor's initials were marked on them, they were held to pass to the assignees. Lingard v. Messiter, 1 Barn. & C. 308.; and see 4 B. & C. 652.

It has been decided by the Court of Exchequer, that the share of a dormant partner in the stock in trade being in the possession of the acting partner does not pass to the assignees under the bankruptcy of such acting partner; but this decision has been much questioned by Lord *Eldon*. Coldwell v. Gregory, 1 Price R. 119. *Ex parte* Dyster, 2 Rose Ca. 256.

And in a late case, where a dissolution of partnership took place some time prior to the bankruptcy of one of the partners, and the trade was carried on after the dissolution (as it had been before) by such partner only, and the whole stock and effects remained in his hands until and at the time of the bankruptcy, by agreement with his former partner; it was decided that the share of the other partner passed to the assignees under the bankruptcy, as being in the possession, order, and controul of the bankrupt. *Ex parte* Enderby, 2 Barn. & C. 389.

As the possession must be with consent of the true owner, the property of infants, who are incapable of consenting, is not within the statute. Viner v. Cadell, 3 Esp. Ca. 88.

Where stock was mortgaged and was afterwards transferred by the accountant general to the mortgagor without privity of the mortgagee, it was held not to pass to the assignees of the mortgagor on his bankruptcy. *Ex parte* Richardson, Buck, 480.

But where a trustee contracted to sell and let the purchaser into possession, the property was held to pass under the purchaser's bankruptcy, the trustee being the "true owner" within the meaning of the statute.‖ *Ex parte* Dale, Buck, 565.

The assignment will not pass goods which the bankrupt hath possession of as factor, though he act upon a *del credere* commission. Garret v. Cullum, Bull. Ni. Pri. 42. (5th edit.)

Godfrey v. Furzo, 1 P. Wms. 185. *Ex parte* Dumas, 2 Ves. 586. 1 Atk. 23 2 Scrimshire v. Alderton, 2 Stra. 1182. Escott v. Milward, Sittings after Mich. 1783. Co. Bankrupt Laws, 456, 457. ‖Delaunay v. Barker, 2 Stark. R. 539. Taylor v. Plumer, 3 Maule & S. 562.‖

‖But

Livesay v. Hood, 2 Camp. R. 83. Gibson v. Bray, 8 Taunt. R. 76. 1 Moo. 519. S. C.

‖But goods which the bankrupt has upon sale or return are not in his possession as factor, and pass under the assignment. But where the trader received a parcel of goods on sale or return the evening before his bankruptcy, and in fact never unpacked them, and his shop was shut next morning and never re-opened, it was held that they did not pass to the assignees.‖

Ex parte Dumas, 2 Ves. 586. 1 Atk. 232.

And upon the same principle, the assignment will not pass bills or goods sent to a trader to be applied to a particular purpose. *Ex parte* Emery, 2 Ves. 674. Godfrey v. Furse, 3 P. Wms. 185. D'Aquila v. Lambert, Ambl. 399. *Ex parte* Clare, and *Ex parte* King, cited in Snee v. Prescott, 1 Atk. 250. Zink v. Waller, 2 Black. R. 1154. Tooke v. Hollingworth, 5 Term R. 215. ‖Bent v. Puller, 5 Term R. 494. Bolton v. Puller, 1 Bos. & Pull. 539.‖

Giles v. Perkins, 9 East R. 12. Thompson v. Giles, 2 Barn. & C. 422. *Ex parte* Wakefield Bank, 1 Rose, 258, 245. 19 Ves. 25.

‖And if bills not due, though indorsed, are paid by a customer to a banker, the property remains in the customer and the bills do not fall within the statute, since the banker is considered as a factor to receive payment of the bills, unless, indeed, the banker can shew an authority, either express or implied, from the customer to treat them as cash.

2 Barn. & C. 229. Bolland v. Bygrave, 1 Ry. & Mod. 271. 1 Rose, 243.

But *indorsement* is considered *primâ facie* evidence of the bills being *discounted* by the banker; and if discounted, the property is changed, and they pass with the rest to the assignees.

Ex parte Sargeant, 1 Rose, 153. *Id.* 235. 18 Ves. 229.

Bills not due, and *entered short*, remain the property of the customer: *aliter* if paid in and treated as *cash*.

Thompson v. Giles, *supra*; and see 1 Deacon, 432. *et seq.*

And if they are entered *as bills*, they remain the property of the customer, although he may have permission to draw on the bankers to the amount of them, if the cash-balance is in favour of the customer at the bankruptcy.‖

Howard v. Jemmett, 3 Burr. 1369.

The assignment will not pass goods which the bankrupt may be possessed of as executor or administrator. *Ex parte* Ellis, 1 Atk. 101. *Ex parte* Marsh, 1 Atk. 158. But if a trader is made executor and residuary legatee, and before his bankruptcy collects in enough of the testator's effects to pay debts and particular legacies, and the remainder of the assets is uncollected; though the *assignees in law* would not be entitled to get it in, because the bankrupt has it in *auter droit* as executor, yet the *assignees under the commission*, notwithstanding the legal interest is not vested in them, may, by the aid of the Court of Chancery, get in the assets in the name of the executor. *Per* Lord *Harcourt*, in *Ex parte* Butler, 1 Atk. 213. Ambl. 74. S. C. As courts of law now take notice of a trust, *the assignee in law* would be entitled. Winch v. Keeley, 1 Term R. 619. ‖Ld. *Hardwicke's* words, 1 Atk. 215. are, "the assignees would *not in law* be entitled," &c., and not the *assignees in law* would not be entitled, which makes the above passage clear. Winch v. Keeley decided, that the assignor of a bond might sue in his own name for the benefit of the assignee notwithstanding his bankruptcy, since the court would take notice that he was a trustee for the assignee. See Joy v. Campbell, 1 Scho. & C. 328.‖

Fox v. Fisher 3 Barn. & A. 135.

‖But where the party entitled to take out administration neglects to do so, and remains in possession of the goods for a number of years, and then becomes bankrupt, the goods will pass to the assignees.‖

Winch v. Keeley, 1 Term

[The assignment will not pass a debt which the bankrupt had previously assigned to another person; for in such case he is a mere

mere trustee, and the debts which are assignable by the statute are those which are *for the benefit* of the bankrupt.] R. 619. ‖Scott v. Surman, Willes R. 402,

Carpenter v. Marriell, 3 Bos. & Pull. 40. Gladstone v. Hadwen, 3 Maule & S. 526.; and see 79th sect. of 6 G. 4. c. 16.‖

‖(H) Of the Relation to the Act of Bankruptcy, and how far it is qualified.‖

THE assignees have an interest in the bankrupt's estate from the very act of bankruptcy, so as to avoid all mesne acts done by the bankrupt during that time, and the issuing out of the commission; and the privity of contract between the bankrupt and his creditors being from that time transferred to the assignees, they have the same right as an administrator, who has a property from the death of the intestate, and may declare *generally ut de bonis suis propriis.* Sland. 239. Sid. 327. Salk. 111. pl. 8. But it has been holden, that before an actual assignment, the bankrupt has such a property for which he may maintain an action. Salk. 108. If upon a *copias ad satisfaciendum* the money is levied, and after the plaintiff becomes a bankrupt, and the money is assigned before the return of the writ, this assignment is void; for being in the hands of the sheriff it is *quasi in custodiâ legis*, and not the bankrupt's money before it is paid him. Cro. Car. 166. 176. If the conusor, after the *extent*, and before the *liberate*, becomes a bankrupt, and the goods are delivered upon the *liberate*, and a commission is after taken out, &c. they cannot be sold; for by the *extent* they were in *custodiâ legis*; and it was not in the power of the conusor by any subsequent act, to destroy the effect of the *extent*. Cro. Car. 148. Sir W. Jones, 202. S. C. If between the act of bankruptcy and before assignment, the goods of the bankrupt are seized and in the officer's hands for the debt of the king, it seems that these goods cannot be assigned; for the king's title and that of a subject's commencing at the same time, the king shall be preferred; besides the king cannot come in as a creditor under the statute. Salk. 102. pl. 2. 108. [2 Stra. 978. But he is bound by an actual assignment. 2 Show. 481.]

The crown is not bound by the acts relating to bankrupts, not being named in them; therefore an extent served upon the property of the bankrupt will bind from the *teste* of the writ, and till actual assignment by the commissioners; but the king is bound by an *actual assignment*, because the property is then absolutely transferred to a third person. Co. Bankrupt Laws, 446. Audley v. Halsey, Sir W. Jones R. 202. Rex v. Pixley, Bunb. 202. Rex v. Bewdley, in the Exchequer, *July* 1784. 2 Show. 480. Lechmere v. Thoroughgood, 3 Mod. 236. Comb. 123. Rorke v. Dayrell, 4 Term R. 408.

One became indebted to the crown, and a commission of bankrupt was sued out against him, and an assignment made of his effects; and an extent issued from the crown, tested the day of the date of the assignment, and the crown was preferred. Park. R. 126. 2 Show. 40. ‖*Qu.* Whether the courts would not now enquire which was first, the execution of the assignment or the issuing the extent? See as to fraction of a day, 2 Barn. & A. 586.; and see 3 Stark. 73. When an extent is apprehended the commission should be sealed with all despatch, in order that a provisional assignment may be executed to bar the crown process. Lord *Eldon* did not complain of being called up in the middle of the night for this purpose. Wydown's case, 14 Ves. 88. As to extents in aid and the restrictions now put upon them, see 57 G. 3. c. 117. 3 Price, 525. 647.; and see 7 G. 4. c. 30. § 1. 1 Deacon, 492.‖

The land-tax money in the hands of collectors is a debt to the king, but the warrant of the commissioners of the land-tax is not equal to an extent, so as to bind the goods from the date, but until assignment the property is in the bankrupt, and the land-tax Brassey v. Dawson, 2 Stra. 978.

tax commissioners' warrant executed before the assignment will create a lien upon such a seizure, therefore all the assignees' right is to redeem the goods which are in the hands of the commissioners of the land-tax for that purpose.

Stacy v. Hulse, Dougl. 395. Attorney-General v. Senior, Rex v. Fowler, Dougl. 400.

A candle-maker, in arrear for the single duties, becoming bankrupt, and convicted for nonpayment after the assignment of his effects, the double duties are a lien upon the candles, utensils, and materials in the hands of his assignees, and they may be distrained.

‖See Austen v. Whitehead, 6 Term R. 436. *In re* Day, 1 M'Clel. 384.‖

Barwell v. Ward, 1 Atk. 260. King v. Leith, 2 Term R. 141.

[Where a trader commits an act of bankruptcy by lying in prison for two months, it relates to the first day of his surrender, so as to overreach all intermediate transactions.]

‖But under the new act 6 G. 4. c. 16. § 5. the act of bankruptcy does not relate to the first day of the imprisonment. Moser v. Newman, 6 Bing. 556. Higgins v. M'Adam, 3 Young & J. 1.‖

Clarke v. Ryal, 1 Black. R. 642.

Where the act of bankruptcy was committed by the bankrupt's lying in gaol two months, and in the interval, before it was completed, the sheriff paid money which he had levied under an execution against the bankrupt to the plaintiff in the action, the court would not assist the assignees upon motion.

Coles v. Robins, 3 Camp. 185. And now by the new act such payment would be good, as being made *before* the act of bankruptcy; see Moser v. Newman, *supra*.

‖Where a payment is made by a debtor to a trader in prison, if the party has notice of that fact, and if the requisite imprisonment is afterwards completed, the payment is not protected, but it is protected if the debtor had no notice of the imprisonment.

Thompson v. Beatson, 1 Bing. R. 145.

A payment by a bankrupt in prison is protected where the party receiving it gives up to the bankrupt papers on which he had a lien.

Thomas v. Desanges, 2 Barn. & A. 586.; and see 3 Stark. Ca. 73.

The courts will notice a fraction of a day, and therefore, where an execution is levied on a trader's goods and on the same day at a subsequent hour he goes to prison and remains in prison two months, the act of bankruptcy does not over-reach the execution.

Ex parte Birkett, 2 Rose Ca. 71. See 6 G. 4. c. 16. § 18. (*a*) 1 Jac. 1. c. 15. § 14. (*b*) 21 Jac. 1. c. 19. § 14. (*c*) 19 G. 2. c. 32. § 1.

The relation to the act of bankruptcy cannot be carried back beyond the accruing of the petitioning creditor's debt, as the assignees cannot avail themselves of an act of bankruptcy precedent to it without destroying their title as assignees.‖

[As this relation to the act of bankruptcy occasionally induceth very great hardship upon parties, it meeteth with but little encouragement from the courts. The legislature too hath interposed, and provided that it shall not extend to the prejudice of any debtor of the bankrupt (*a*), who pays his debt to the bankrupt truly and *bonâ fide* before he shall understand or know that he is become a bankrupt; or to purchasers for valuable consideration (*b*), unless the commission shall be sued out within five years after the act of bankruptcy; or to payments for goods or bills of exchange *bonâ fide* made by the bankrupt in the course of trade (*c*), without the creditor's knowing that he is become bankrupt, or in insolvent circumstances.]

There is no difference between an actual payment of money in satisfaction of a debt, and indorsing bills of exchange, provided there be no notice, and the money be received on them before the commission of bankruptcy

bankruptcy issues. Hawkins v. Penfold, 2 Ves. 550. ‖The giving of goods, or a bill of exchange in payment for goods, is a payment protected, though the bill is paid after notice of an act of bankruptcy. Wilkins v. Casey, 7 Term R. 711. So also a *bonâ fide* payment for goods purchased after a secret act of bankruptcy. Cash v. Young, 2 Barn. & C. 413.; but an advance of money by a factor on security of goods is not a payment protected. Copeland v. Stein, 8 Term R. 199.; nor where goods are taken of a trader on sale and return after a secret act of bankruptcy, can they be retained on the ground of a set-off of a prior debt due from the bankrupt to the party taking them. Hurst v. Gwennap, 2 Stark. Ca. 306. And a payment by a party not actually indebted at the time to the bankrupt has been held bad, though in anticipation of goods previously ordered of the bankrupt. Bishop v. Crawshay, 3 Barn. & C. 415.; but *quære* whether this would not be good under the § 82. of the new act? As to payments by *partners*, see *post*. A payment to a carrier by the bankrupt for carriage of goods, was held not protected by the 19 G. 2. c. 32. § 1. Bradley v. Clark, 5 Term R. 197. And so also a bill of exchange given by a bankrupt after an act of bankruptcy, in payment of damages recovered against him before the bankruptcy. Pinkerton v. Marshal, 2 H. Black. 334. But these two last payments would now be protected by the more general words of the 82d section of 6 G. 4. c. 16. However, it must still be a *bonâ fide* payment, not for instance a payment for goods before they are delivered, *per Bayley* J. 3 Barn. & C. 416.; nor, perhaps, a payment by weekly instalments for goods previously delivered to the bankrupt. Bolton v. Jager, 1 Ry. & Moo. 265.‖ Payment by the acceptor of a bill, after time given him by the holder on condition of allowing interest, is not a payment in the course of trade, and of course not protected against a secret act of bankruptcy. Vernon v. Hall, 2 Term R. 648. A banker is affected by notice equally with other persons; and if in such case he pays the draft of a trader keeping cash with him, he is liable to pay it over again to the assignees. Vernon v. Hankey, 2 Term R. 113. 3 Bro. Ch. R. 313. But the assignees having recovered the money from the banker, cannot compel the creditor to whom the bankrupt paid it to refund. Vernon v. Hanson, 2 Term R. 287. If a person borrows money, and repays it after a secret act of bankruptcy this, though not a payment in the course of trade, will yet be allowed; for the loan being repaid, it will be considered as never borrowed. *Ex parte* Congalton, 3 Bro. Chan. R. 47. ‖So where a party lent to a bankrupt during his imprisonment money to settle with his creditors, and the object failing the money was repaid, the repayment was protected. Toovey v. Milne, 2 Barn. & A. 483. Money in dispute was deposited by a bankrupt in the hands of an arbitrator who was to decide to whom it belonged, and he, before the commission, and without notice of any act of bankruptcy, paid it to the person whom he thought entitled. It was held that the assignees could not recover it from the arbitrator. Tope v. Nicholls, 7 Barn. & C. 101.; and see 4 Taunt. 198.‖

‖By the 46 G. 3. c. 135. § 1. and the 49 G. 3. c. 121. § 2. all conveyances by, all payments to, and all contracts and other dealings and transactions by and with the bankrupt, and all executions and attachments two months before a commission, were declared valid, provided the party had no notice of an act of bankruptcy, or that the trader was in insolvent circumstances; and by the 56 G. 3. c. 137. § 1. a delivery of goods or effects without notice of an act of bankruptcy was protected. 46 G. 3. c. 135. § 1. 49 G. 3. c. 121. § 2.

The 6 G. 4. c. 16. which has repealed the former statutes, has re-enacted, altered, and extended their provisions. By the 81st section (which re-enacts the 46 G. 3. c. 135. § 1. and 49 G. 3. c. 121. § 2.) all conveyances by, and all contracts, dealings, and transactions by and with any bankrupt *bonâ fide* entered into more than two calendar months before the commission (*a*), and all executions and attachments *bonâ fide* executed and levied more than two months before the commission, shall be valid notwithstanding any prior act of bankruptcy, provided the person dealing, *&c.* had no notice of any prior act of bankruptcy: (*b*) provided that where a commission is superseded and another commission issued, no such conveyance, contract, *&c.* shall be valid unless made, entered into, *&c.* more than two months before the first commission. 6 G. 4. c. 16.

(*a*) See 1 Moo. & Malk. 137. 140, 141. 251.

(*b*) This provision is new.

By

(a) The words "in the course of trade," in 19 G. 2. c. 19. § 14. are here omitted; and the notice under the 6 G. 4. c. 16. is in all cases notice of *an act of bankruptcy*, so that it is now unnecessary to consider the cases as to notice of insolvent circumstances, or of stopping payment. Where *A.* purchased a library of *B.* after an act of bankruptcy by *B.* of which *A.* was ignorant, it was held the assignees could not recover the value of the books without at least tendering the price, since the payment by *A.* was valid, under the 82d section. Hill v. Farnell, 9 Barn. & C. 45. *Sed vide* Carter v. Breton, 6 Bing. 617. The clause extends to payments *bonâ fide* made before the act took effect. Churchill v. Crease, 5 Bing. 177. Terrington v. Hargreaves, *id.* 489. A payment made by a partner who has committed an act of bankruptcy of a partnership debt due from the firm before the act of bankruptcy, is not good, if the creditor receiving it has notice of the partner's act of bankruptcy. Craven v. Edmonson, 5 Bing. 734. Where the bankrupt after a secret act of bankruptcy bought on credit and sold for ready money, at unduly low prices, the purchasers were held not protected under the 82d section, unless the purchase was in the *usual course* of business. Ward v. Clarke, 1 Moo. & Mal. 497.

By § 82. it is enacted, all payments really and *bonâ fide* made by any bankrupt to any creditor (*a*), (not being a fraudulent preference), and all payments *bonâ fide* made to any bankrupt before the date and issuing of the commission shall be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing had not notice of any act of bankruptcy.

§ 83. By § 83. the issuing of a commission, if the adjudication be notified in the *London Gazette*, and the person to be affected may reasonably be presumed to have seen the same, shall be deemed notice of an act of bankruptcy.

§ 84. By § 84. no person or body, *&c.* having money, goods, wares, *&c.* belonging to any bankrupt, shall be endangered by payment or delivery to the bankrupt without notice of an act of bankruptcy.

§ 85. By § 85. notice to the agent of a corporate body shall be notice to the body.

§ 86. By § 86. no purchase for valuable consideration, where the purchaser had notice of an act of bankruptcy, shall be impeached by reason thereof, unless the commission be sued out within twelve calendar months after such act of bankruptcy.

§ 87. By § 87. no title to any real or personal estate sold under any commission shall be impeached by the bankrupt or any claiming under him, in respect of any defect in the proceedings, unless the bankrupt has commenced proceedings to supersede such commission within twelve months from the issuing thereof.‖

Foster v. Allenson; 2 Term R. 479. ‖Fuller v. Gibson, 2 Cox, 24. Puckell v. Down, 3 Camp. Ca. 131. *Qu.* Whether a payment on judgment by default is protected? See 2 Christ. B. L. 600.; and see 1 Will. 4. c. 7. § 7. which takes judgment by default in adverse suits out of the operation of the 108th section; and see *ante*.‖

[The relation operates only on voluntary payments with notice; and if the debtor pays the debt in consequence of a judgment at law, the assignees cannot recover the money a second time.]

Stevenson v. Wood, 5 Esp. Ca. 200. Mayor v. Croome, 1 Bing. R. 261.

‖So also payment of rent to a landlord who is about a distrain is a payment protected by the statute, though after an act of bankruptcy.

Windham v. Paterson, 1 Stark. N.P.C. 147.; and see Hovil v. Browning, 7 East, 154.

But a debtor of the bankrupt is not warranted in paying funds of the bankrupt on a mere attachment in the mayor's court before judgment.‖

[It

[It will not avoid a fair act substantially complete, though defective in some formal circumstance. If therefore a trader assigns goods at sea, and at the same time undertakes to indorse and deliver the bill of lading as soon as he receives it, the indorsement will be good, though an act of bankruptcy be committed before it is made.] Lempriere v. Pasley, 2 Term R. 485. The like law as to an indorsement of a bill of exchange in pursuance of a prior agreement. Smith v. Pickering, Espin. Ni. Pri. 30. ‖See Watkins v. Maule, 2 Jac. & Walk. 237.‖

If a *fieri facias* is taken out, and indorsed according to the statute, and delivered to the sheriff, and after, the same day, the defendant becomes a bankrupt, and the sheriff levies 400*l.* of the goods of the defendant, and pays it to the plaintiff; yet the commissioners may assign these goods notwithstanding, &c.; for, by the delivery of the writ to the sheriff, the goods are bound in no other manner than before the statute they were bound from the *teste* of the writ; and by the delivery of the writ the execution is not served or executed (*a*). 3 Lev. 69. 191. See *acc.* 1 P. Wms. 92. 737. (*a*) Therefore not within 21 Jac. 1. c. 19. § 9.] ‖Sect. 108. of 6 G. 4. c. 16.; and see 1 Will. 4. c. 7. § 7.‖

[It seemeth to have been formerly (*b*) very much doubted, whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission; but it is now settled (*c*), that the assignees may in such case bring trover against him, though the relation shall not operate so as to make him a trespasser (*d*) ‖And trover seems to lie though the sheriff seize, sell, and pay over the money before a commission issues. (*e*)‖ (*b*) See Baily v. Bunning, 1 Lev. 173. 1 Sid. 271. S.C. 1 Keb. 900. S. C. (*c*) Cooper v. Chitty, 1 Burr. 20. 1 Black. R. 65. S. C.

(*d*) Nor will he be a trespasser, though he sell after notice from the provisional assignee. Smith v. Miles, 1 Term R. 475. ‖See Wyatt v. Blades, 3 Camp. Ca. 395. Stead v. Gascoigne, 8 Taunt. 527. (*e*) Potter v. Starkie, cited 4 Maule & S. 260. And as to the protection which the courts will give to the sheriff, see Burr. 37. Macgregor v. Birch, 4 Taunt, 595. King v. Bridges, 1 Moo. 43. 7 Taunt. 494. Burr v. Freethy, 1 Bing. R. 71.‖

‖And the assignees may also bring trover against the execution creditor suing, if he makes himself a party to the conversion, as by giving a bond to the sheriff, or by accompanying the officer in levying.‖ Menham v. Edmonson, 1 Bos. & Pull. 369.

[A purchaser for a valuable consideration, without notice of an act of bankruptcy, shall not be obliged in equity to discover any thing that may tend to deprive him of a legal title; but every advantage shall be left him to defend himself. Indeed where a commission is actually taken out, the case is very different, because that is a public act, which all are bound to notice (*a*); but an act of bankruptcy may be so secret as to be impossible to be known.] Akerry v. Williams, 2 Vern. 27. Collet v. De Golls, Ca. temp. Talb. 65. Wilker v. Bodington, 2 Vern. 599. ‖Fisher v. Touchett, 1 Eden, 158. And as to a mortgagee's right to tack further advances made after a secret act of bankruptcy, see *Ex parte* Herbert, 13 Ves. 183. Hitchcock v. Sedgwick, 2 Vern. 156. Eden's B. L. 234. Sugden V. & P. 721. (*a*) By 6 G. 4. c. 16. § 83., the issuing a commission is only notice if an act of bankruptcy has been actually committed; and if the adjudication is published in the *London Gazette*, and the party to be affected may reasonably be presumed to have seen the same. And it was decided in Sowerby v. Brook, 4 Barn. & Ald. 523., that the issuing a commission is not notice independent of statutory enactment.‖

‖(I) Actions and Suits by Assignees, and Evidence therein.‖

Cro. Car. 187. Jones, 223. Where wager of law lay against the bankrupt, it lies against the assignee. Cro. Jac. 105.

THOUGH the bankrupt's estate is transferred to the assignees, yet must they pursue the same remedies for the recovery of it as the bankrupt himself; therefore if a debt upon a simple contract due to the bankrupt is assigned, an action of debt will not lie against the executor of the debtor, but the assignee must bring his action on the case.

Allen, 28, 29. Stile, 62. S. C. Raym. S. C. cited. (*b*) This case is not worth attending to — assignees now declare *generally* as such, without mentioning any assignment; they state the cause of action accruing to the bankrupt before he became such, the promise in like manner; and in the breach allege the defendant has not paid to the bankrupt before he became such, nor to the assignees since; and conclude to the damage of the assignees.

The plaintiff declares upon an *assumpsit* for 43*l.* 1*s.*, and sets forth an assignment of the debts of the bankrupt, *mentionat. in quadam schedula continen. prædict. summam* 43*l.* 1*s.*, and the jury find he was indebted only 41*l.* 1*s.*, which he promised, *&c.* and that the commissioners assigned *debita præd. in quadam schedula continen. præd. summam* 43*l.* 1*s.*, and if this be the same promise, concludes for the plaintiff; and because the issue and verdict were concluded to the promise, and the assignment not in question, and the statute giving the like remedy to the assignee as the bankrupt had, it was adjudged for the plaintiff. (*b*)

Lev. 17. Raym. 6, 7. Keb. 167. (*a*) But the facts must appear on the record.

If there be a joint bond to *A.* and *B.*, and *A.* become a bankrupt, *&c.* the assignee cannot bring an action alone; but if assigned to *B.*, he alone may bring an action, being entitled to one moiety in his own right, and to the other for the benefit of creditors, by virtue of the assignment. (*a*)

Carth. 29. Pepys and Low, Comb. 108. S. C. [Lawson v. Lamb, 1 Lutw. 274. S. P. 2 Ld. Raym. 1548. S. P. The assignee must lay the promise to be made to the bankrupt, if the contract be prior to the bankruptcy. 6 Mod. 131. Stra. 697. *Secùs*, if subsequent; and therefore, in such case, they need not name themselves assignees. Evans v. Mann, Cowp. 569.] ‖Thomas v. Riding, 1 Rose, 121. So in action of covenant for rent accrued since the bankruptcy, it is no objection on general demurrer that the title is not set out. Parker v. Manning, 7 Term R. 537.‖ [If the same persons are assignees of *A.* and *B.*, who were partners, but there is no joint commission, they cannot in one action sue for debts due to *A.* and *B.* jointly, and also for debts due to each individually. Hancock v. Hayward, 3 Term R. 433. Streatfield v. Halliday, *Id.* 779.] ‖But after verdict the defect is cured, since it does not appear under how many commissions the assignees claimed, *Ibid.* *Vide* Smith v. Goddard, 3 Bos. & Pull. 469. The assignees under a joint commission may sue for demands due to any of the bankrupts, describing themselves as

In *assumpsit* the plaintiff declared as assignee under a commission of bankruptcy awarded against *J. S.* who became a bankrupt, *&c.*, and that the defendant was indebted to the said *J. S.*, *&c.*; and on demurrer to the declaration it was objected, that it was uncertain, it not being shewn how *J. S.* became a bankrupt, *viz.* either by keeping close within his house, by suffering himself to be arrested, *&c.*; and that in pleading simony, the particular act must be set forth: but it was held well enough in this case, for the statutes mentioned the word *bankrupt*, but in the statute against simony no mention is made of the word; besides, in this case the plaintiff is a stranger to the bankrupt, and it cannot be presumed that it lies in his knowledge in what manner he became a bankrupt.

as assignees of those to whom the debt is due. Stonehouse v. De Silva, 3 Camp. 399. Harvey v. Morgan, 2 Stark. 17. Where there are separate commissions and different assignees under each, in declaring for a joint debt they must describe themselves as assignees of each separately. Ray v. Davis, 2 B. Moo. 3.; and see Hogg v. Bridges, *Id.* 122. 2 Saund. R. 47. p. note. And by the 16th section of 6 G. 4. c. 16., joint commissions may issue against *some* of several partners. The non-joinder of a joint assignee as plaintiff is a ground of nonsuit, and need not be pleaded in abatement. Snelgrove v. Hunt, 2 Stark. 424. In an action by the provisional assignee the assignment by him to the general assignees between the writ and declaration, is no ground of nonsuit on the general issue. *Qu.* If specially pleaded. Page v. Bauer, 4 Barn. & A. 345. In an action by a new assignee on a judgment obtained by a former assignee, it is sufficient to state the removal, and that the new assignee was *duly* appointed. De Cosson v. Vaughan, 10 East, 61. Counts for money lent and money paid by plaintiff as assignee, may be joined with counts for money had and received to his use as assignee; for it may be intended that the money lent was the bankrupt's money which, under the 5 G. 2. c. 30. § 32. (sect. 102. of the 6 G. 4. c. 16.), the assignee might be authorized to lend. Richardson v. Griffin, 5 Maule & S. 294.‖

[The assignees may bring either *trover* or *assumpsit* for money received subsequent to the bankruptcy; but they cannot bring both; and having brought one, and proceeded to judgment in that, it will bar the other.] Hitchin v. Campbell, 2 Black. R. 779. 827. 3 Wils. 309. They were formerly not allowed to maintain *assumpsit* in such case. 1 Ves. 329. 3 Lev. 191.

‖They cannot bring *trover* unless the money proceeds from the conversion of valuable property; in such case, they can recover in *trover* the full value of the property, whereas in *assumpsit* they can only recover the sum actually received on the sale. And in *assumpsit* the defendant may set off any debt due to him from the bankrupt. King v. Leith, 2 Term R. 141. Smith v. Hodson, 4 Term R. 211.

The assignees by bringing *assumpsit* affirm the bankrupt's contract, and must stand in his situation in all respects; but by bringing *trover*, they elect to disaffirm the bankrupt's contract, and to stand on their rights as assignees. Reed v. James, 1 Stark. 134. Butler v. Carver, 2 Stark. 433.

By bringing *assumpsit*, however, they only affirm the transaction as a valid sale on the part of the bankrupt, and do not thereby let in a set off of a debt founded in a fraud on the bankrupt, and which the defendant could not have set off against the bankrupt himself. Burra v. Clarke, 3 Camp. 355. Fair v. M'Iver, 16 East, 150.

If the assignees once affirm the acts of a person wrongfully selling the bankrupt's property, they cannot afterwards treat him as a wrongdoer and maintain *trover*. Brewer v. Sparrow, 7 Barn. & C. 310.

Where a bankrupt, after his bankruptcy, drew a check on his bankers in favour of a creditor, to whom the money was paid, it was holden that the assignees could not recover the amount in *trover* for the check against the creditor, since the action proceeded on the ground that the check was drawn without authority, and worth nothing, and, therefore, at all events, the value of the paper only could be recovered; and it seems the plaintiff must be nonsuited in such an action. Matthew v. Sherwell, 2 Taunt. 439.; and see Walker v. Laing, 7 Taunt. 568. 1 Moo. 281. Wills v. Wells, 8 Taunt. 264. 2 B. Moo. 247.

Assignees, like other persons, are under the necessity of suing in a Court of Requests for a debt under 40*s.*, however inconvenient it may be that questions of bankruptcy should be tried there. Keay v. Rigg, 1 Bos. & Pull. 11. Ward v. Abrahams, 1 Barn. & A. 567.

Allanson v. Atkinson, 1 Maule & S. 583.

Where the bankrupt on being taken on a *ca. sa.* subsequent to an act of bankruptcy, delivered goods to the officer, which were pawned by the officer, and the produce was five weeks afterwards paid over by the officer to the defendant, the plaintiff in the execution, but not in the specific money raised by the officer, it was held that the assignees might recover this, as money had and received, from the defendant. — *Quære.* Whether such a payment, being before a commission, would now be protected by the eighty-second section of 6 G. 4. c. 16.‖

Miles v. Williams, 1 P. Wms. 249. 1 Atk. 193.

[It is in one case said, that if a bond was made to *A.* in trust for *B.*, who becomes a bankrupt, the assignees may bring the action in their own name, though *B.* must have brought it in the name of his trustee; but this opinion has been denied to be law by Lord *Hardwicke*, who thought clearly by the manner of wording the clause, relating to the commissioners' power of assignment of a bankrupt's effects, 1 Jac. 1., that assignees can only have the like remedy to recover a debt as the bankrupt himself might have had, the words "as the party himself might have had," in the conclusion of that clause, appearing to him to be meant of the bankrupt.

Sturdy v. Arnaud, 5 Term R. 599.

The assignees cannot maintain an action to recover the payment of an annuity, which the bankrupt, prior to an act of bankruptcy, had agreed should be applied to satisfy a debt due from the bankrupt to the grantor of the annuity.]

[Creditors cannot give a general power to assignees to prosecute suits at their own discretion, but

‖By the 6 G. 4. c. 16. § 88. (following the 5 G. 2. c. 30. § 38.) it is enacted, "that no *suit in equity* shall be commenced by any "assignee or assignees, without the consent of the major part "in value of the creditors of such bankrupt, who shall be pre-"sent at a meeting of the creditors, pursuant to notice to be "given in the *London Gazette* for that purpose."

there must be a meeting of creditors upon notice in the *Gazette*, to consider of each particular suit. Atk. R. 92. pl. 39. And a solicitor who carries on suits for an assignee, without the consent of the creditors assembled pursuant to this act, is not entitled to be paid out of the bankrupt's estate, but is left to a personal remedy against the assignee employing him. *Ex parte* Whitchurch, 1 Atk. 210. Actions at law may be brought without first calling any meeting of creditors. Hussey v. Fidell, 3 Salk. 59.] ‖A demurrer does not lie to a bill in equity because it does not state the consent of creditors. 3 Younge & J. 373.‖

See Elmslie v. M'Aulay, 3 Bro. C. C. 624. and note. (Eden's edit.)

Provided that if one third in value of the creditors do not attend, the assignees may, with consent of the commissioners, do the several acts mentioned.

Franklyn v. Fern, Barnard. Chan. R. 30.

If the majority of creditors at such meeting dissent from instituting a suit to get in the estate, the court will not in general suffer the other creditors to file a bill for that purpose; but it is otherwise if collusion is shewn.

Wilkins v. Fry, 1 Meriv. R. 244.

The consent of creditors is not necessary to a suit by the assignees on a personal claim for their own indemnity, since the creditors have no interest.

Bull. N. P. 37.

Evidence in Actions by Assignees.‖ [In actions brought by assignees, it is necessary to prove the bankrupt a trader within the statute, the act of bankruptcy, that the commission was regularly

regularly granted, the assignment to the plaintiff, and property in the bankrupt.]

‖But if the defendant by his conduct has impliedly admitted the title of the assignees, the strict proof of their title is dispensed with. Maltby v. Christie, 1 Esp. Ca. 340. Dickenson v. Coward, 1 Barn. & A. 677. Goldie v. Gunston, 4 Camp. 381. Harmer v. Davis, 1 Moo. R. 300.

And so also where the issue joined is not such as to dispute it; as where to debt on bond by assignees the defendant pleaded only payment. Corsbie v. Oliver, 1 Stark. R. 76.

The mere proof by the defendant of a debt under the commission, is not such an admission of the assignees' title as to dispense with the proof. Rankin v. Horner, 16 East, 191. *Ex parte* Jeeks, 1 Rose, 393.

Where the title of the assignees comes incidentally in question, they being strangers to the record, it must be strictly proved: no notice can be given to dispute it. Doe dem. Mawson v. Liston, 4 Taunt. 741.

But though the assignees are not named as assignees on the record, still if the opposite party knows that they claim as such, the strict proof is dispensed with, unless a notice is given. Simmonds v. Knight, 3 Camp. 251.; and see Gow. 24.

And so also, though there are other defendants besides the assignees, if such defendants justify as servants of the assignees. Gilman v. Cousins, 2 Stark. Ca. 82.

By the provisions of the 6 G. 4. c. 16. (which have materially extended those of Sir *Samuel Romilly*'s Act, the 49 G. 3. c. 121. § 10.) the right of disputing the bankruptcy is intended to be confined to those cases where the assignees claim either as plaintiffs or defendants, in respect of their rights *as assignees originating solely under the bankruptcy*, and where the bankrupt himself, had there been no bankruptcy, would have had no claim. But in cases where the assignees are merely suing for a debt or demand *for which the bankrupt might himself have sued*, here the other party is excluded from disputing the commission, a certain time being allowed for the bankrupt himself to do so. The former provision is contained in the ninetieth section (following § 10. of 49 G. 3. c. 121.), whereby it is enacted, that in any action by or against any assignee (*a*), or any commissioner or person acting under the warrant of such commissioner, for any thing done as such commissioner, or under such warrant (*b*), *no proof shall be required* of the petitioning creditor's debt, trading, or act of bankruptcy, unless the other party, if defendant before plea, and if plaintiff before issue, shall give notice of disputing some and which of such matters; and if the same are proved or admitted after notice given the judge may certify such proof or admission, and such assignee, commissioner, *&c.* shall be entitled to the costs occasioned by such notice. (*c*) See Eden's Bank. Law, 346. 6 G. 4. c. 16. § 90.

(*a*) *Qu.* Whether the following or similar words are not here wanted, "for any debt "or demand "for which the "bankrupt "himself "could not "sue." (*b*) In the 49 G. 3. c. 121. the words were "the commission of bankrupt and pro- "ceedings shall be evidence." (*c*) Assignees are not entitled to costs when they are non-suited. Atkins v. Seward, 1 Bro. & B. 275.

§ 91. And by § 91. (following § 11. of 49 G. 3. c. 121.) similar proof is dispensed with on hearing of suits by assignees in equity, unless notice is give within ten days after rejoinder.

§ 92. The latter of the provisions above mentioned is contained in the ninety-second section, whereby it is enacted, that if the bankrupt shall not (if within the kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if without the kingdom) within twelve calendar months, give notice to dispute the commission, and proceed therein with due diligence, the depositions taken before the commissioners of the petitioning creditor's debt, trading, and act of bankruptcy shall be *conclusive evidence* (*d*) of the matters therein contained, in all actions at law or suits in equity brought by the assignees *for any debt or demand for which the bankrupt might have sustained any action or suit.*

(*d*) Under the 49 G. 3. c. 121. the depositions were decided to be only *primâ facie* evidence, and might be contradicted. 3 Camp. 424. 2 Maule & S. 556. The depositions, are only evidence of the facts appearing on the face of them; and, therefore, unless these facts as set forth are sufficient to establish a debt, trading, and act of bankruptcy, the evidence of the depositions is insufficient, notwithstanding the adjudication. Cooper v. Machin, 1 Bing. R. 426. Lawson v. Robinson, 1 Stark. Ca. 456. Marsh v. Meager, 1 Stark. Ca. 353. Skaife v. Howard, 2 Barn. & C. 560. Kay v. Stead, 2 Stark. 200. Rawson v. Haigh, 1 Carring. 80. The deposition of the petitioning creditor is evidence of his debt, though he himself is not competent to support the commission. Bisse v. Randall, 2 Camp. 493. Green v. Jones, *Id.* 411. The 92d section applies to cases where an action is brought by the assignees before the two months allowed the bankrupt to dispute his commission have expired, if the trial takes place *after* that period. Earith v. Schroder, 1 Moo. & Malk. 24. The section only applies to the depositions under the commission against the bankrupt, whose assignees are plaintiffs on the record; and therefore where the commission is prosecuted by a petitioning creditor, assignee of another bankrupt, and it becomes necessary to prove the petitioning creditor's debt, &c. under that former bankruptcy, this cannot be done by producing the depositions under such former bankruptcy, but must be done by the ordinary evidence. Muskett v. Drummond, 10 Barn. & C. 153.

§ 93. And by § 93., if a debtor is sued by the assignees before the time allowed the bankrupt to dispute the commission has elapsed, the defendant may pay the sum into court, and all proceedings shall be stayed; and after the time has elapsed, the assignees may take the same out of court. (*e*) ‖

(*e*) No provision is made for paying the money out of court either to the debtor or the bankrupt, in case the commission is superseded. The 94th section does not appear to meet this case.

Abbot v. Plumbe, Dougl. 216. But, as against a person who is party to a deed, his examination before the commissioners, wherein he admits the execution of it, supersedes the necessity of calling the subscribing witness. Bowles v. Langworthy, 5 Term R. 366. ‖But see Call v. Dunning, 4 East, 53., and Phill. on Evid. vol. 1. 446. And as to proof of petitioning creditor's debt, see *Id.* v. ii. 521.‖

[It is an established rule, that assignees must prove the petitioning creditor's debt by the same evidence which must have been produced in an action against the bankrupt; and as it is necessary, in order to recover on a bond, to call the subscribing witness, unless some reason can be given for his absence, so the petitioning creditor's debt, if it arises on bond, must be proved in like manner.]

Cowie v. Harris, 1 Moo. & Malk. 141. ‖Where the petitioning creditor's debt arises on a note indorsed or a bill accepted by the bankrupt, evidence must be given that the indorsement or acceptance was prior to the act of bankruptcy.

Watts v. Entries and accounts signed by the bankrupt before his bankruptcy,

bankruptcy, are admissible as admissions of a debt due from him.

Thorpe, 1 Camp. 376. Hoare v. Coryton, 4 Taunt. 560.; and see Jarrett v. Leonard, 2 Maule & S. 265. Rex v. Barnes, 1 Stark. 243.

An admission by the bankrupt of a debt due to the petitioning creditor, made after an act of bankruptcy, but before the commission, is not evidence.‖

Smallcombe v. Bruges, 13 Price, 136.; and see Taylor v. Kinloch, 1 Stark. 176.

[The depositions of the act of bankruptcy, when recorded, according to 5 G. 2. c. 30. § 41., are evidence in an action at law to prove the precise time when the act of bankruptcy was committed, if specified therein.]

Janson v. Wilson, Dougl. 257. ‖If it appears on the depositions that the debt is due to the bankrupt *as executor*, it is not necessary to prove him such, nor if it appears due to him *as assignee*, is it necessary to prove the assignment. Skaife v. Howard, 2 Barn. & C. 560.; and see 1 Deacon, 787.; but see 10 Barn. & C. 153.‖

‖By § 95. of the 6 G. 4. c. 16. all things done pursuant to the above clause of 5 G. 2. are confirmed, and the Lord Chancellor shall be at liberty from time to time by writing under his hand to appoint a proper person, who, by himself or by deputy, shall enter of record all matters relating to commissions, and have the custody of such entries. And by § 96. no commission, adjudication of bankruptcy, or assignment, or certificate of conformity shall be received as evidence, unless so entered; and every such instrument shall be so entered, on application of the parties, without petition; and the Lord Chancellor may on petition direct any depositions, proceedings, or other matters relating to commissions, to be entered of record, and the certificate of such entry written upon the instrument, shall be evidence of the instrument having been entered, without proof of the signature of the officer signing the entry. (*a*)

6 G. 4. c. 16. § 95. § 96. (*a*) The Court of C. P. has no authority under this section to compel the entry of the proceedings; the application must be to the Chancellor. Johnson v. Gillett, 5 Bing. 5.; and see 1 Mont. & M. 82. 6 Bing. 576. The production of the assignment duly enrolled, is sufficient without proof of its execution, unless notice is given to dispute that fact. Tucker v. Barrow, 1 Moo. & Malk. 137. *sed vide* 2 Younge & J. 5.

And by § 97. (following the 3 G. 4. c. 81. § 7.) office copies of any original instrument or writing filed in the office, or officially in possession of the secretary of bankrupts, shall be evidence to be received of such instrument or writing; and the costs of producing the original shall not be allowed, unless it appear that the production thereof was necessary. § 97.

And by § 98. all commissions, deeds, assurances, writs, and instruments relating to the estates of bankrupts, are exempted from stamp duties.‖ § 98.

[A bankrupt cannot be a witness to prove his own act of bankruptcy (*a*); but, if the defendant calls him, he waives all objections to the competency of his evidence, and the bankrupt may be cross-examined by the plaintiffs to that fact. (*b*)

Field v. Curtis, 2 Strange, 829. Assignees of Gill v. Woodmass, ruled by *Lee* C. J., Mich. Sittings, 1752. Bull. Ni. Pri. 38. ‖(*a*) Because formerly bankrupts were considered as criminals; but this reason is unsatisfactory. See 7 Term R. 611. 2 Phillips, 334. (*b*) See *contrà* Wyatt v. Wilkinson, 5 Esp. 187. Declarations of the bankrupt at the time of absenting himself from home are admissible, but not if made afterwards. Ambrose v. Clendon, Ca. temp. Hardw. 267. Robson v. Kemp, 4 Esp. Ca. 233. Marsh v. Menger, 1 Stark. Ca. 353. Schoeling v. Lee, 3 Stark. Ca. 149. And as to proof of the act of bankruptcy, see 2 Phill. on Evid. 309.‖

Bull. N. P. 43. Cowp. 71. ‖See Carter v. Abbott, 1 Barn. & C. 444. Goodhay v. Hendry, 1 Moo. & Mal. 319.‖

The bankrupt cannot be evidence to swear property in himself, or a debt due to his estate, without having obtained his certificate, and given a release of his share in the surplus and the dividends, for else he is plainly interested; but he may prove property in, or a debt due to, another.

Masters v. Drayton, 2 Term R. 496.; ‖and see 14 East, 565.‖

Upon the same principle an uncertificated bankrupt cannot be witness to prove usury in a creditor, who had proved that debt under the commission.

Walker v. Walker, cited Cowp. 70. Butler v. Cooke, Cowp. 70. ‖*Ex parte* Burt, 1 Madd. 46.‖

It is a settled rule, that a bankrupt may be a witness to diminish the fund, though he has not obtained his certificate; because, in so doing, he speaks manifestly against himself; for he may not only defeat his title to the benefit which the law allows him, if the fund is of a certain amount, but he hazards the displeasure of all his other creditors.

Russel v. Russel, 1 Bro. Chan. R. 269.

If a bankrupt has had his certificate, and received his allowance, his evidence will be admissible, for he is not bound to refund.

Chapman v. Gardner, 2 H. Black. 279. Cross v. Fox, and Flower v. Herbert, *Ibid.* on Evid. 335.‖

It must be observed, however, that though a bankrupt has obtained his certificate, yet he is not a competent witness to prove the petitioning creditor's debt, or any other fact necessary to support the commission.](a)

‖(a) But this rule does not seem to rest on satisfactory reasons. See 2 Phill.

Morgan v. Prior, 2 Barn. & C. 15.

‖He may prove the signatures of the commissioners, in order to identify the proceedings; this not being evidence to support the validity of the commission.

Fletcher, assignee, &c. v. Woodmass, Selw. N. P. 253. Wyatt v. Wilkinson, 5 Esp. Ca. 187.

Where in an action by the assignees the defendant called the bankrupt as a witness, and the plaintiffs then proposed to cross-examine him to prove his act of bankruptcy, *Lee* C. J. held this might be done, as the defendant had waived all objections by calling him; but *Chambre* J. has held otherwise.

Mr. Deacon, in his valuable work, vol. 1. 793., observes, that he cannot find the first of these cases where Mr. Christian refers to it, but it is to be found as above; and see 2 Phill. on Evid. 336.

Williams v. Stevens, 2 Camp. 301. Adams v. Malkin, 3 Camp. 543.

A creditor is incompetent to increase the fund, and this whether he have proved or not; but if he has sold his debt, he is competent. And he may be called to overset the petitioning creditor's debt.

Crooke v. Edwards, 2 Stark. 302. Granger v. Furlong, Black. R. 1273. Heath v. Hall, 4 Taunt. 326. *In re* Codd, 2 Scho. & Lef. 116.

Green v. Jones, 2 Camp. 411. Lloyd v. Stretton, 1 Stark. Ca. 40.

The petitioning creditor is incompetent to support the commission by reason of his bond to the Lord Chancellor, but he is competent to defeat the commission, or even to cut down his own debt.

Tomlinson v. Wilkes, 2 Bro. & B. 397. Cooke v. Edwards, 2 Stark. 302.; and see further, as to evidence in suits by and against assignees, 2 Phil. on Evid. 306, (6th edit.) Stark. on Evid., and Deacon's B. L. c. 19.

An assignee who has released his claims on the estate, is competent to prove the petitioning creditor's debt; for after his release he is a mere trustee. *Quære*, whether a commissioner is competent.‖

(K) Of

(K) Of setting off, submitting to Arbitration, and compounding Debts due to the Bankrupt.

‖BY 6 G. 4. c. 16. § 50. (which consolidates the provisions of 5 G. 2. c. 30. § 28., 46 G. 3. c. 135. § 2. and 3., 7 G. 1. c. 31. § 1. and 2.), it is enacted, that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed on either side respectively; * and every debt or demand hereby made provable against the estate of the bankrupt may also be set off in manner aforesaid against such estate; * provided that the person claiming the benefit of such set off had not, when such credit was given, notice of an *act of bankruptcy by such bankrupt committed.* (*a*)‖

6 G. 4. c. 16. § 50. The clause within the * * is new in the present act; and the proviso that the credit must have been given two months before the bankruptcy is omitted. (*a*) Instead of that the bankrupt "was "insolvent," or "had "stopped "payment." *Vide* 2 Bulst. 26. Mod. 215. Eq. Ca. Abr. 8. 2 Vern. 428., from which it seems that, antecedent to any statute on the subject, a debtor to a bankrupt merchant was in practice only called upon to pay the balance after deducting what the bankrupt owed him.

[It hath been holden in one case, that the statutes of set-off could not be pleaded by a debtor to a bankrupt in an action brought against him by the assignees; for as between them there could not be mutual debts, because, as the debtor could have no action against the assignees, there could not be mutual remedies. But this decision hath been impeached in a later case, and it is now settled, that a defendant may set off a debt due to him from the bankrupt; for the assignees are to be considered as the bankrupt.

Ryall v. Larkin, 1 Wils. 155.

Ridout v. Brough, Cowp. 135. Lock v. Bennet, 2 Atk. 49.

Contingent debts, not due at the time of the bankruptcy, cannot be set off.

Ex parte Groome, 1 Atk. 119. Hancock v. Entwissle, 3 Term R. 435. ‖But as contingent debts are now provable by § 56. of the 6 G. 4. c. 16. they may be set off under § 50. *suprà*.‖

A note indorsed to a debtor of the bankrupt after the bankruptcy cannot be set off.]

Marsh v. Chambers, 2 Stra. 1234.

‖Under the former acts the holder of cash notes of the bankrupt payable to bearer could not set them off against a debt due to the bankrupt, and sued for by the assignees, unless he showed that they came to his hands *before* the bankruptcy; but if he proved that notes to the amount were in his hands three or four weeks before the bankruptcy, the jury might infer that the notes were the same, and that they were in his hands *at* the bankruptcy.

Dickson v. Evans, 6 Term R. 57. Moore v. Wright, 2 Marsh. R. 209.; and see *Ex parte* Hale, 3 Ves. 304. Ouchterlony v. Easterby, 4 Taunt. 838.

Under the present act (§ 50. *suprà*), the party holding such notes may set them off, though he take them *after* an act of bankruptcy, provided he had no notice of it; and this although he had notice of the bankers' having stopped payment, for notice

Hawkins v. Whitten, 10 Barn. & C. 217.

of *an act of bankruptcy* alone prevents the set-off under the new act.

Dickson v. Cass, 1 Barn. & Adol. 343.

If, however, the party receives notes of a *firm* after he has notice of an act of bankruptcy of *any* of the partners, this will defeat his right of set-off.‖

1 P. Wms. 326. Dillon v. Hyde, 1 Atk. 126. *Id.* 237 1 Ves. 375. Lanesborough v. Jones, 2 P. Wms. 325.

[Where there is a plain mutual credit, one party shall set off against the other, and the statute is not to be construed of dealings in trade only, or in case of mutual running accounts, but in all cases of mutual credit the balance only shall be paid. Therefore where *Samuel Jones* borrowed 1500*l.* of *Coggs* on mortgage, and *Coggs* owed about 1400*l.* to *Jones* upon notes, *Jones* was allowed to set off his demand upon the notes against the mortgage.

Vide Ex parte Edwards, 1 Atk. 100., where Lord *Hardwicke* doubted, whether a person, a creditor under a separate commission against *A.*, and debtor under a joint commission against *A.* and *B.*, can set off the debt he owes the latter, by his demand against the former.

But if *A.* and *B.* are joint traders, and *J. S.* is indebted to *A.* and *B.* on their joint account 100*l.*, and *A.* owes said *B.* 100*l.* on two separate accounts; *J. S.* cannot deduct so much as *A.*'s proportion of the 100*l.* comes to out of the joint debt; because the copartnership debts of *A.* and *B.* are to be first paid before any separate debts; but if there be a surplus beyond what will pay the partnership debts, then, out of *A.*'s share of the surplus, *J. S.* may deduct the separate debt of *A.*]

Ex parte Christie, 10 Ves. 105. *Ex parte* Towgood, 11 Ves. 517. Addis v. Knight, 2 Meriv. R. 117. Kinnerley v. Hossack, 2 Taunt. 170. *Ex parte* Stephens, 11 Ves. 241. *Ex parte* Ross, Buck, 125.

‖It is now settled that the same mutuality is necessary in case of debts and credits under the bankrupt law as in cases of set-off under the statutes of set-off; and this rule prevails in equity as well as in bankruptcy and at law. And therefore, a debt due from the bankrupt jointly with another cannot be set off against a debt due to the bankrupt alone; nor *vice versâ*; unless indeed there is an express agreement to this effect before the bankruptcy; or in case of fraud: and where *A.* is indebted to *B.* and *C.*, and *B.* and *C.* to *A.*, and *B.* by deed takes upon himself solely the debt to *A.*, he cannot set off the debt due from *A.* to himself and *C.*

Staniforth v. Fellowes, 1 Marsh. R. 185.

And where there are mutual credits between a firm and *A.*, and only some of the partners become bankrupt, *A.* cannot in an action by the assignees of the bankrupts, jointly with the solvent partner, set off what is due from the firm, since such a case is not within the statute, not being a case of mutual credits between the bankrupts and a third person, but between the bankrupts and a solvent partner on the one side, and a third party on the other.

Thomason v. Frere, 10 East 418.

Nor where funds of a partnership are assigned over to *A.*, after an act of bankruptcy by two partners assigning them, can *A.*, in an action by the assignees of the bankrupts and a solvent partner for recovering such funds, set off a debt due from the firm to him; for there is no mutuality.

Tamplin v. Diggins, 2 Camp. R. 311.

So also where the defendants had drawn bills for the accommodation of the bankrupt, which were outstanding at the time of the act of bankruptcy, and the bankrupt, after the bankruptcy and before the commission, paid to the defendants a sum of money

money to take up the bills; it was held that the assignees were entitled to recover this money, and that the defendants could not set off the bills, since the money was the money of the assignees, and the credit on the bills was given to the bankrupt. But as the accounts may, under the new act, be taken down to the time of the commission, this would now be otherwise.

Where a sale of the bankrupt's property was made after an act of bankruptcy, but more than two months before the commission, and a creditor of the bankrupt was the purchaser of goods at it, it was held that he might set off against the claim of the assignees for the price a prior debt due from the bankrupt to him; for the sale was (under the operation of the 46 G. 3. c. 135.) in effect a sale by the bankrupt, and consequently the credit was given by him; and the present law re-enacts the provision of 46 G. 3. c. 135. § 3., *omitting the restriction of two months before the commission.*‖ Southwood v. Taylor, 1 Barn. & A. 471.

[Where *A.* was a creditor of the bankrupt for 100*l.* and 10*l.*, and a debtor to him on bond for 340*l.* payable on the 4th of *March* 1756, with lawful interest, and applied that he might set off his demand of 100*l.* against the principal and interest due on the bond, and not be obliged to prove his debt under the commission, and take a dividend upon it only; the Lord Chancellor said, though this is not in strictness a mutual debt, yet it is a mutual credit; for the bankrupt gives credit to the party in consideration of the bond, though payable at a future day, and he gives the bankrupt credit for the debt upon simple contract, and therefore it is a case within the equity of the 5 G. 2. *Ex parte* Prescot, 1 Atk. 231. For, though the debt be paid *after* the bankruptcy, yet if it be in consequence of a liability *before*, it may be set off. Smith v. Hodson, 4 Term R. 211.

French v. Fenn, there cited. Martin v. Court, 2 Term R. 640. Dobson v. Lockhart, 5 Term R. 133. ‖*Ex parte* Boyle, Co. B. Law, 542. Sheldon v. Rothschild, 8 Taunt. 156. *Ex parte* Wagstaff, 13 Ves. 65. Arbouin v. Tritton, 1 Holt Ca. 408.‖

A broker having a *del credere* commission may, under this statute, give in evidence, upon the general issue, a loss upon a policy happening before the bankruptcy in an action by the assignees of the underwriter, for premiums upon various policies underwritten by him. Grove v. Dubois, 1 Term R. 112. Bize Dickson, *Id.* 285. S. P. ‖*Vide* tit. *Set-off*, Vol. VII.‖

But where there is no *del credere* commission, the broker is not entitled to set off losses on goods which he insured for other persons, the debts being properly due to them, and not to the broker. Wilson v. Watson, Esp. Ni. Pri. 274.

A broker is entitled to deduct money due from the bankrupt to him for premiums, out of what he collects on the policy, where it is put into his hands to receive the money from the underwriters.] Whitehead v. Vaughan, Trin. 25 G. 3. *B. R.* and Parker v. Carter, in C.P. Trin. 28 G. 3. Co. Bankrupt Laws, 647. 649.

‖And he may not only retain what is due for premiums, but also his general balance due from the bankrupt under the clause as to mutual credit. Olive v. Smith, 5 Taunt. 55. And as to set-off between underwriters and brokers, see tit. *Set-off*, Vol. VII.

Whether a bailee of goods can, in the event of the bailor becoming bankrupt, retain the goods for his general balance on the ground

ground of a mutual credit between him and the bankrupt, has been much agitated. Lord *Hardwicke* held in one case, that a packer having received cloth to pack, was entitled to retain it against the assignees of the owner (who had become bankrupt subsequent to the delivery of the cloth), not only for what was due for packing, but also for a general balance: his Lordship observing, that it was hard that mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands belonging to a debtor of his, which cannot be got from him without a suit at law or equity, that it should not be considered as mutual credit. But in a subsequent case, decided six years afterwards, his Lordship held that a miller, to whom corn had been delivered to grind by a person who afterwards became bankrupt, had no right to retain the corn for a debt due from the owner, but only for the charge for grinding: and his Lordship said, that in *Ex parte Deeze* there was evidence that it was usual for packers to lend money to clothiers, and the cloth to be a pledge (though this does not appear in the report of that case, and the reasoning of his Lordship's judgment proceeds entirely on the ground of the statutes respecting mutual credit applying to cases of lien on goods).

Ex parte Deeze, 1 Atk. 228.

Ex parte Ockenden, 1 Atk. 235.

In a subsequent case, in 1783, where a bankrupt before his bankruptcy, and another party and the defendant, joined in the purchase of pearls for sale, and the defendant advanced the money, but the profit and loss was to be divided, and the defendant caused the pearls to be sold in China, and received the proceeds after the bankruptcy of the bankrupt; the assignees brought an action for money had and received against the defendant, to recover the third of the proceeds due to the bankrupt; and the Court of King's Bench held that the defendant might set off against such third share a debt due from the bankrupt; since there was a trust between the two, and that made a mutual credit.

French v. Fenn, Co. B. Law, 565.

But where cloths were deposited with the defendant, a fuller, to dress, by a party who afterwards became a bankrupt, it was decided, after argument, and a full consideration of the judgments of Lord *Hardwicke*, and of all the decisions on the subject, that the defendant was not entitled to retain them for a general balance due from the bankrupt, the case not being one of mutual credit within the meaning of the statute; the legislature intending such credits only as must in their nature *terminate in cross debts:* as where a debt is due from one party, and credit given by him on the other, for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other: but where there is a mere deposit of property, without authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute.

Rose v. Hart, 8 Taunt. 499.

This construction of the statute has been recognized in the subsequent decisions. In order to constitute a mutual credit by delivery

Easom v. Cato, 5 Barn. & A. 861.

delivery of goods, it was held in one case not necessary that the goods should be delivered into the hands of the party to whom the credit was given; it was sufficient if they were placed under his authority, so that he was entitled to call upon the persons in actual custody of them for an account.

A guarantee against contingent damages was held, under the former acts, not to constitute a credit within the statute, so that in an action brought upon it by the assignees of the bankrupt a debt due from the bankrupt could be set off against it. Sampson v. Burton, 2 Brod. & Bing. 89. Such a claim would perhaps now be proveable as a contingent debt under the 56th section of 6 G. 4. c. 16., and might consequently be set off under § 50.

Where *Nash* kept cash with *Marsh* and Co. bankers, and accepted a bill drawn by one of the partners in the firm, and the partner indorsed it to the firm, who discounted it, and then indorsed it for value to *S.* Before the bill became due, *M.* and Co. became bankrupts, having funds in the hands of *S.* more than sufficient to pay the bill, and having in their hands money belonging to *A.* When the bill became due *S.* presented it for payment to *A.*, who having refused payment, *S.* paid himself the amount out of the funds of *M.* and Co. remaining in his hands, and delivered the bill to their assignees. In an action brought by the assignees against *A.*, as acceptor of the bill, the court held, there had been, before the bankruptcy, a mutual credit between the bankrupts and *A.*, and that the latter was entitled to set off against the sum due to the bankrupts on the bill, the debt due to him from *M.* and Co. at the time of their bankruptcy. Bolland v. Nash, 8 Barn. & C. 105. See *Ex parte* Hale, 3 Ves. jun. 304. *Ex parte* Burton, 1 Rose, 320.

The right to set off on the ground of mutual credit under the statutes of bankrupt has been even held to attach in several cases where the bankrupt and the other party had expressly dealt on a footing excluding the set-off. Thus, where the bankrupt bought of the defendant a parcel of goods, for which he gave a bill at six months, and four months afterwards purchased another parcel, for which he gave a like bill; the first bill being dishonoured, the bankrupt deposited with the defendant good bills exceeding the amount of the first bill, and the defendant expressly promised to pay the surplus over to the bankrupt when such deposited bills should be paid, and it was not in contemplation of the parties that the defendant should receive more than the amount for the first parcel out of the deposited bills. After the money was received on these bills the bankruptcy took place; and in an action by the assignees to recover the overplus of the deposited bills, it was held that the defendants had a right to detain it to meet the acceptance of the bankrupt not yet due for the second parcel of goods, on the ground of a mutual credit within the statute. Atkinson v. Elliott, 7 Term R. 378. Chalmers v. Page, 3 Barn. & A. 697. M'Gillivray v. Simson, 9 Barn. & C. 746. *notâ.*

But in a case where a bill was deposited with the bankrupt expressly for the purpose of raising money for the bankrupt, and not on the general account, and the defendant refused to discount it, but advanced money on it, and promised to advance more, the assignees, after tendering the amount advanced by the defendant on Key v. Flint, 8 Taunt. 21. 1 Moo. 451.

Ex parte Flint, 1 Swanst. R. 30. 30.; and see Buchanan v. Findley, 9 Barn. & C. 738. *acc.*

on the bill, were held entitled to recover the bill in trover against the defendant; *Dallas* J. saying, that mutual credit must mean mutual trust, and that this attempt of the defendant to retain the bill was a gross breach of trust. And the Lord Chancellor, on the same case coming before him on petition, held the same opinion; observing, that the use the petitioner sought to make of the bill was contrary to natural equity.‖

Wilkins v. Carmichael, Dougl. 97.

[A demand against a bankrupt cannot be set off in an action by his assignees for *trover* and conversion, subsequent to the bankruptcy, of effects belonging to the bankrupt estate.

Gibson v. Hudson's Bay Company, 1 Stra. 645. 1 Eq. Ca. Abr. 9.

A company incorporated by charter, or act of parliament, cannot prevent the assignees of a bankrupt from selling any stock he is entitled to on account of a demand they may have against the bankrupt, for the rule relating to mutual credit does not apply to this case. But, if there is an express bye-law to subject the stock of each member to satisfy the debts they may owe to the company, they are at liberty to hold it, and to account only for the balance.

Bishop v. Church, 3 Atk. 691.

Debts due in different rights cannot be set off.]

Slipper v. Slidstone, 5 Term R. 493.

‖A debt to a party as surviving partner may be set off against a debt due from him in his own right, and *e converso*. French v. Andrade, 6 Term R. 582.

Bishop v. Church, 3 Atk. 691. Willes, 103.; *et vide* 2 P. Wms. 150.

A debt due from an executor on his own account cannot be set off against a debt due to his testator.

Ex parte Blagden, 19 Ves. 465.; and see 2 Esp. Ca. 594.

Nor can a debt due from a bankrupt to a married woman *dum sola* be set off against a debt due from her husband to the bankrupt.

As to retaining a legacy to wife to satisfy a debt due from the husband to the testatrix, see *Ex parte* O'Farrall, 1 Glyn & Ja. 54. Ranking v. Barnard, 5 Madd. 32.

Fair v. M'Iver, 16 East R. 130.

A debt due to the defendant as trustee for another cannot be set off against a debt due from him in his own right.

This case was decided principally on the ground of fraud.

Ex parte Stephens, 11 Ves. 24. *Ex parte* Hanson, 12 Ves. 346.; and see 19 Ves. 467. 18 Ves. 232. 3 Meriv. 618. 3 Madd. 205.

But in equity debts may sometimes be set off which do not fall within the law on the subject, for that court was in possession of the doctrine of set-off, as grounded on principles of equity long before the law interfered; though where the court does not find a natural equity going beyond the statute, the construction is the same in equity as at law. Thus, where a lady employed her bankers to lay out money in navy annuities, and they, without doing it, fraudulently represented to her that they had done so, and accounted for the dividends, and she afterwards joined with her brother as his surety in a note to the bankers, Lord *Eldon*, on the ground of the *fraud*, allowed the joint debt on the note to be set off against the debt from the bankers to the lady, giving her leave to prove for the residue, and restraining the assignees of the bankers from proceeding on the note against her or her brother.

6 G. 4. c. 16. § 88.

By 6 G. 4. c. 16. § 88. "The assignees, with the consent of the "major

" major part, in value, of the creditors who shall have proved, pre-
" sent at any meeting, whereof twenty-one days' notice shall have
" been given in the *Gazette*, may compound with any debtor to the
" bankrupt's estate, and take any reasonable part of the debt in dis-
" charge of the whole, or may give time or take security for pay-
" ment of such debt, or may submit any dispute, between such as-
" signees and any persons concerning any matter relating to such
" bankrupt's estate, to the determination of arbitrators, to be chosen
" by the assignees and the major part, in value, of such creditors,
" and the party with whom they shall have such dispute, and the
" award of such arbitrators shall be binding on all the creditors;
" and the assignees are thereby indemnified for what they shall
" do, according to the directions aforesaid, and no suit in equity
" shall be commenced by the assignees without such consent as
" aforesaid: *provided, that if one third in value, or upwards, of*
" *such creditors shall not attend at any such meeting (whereof no-*
" *tice shall have been given as aforesaid), the assignees shall have*
" *power with consent of the commissioners, testified by writing*
" *under their hands, to do any of the matters aforesaid.*"‖

Robson v. ——, 2 Rose, 50. The clause in italics is new.‖

[Creditors cannot give a general power to assignees to submit matters to arbitration at their own discretion; but there must be a meeting of creditors upon notice in *Gazette*, to consider each particular case. 1 Atk. 21. pl. 39.]

‖A general reference to arbitration by assignees without a protest is an admission of assets.

(L) Of the Distribution to be made of the Bankrupt's Estate.

‖BY the 6 G. 4. c. 16. § 106. it is enacted, " that the commis-
" sioners shall, at the meeting appointed for the last ex-
" amination of the bankrupt, appoint a public meeting, not
" sooner than four calendar months from the issuing of the com-
" mission, nor later than six calendar months from the last
" examination of the bankrupt, whereof and of the purport
" whereof they shall give twenty-one days' notice in the *London*
" *Gazette*, to audit the accounts of the assignees; and the
" assignees at such meeting shall deliver, upon oath, a true state-
" ment in writing of all money received by them respectively,
" and when and on what account, and how the same have
" been employed; and the commissioners shall examine such
" statement, and compare the receipts with the payments,
" and ascertain what balances have been from time to time in
" the hands of such assignees respectively, and shall enquire
" whether any sum, appearing to be in their hands, ought to be
" retained; and it shall be lawful for the said commissioners to
" examine the said assignees upon oath touching the truth of
" such accounts; and in such accounts the said assignees shall
" be allowed to retain all such money as they shall have ex-
" pended in suing out and prosecuting such commission, and
" all other just allowances."

Chan. Ca. 139. 2 Vern. 293. 706.

6 G. 4. c. 16. § 106. This important section is new. If the commissioners make a fraudulent distribution, it may be set aside in Chancery. 2 Vern. 158. 162. For the cases which have been on 15 Eliz. c. 7. *vide* 2 Co. 26. 8 Co. 98 b. Jones, 203. 2 Sid. 177. Godb. 195. How distribution is to be under a joint commission taken out against partners, *vide*

And by section 107. (taken from 5 G. 2. c. 30. § 33.(*a*),) it is enacted, " that the commissioners shall, not sooner than four, " nor later than twelve calendar months from the issuing " the

§ 107.

‖(*a*) The only alteration is that by the

former acts the assignees were to make the dividend. (*b*) Before the present statute if a debt was improperly proved, it was necessary to petition the Lord Chancellor to expunge it; but by the 60th section of 6 G. 4. c. 16. the commissioners have this power on application of the assignees or creditors.‖ [The Chancellor will not interfere till the four months have elapsed. Cooper v. Pepys, 1 Atk. 111. And it seemeth doubtful whether he will interfere until application hath been made to the commissioners. See *Ex parte* Whitchurch. *Id.* 91. Co. Bankrupt Laws, 588.] ‖The Lord Chancellor may postpone the dividend beyond the time limited, but it must be for the general benefit of the creditors. *Ex parte* Kendal, 17 Ves. 514. 1 Rose, 71.‖ [Assignee cannot stop creditor's dividend on account of his own private debt due from such creditor. 1 Atk. 90. But *quære* of this? and see *Ex parte* Nockold, 29th *June* 1754. Co. Bankrupt Laws, 590.]; ‖and see *Ex parte* Whitehead, 1 Glyn & Ja. 39.‖ [Upon affidavit of creditor that he has not read the *Gazette*, he will be admitted so as not to disturb former dividends; and commissioners cannot proceed to make a second till he is brought up equal to the creditors under the first, provided he hath obtained an order for that purpose. 1 Atk. 209. ‖*Ex parte* Long, 2 Bro. C. C. 50. *In re* Wheeler, 1 Scho. & Lef. 242. *acc.* An order of dividend separates the dividend from the bulk of the estate, and it is afterwards at the risk of the creditor if he neglects to apply for it. *Ex parte* Powell, 1 Mont. & Mac. 283. If an assignee sign checks for a dividend, and deposit them in a desk from which they are fraudulently taken by a clerk, it seems the assignee is liable to the creditor. *Ex parte* Griffin, 2 Glyn & Ja. 114.; and see *Ex parte* Grant, 1 Mont. & Mac. 77.‖

" the commission, appoint a public meeting, (whereof and of " the purport whereof they shall give twenty-one days' notice " in the *London Gazette*,) to make a dividend of the bankrupt's " estate, at which meeting all creditors who have not proved " their debts shall be entitled to prove the same; and the said " commissioners, at such meeting, shall order such part of the " net produce of the bankrupt's estate in the hands of the " assignees as they shall think fit to be forthwith divided " amongst such creditors as have proved debts under the com- " mission (*b*), in proportion to their respective debts, and shall " make an order for a dividend in writing under their hands, " and shall cause one part of such order to be filed amongst the " proceedings under the commission, and shall deliver another " part thereof to the assignees, which order shall contain an ac- " count of the time and place of making such order, of the " amount of the debts proved, of the money remaining in the " hands of the assignees to be divided, of how much in the pound " is then ordered to be paid to every creditor, and of the money " allowed by the commissioners to be retained by the assignees, " with their reasons for allowing the same to be so retained; " and the assignees, in pursuance of such order (and without " any deed or distribution made for that purpose) shall, forth- " with make such dividend, and shall take receipts, in a book " to be kept for that purpose, from each creditor, for the divi- " dend received by such creditor; and such order and receipt " shall be a discharge to every such assignee for so much as he " shall pay pursuant to such order; and no dividend shall be " declared, unless the accounts of the assignees shall have been " first so audited as aforesaid, and such statement delivered by " them upon oath as aforesaid."

§ 109. (*a*) Instead of " the assignees" as in the former act.

And by section 109. (taken from 5 G. 2. c. 30. § 37.), it is enacted, " that if the bankrupt's estate shall not have been wholly " divided upon the first dividend, the commissioners (*a*) shall, " within eighteen calendar months after the issuing of the com- " mission, appoint a public meeting (whereof and of the purport " whereof they shall give twenty-one days' notice in the *London* " *Gazette*), to make a second dividend of the bankrupt's estate, " when all creditors who have not proved their debts may prove " the

" the same; and the commissioners at such meeting, after taking " such audit as hereinbefore directed, shall order the balance " in the hands of the assignees to be forthwith divided amongst " such of the creditors as shall have proved their debts; and such " second dividend shall be final, unless any action at law or suit " in equity be depending, or any part of the estate be standing " out not sold or disposed of, or unless some other estate and " effects of the bankrupt shall afterwards come to the assignees, " in which case they shall, as soon as may be, convert such " estate and effects into money, and within two calendar months " after the same shall be so converted, divide the same in manner " aforesaid."‖

[If a creditor has obtained an unfair possession of the bankrupt's property, his share of the dividend may be retained until he gives up the property of which he hath so possessed himself.] *Ex parte* Smith, 3 Bro. Chan. R. 46.

‖Formerly assumpsit would lie for a dividend under the order for payments, but by the 111th section of 6 G. 4. c. 16. (following the 49 G. 3. c. 121. § 12.), no action is to be brought against assignees for the dividend, but the Lord Chancellor may, upon petition, order payment with interest and costs of the application. Brown v. Bullen, Dougl. 407. 6 G. 4. c. 16. § 111.; and see *per* Ld. *Eldon*, 1 Rose, 458.

On this petition the assignee cannot dispute the debt, since he could not have done so at law on an action being brought; but he must present a separate petition for that purpose. *Ex parte* Whiteside, 1 Rose, 319. *Ex parte* Atkinson, 3 Ves. & B. 13. *Ex parte* Loxley, Buck, 456.

The order for payment of the dividends on a petition raises a personal responsibility in the assignee, and if he resist, it is at his personal risk. *Ex parte* Graham, 1 Rose, 456.

To obtain interest on the petition an application to the assignee for the dividend must be shewn. Wackerbarth v. Powell, Buck, 508.

By the 110th section of 6 G. 4. c. 16. if any assignee shall have in his hands, order, or disposition any unclaimed dividend amounting to 50*l.* and shall not, within two months from the expiration of one year after the order for payment of the dividend by the commissioners, either pay it to the creditor or cause a certificate to be filed in the office of the secretary of bankrupts, containing a full account of the name of the creditor and amount of the dividend, such assignee shall be charged interest on such dividend from the time that such certificate is directed to be filed, at the rate of 5*l.* per cent. per annum, and also such further sum as the commissioners shall think fit, not exceeding 20*l.* per cent. per annum; and the Lord Chancellor or commissioners may order the investment of any unclaimed dividends in the public funds or on government security for or on account of the creditor; and if the same shall remain unclaimed for the space of three years, the Chancellor may order the same to be divided amongst the other creditors. 6 G. 4. c. 16. § 110. This is new.

By the 33 G. 3. c. 54. § 10. it is enacted, " that if any person " appointed to any office by any friendly society, and being " intrusted with monies or effects belonging to such society, " shall become bankrupt, his assignees shall, within forty days " after 33 G. 3. c. 54. § 10.

Ex parte Lancaster Amicable Society, 6 Ves. 98.; and see *Id.* 441. 804. 15 Ves. 280. Buck. 214.

" after demand made by order of such society, deliver all things " belonging to such society to such person as the society shall " appoint, and pay out of the assets of such person all sums of " money remaining due and received by such person in virtue " of such office, before any other debts are paid or satisfied."

This clause only extends to money in the hands of persons duly appointed officers of the society, and not to bankers or to persons to whom money has been lent by the society; nor does it apply to money in the hands of an officer of the society if lent to him, or remaining in his hands on security.‖

(M) How the Bankrupt is to demean himself; and herein of the Crime in not appearing, and discovering his Estate, and the Privilege he is to enjoy during his Attendance.

6 G. 4. c. 16. § 112.

‖BY 6 G. 4. c. 16. § 112. (taken from 5 G. 2. c. 30. § 1. and 1 G. 4. c. 115. § 1.) it is enacted, " that if any person against " whom any commission has been issued, or shall hereafter be " issued, whereupon such person hath been or shall be declared " bankrupt, shall not, before three of the clock upon the forty- " second day after notice thereof in writing to be left at the usual " place of abode of such person, or personal notice in case such " person be then in prison, and notice given in the *London* " *Gazette* of the issuing of the commission, and of the meetings " of the commissioners, surrender himself to them, and sign or " subscribe such surrender and submit to be examined before " them from time to time upon oath, or being a Quaker, upon " affirmation (*a*); or if any such bankrupt upon such examin- " ation shall not discover all his real or personal estate, and " how, and to whom, upon what consideration, and when he " disposed of, assigned or transferred any of such estate, and " all books, papers, and writings relating thereto (except such part " as shall have been really and *bona fide* before sold or disposed in " the way of his trade (*b*), or laid out in the ordinary expense of " his family); or if any such bankrupt shall not upon such ex- " amination deliver up to the commissioners all such part of " such estate, and all books, papers, and writings relating there- " unto, as be in his possession, custody, or power (except the " necessary wearing apparel of himself, his wife, and children); " or if any such bankrupt shall remove, conceal, or embezzle " any part of such estate to the value of ten pounds (*c*) or up- " wards, or any books of accounts, papers, or writings relating " thereto, with intent to defraud his creditors, every such bank- " rupt shall be deemed guilty of felony, and liable to be trans- " ported for life, or for such term, not less than seven years, " as the court before which he shall be convicted shall adjudge, " or shall be liable to be imprisoned only, or imprisoned and " kept to hard labour in any common gaol, penitentiary, or " house of correction, for any term not exceeding seven years."

(*a*) In the 5 G. 2. c. 30. § 1. the offences were stated conjunctively, so that it was held that if the bankrupt surrendered it was no felony to refuse a disclosure. The words of the present act are *disjunctive*. See Rex v. Page, 1 Bro. & B. 308.

(*b*) See Cullen, B. L. 345. 1 Deacon 514.

(*c*) 20*l.* in 5 G. 2. c. 30. § 1. *Alexander Thompson*, an embroiderer by trade, was convicted for not surrendering though his time had never been enlarged, and was executed in the beginning of the year 1756.

[On a petition to Ld. *Hardwicke*, that the clerk of the commission might be ordered

ordered to attend at the Old Bailey with the proceedings upon a prosecution against the bankrupt for felony in not surrendering, his Lordship said, that a court of equity will not lend its aid to such a prosecution; but that the petitioner must go on in such manner as the law prescribes to prove him a bankrupt and a felon within the meaning of the act of parliament. 1 Atk. 221. Lord *Macclesfield*, his Lordship added, in several instances superseded the commission in order to prevent such a prosecution where a bankrupt did not surrender himself in due time; and there did not appear any intention in him to defraud his creditors. *Id* 222.] ‖And the same was done where the bankrupt had surrendered to a joint commission, but omitted, under wrong advice, to surrender to a separate one. *Ex parte* Lavender 18 Ves. 18. 1 Rose, 55. *Richard Town*, a tallow-chandler by trade, was convicted for concealing his effects, and was the first person who suffered capitally by the bankrupt laws; he was executed 12th *Dec.* 1712. *John Perrott* was convicted of a like concealment, and executed in *Nov.* 1762. *Vide* 2 Burr. 1216. ‖It will be seen that by the present law (which follows the 1 G. 4. c. 115. § 1.), the punishment is transportation for life, or not less than seven years, or imprisonment for any term not exceeding seven years.‖

§ 113. [If by a *mere innocent* default of the bankrupt, he has neglected to surrender himself on the day appointed, the Chancellor may upon petition make an order that the commissioners appoint a new day for taking the examination. *Ex parte* Graham, 2 Bro. Chan. R. 48. *Ex parte* Bould, *Id.* 49. *Ex parte* Smith, Co. Bankrupt Laws, 521. *Ex parte* Rogers, Ambl. 307. *Ex parte* Grey, 1 Ves. jun. 195. *Ex parte* White, 2 Bro. Chan. R. 47. But such order will not avoid the effect of the statute; it is only declaratory of the opinion of the court that the bankrupt had no intention of keeping out of the way fraudulently. It therefore recites the special circumstances of the case. See the above authorities.] ‖*Ex parte* Ricketts, 6 Ves. 445. *Ex parte* Higginson, 12 Ves. 496. *Ex parte* Jackson, 15 Ves. 119.; and see *Ex parte* Dawson, 2 Cox. 48. *Ex parte* Parr, 1 Mont. Dig. B. L. 113. An application for this purpose should be upon the petition either of the bankrupt or the assignees. Fuller's case, 10 Ves. 183. In one case it was on the joint petition of the commissioners and assignees. *Ex parte* Grey, 1 Ves. jun. 195. The consent of the assignees is not always necessary. *Ex parte* Shiles, 2 Rose, 381. 1 Madd. 241. It is irregular in the assignees to obtain an *ex parte* order if the bankrupt is ready to attend. 1 Glyn & J. 281.; and see Deacon B. L. c. 13. § 1.

And by § 113. (taken from 5 G. 2. c. 30. § 3.) it is enacted, "that the Lord Chancellor shall have power, as often as he shall "think fit, from time to time to enlarge the time for the bankrupt's surrendering himself for such time as the Lord Chancellor shall think fit, so as every such order be made six days "at least before the day on which such bankrupt was to surrender himself."

§ 114. This section is new.

And by § 114. it is enacted, "that it shall be lawful for the "commissioners before the choice of assignees, and after such "choice for the assignees, with the approbation of the commissioners testified in writing under their hands, from time to "time to make such allowance to the bankrupt out of his estate, "until he shall have passed his last examination, as shall be "necessary for the support of himself and his family."

§ 115. (*a*) Instead of a judge's warrant as in the former act.

And by § 115. (taken from 5 G. 2. c. 30. § 14.) it is enacted, "that if any bankrupt apprehended by any warrant of the "commissioners (*a*) shall, within the time hereby allowed for "him to surrender, submit to be examined, and in all things "conform, he shall have the same benefit as if he had voluntarily surrendered."

§ 116.

And by § 116. (taken from 5 G. 2. c. 30. § 36.) it is enacted, "that the bankrupt after the choice of assignees shall (if thereto "required) forthwith deliver up to them upon oath, before a "master ordinary or extraordinary in Chancery, or justice of "the peace, all books of accounts, papers, and writings relating "to his estate in his custody or power, and discover such as "are in the custody or power of any other person; and every "such

" such bankrupt not in prison or custody shall at all times after " such surrender attend such assignees upon every reasonable " notice in writing for that purpose given by them to him, or " left at his house, and shall assist such assignees in making " out the accounts of his estate; and such bankrupt after he shall " have surrendered, may at all seasonable times before the ex- " piration of the said forty-two days, or such further time as " shall be allowed to him to finish his examination, inspect his " books, papers, and writings in the presence of his assignees " or any person appointed by them, and bring with him each " time two persons to assist him; and every such bankrupt after " he shall have obtained his certificate, shall, upon demand in " writing given to him or left at his usual place of abode, attend " the assignees to settle any accounts between his estate and " any debtor to or creditor thereof, or attend any court of " record, to give evidence touching the same, or do any act " necessary for getting in the said estate, for which attendance " he shall be paid five shillings *per* day by the assignees out of " his estate; and if such bankrupt shall, after such demand as " aforesaid, not attend, or on such attendance refuse to do any " of the matters aforesaid, without sufficient cause shewn to the " commissioners for such refusal, and by them allowed, the " assignees making proof thereof upon oath before the com- " missioners, the said commissioners may, by warrant directed " to such persons as they shall think proper, cause such bank- " rupt to be apprehended and committed to such prison as they " shall think fit, there to remain until he shall conform to the " satisfaction of the commissioners or of the Lord Chancellor."

§ 117. And by § 117. (taken from 5 G. 2. c. 30. § 5.) it is enacted,

(*a*) This means an escape warrant at suit of a creditor. 1 Barn. & Ald. 311. (*b*) [This is a particular privilege to enable the bankrupt to surrender; and until actual surrender, confined to the act of his going *with that view*; not a *general* privilege during the whole time which the act allows him to surrender in. Nevertheless, if a bankrupt be abroad, and upon his return with an intention to surrender, be arrested on his landing before he can conveniently make his surrender, the privilege shall extend to him; but it must appear that he was actually going to surrender. Kenyon v. Solomon, Cowp. 156. Co. B. Laws, 142. A bankrupt may be taken, and surrendered by his bail within the time of privilege; for this act is no protection but against the suits of creditors. *Ex parte* Gibbons, 1 Atk. 238.]; ‖and see *Ex parte* Leigh, 1 Glyn & Ja. 264.

" that the bankrupt shall be free from arrest or imprisonment " by any creditor in coming to surrender; and after such sur- " render during the said forty-two days, and such further time " as shall be allowed him for finishing his examination, pro- " vided he was not in custody at the time of such surrender; " and if such bankrupt shall be arrested for debt, or on any " escape warrant(*a*), in coming to surrender, or shall after his sur- " render be so arrested within the time aforesaid, he shall, on pro- " ducing the summons under the hands of the commissioners to " the officer who shall arrest him, and giving such officer a copy " thereof, be immediately discharged; and if any officer shall " detain any such bankrupt after he shall have shown such " summons to him so signed as aforesaid, such officer shall for- " feit to such bankrupt, for his own use, the sum of five pounds " for every day he shall detain such bankrupt, to be recovered " by action of debt in any court of record at *Westminster* in the " name of such bankrupt, with full costs of suit." (*b*)

But

But the court will enlarge the time for the bankrupt to surrender, in order that he may first finish his examination. Maude v. Jowett, 3 East, 145. Glendinning v. Robinson, 1 Taunt. 320. Offley v. Dickins, 6 Maul. & S. 349. Where the bankrupt has escaped from prison, he may be re-taken by the officer in the time of privilege. *Ex parte* Johnson, 14 Ves. 36. Anderson v. Hampton, 1 Barn. & A. 308. If he is in prison at the time of the adjudication he is not protected from subsequent detainers. *Ex parte* Goldie, 1 Meriv. R. 176. 2 Rose, 343.; unless the original arrest is bad, in which case the detainers fall to the ground. *Ex parte* Hawkins, 4 Ves. 691. *Ex parte* Ross, 1 Rose Ca. 262. *Ex parte* Moore, Buck's Ca. 521.; but see *contrà*, Barclay v. Faber, 2 Barn. & A. 743. The bankrupt is entitled to his discharge, though the commissioners omit to indorse the adjournment on the summons. Price's case, 3 Ves. & B. 23.; he is protected during the whole of the forty-second day. *Ex parte* Donlevy, 7 Ves. 317.; and so, also, notwithstanding the debt on which he is arrested was not proveable, not being due at the bankruptcy. Darby v. Baugham, 5 Term R. 209. And the privilege extends to an attachment for not paying money on an award made a rule of court. *Ex parte* Parker, 3 Ves. 554.; but not to a debt due to the crown. *Ex parte* Temple, 2 Rose, 22.; but he is protected at common law from such debt while he is actually attending the commissioners, or going or returning. *Ex parte* Russell, 1 Rose, 278.; and this common law privilege seems to extend to any attendance of the bankrupt at any time under the commissioners' summons. Arding v. Flower, 8 Term R. 534.; and to a voluntary attendance *bonâ fide* to be examined. *Ex parte* Ross, 1 Rose, 260. And so although he is deviating from the road at the time of his arrest, if he is *bonâ fide* going to be examined. Ogle's case, 11 Ves. 556. See Deacon B. L. c. 13. § 5.‖

(N) Of the Surplus of the Estate, and the Allowance to be made to the Bankrupt: and herein of his Discharge and Certificate.

6 G. 4. c. 16 § 128. The sums are double those in the former statute. [Bankrupts are not entitled to allowance under this act, till a *final* dividend is made, and they have had their certificate. 1 Atk. 208.] ‖See 1 Mont. & Mac. 135. 287. And if the fund is exhausted before the certificate the assignees are not

‖BY § 128. (in place of 5 G. 2. c. 30. § 7. & 8.) it is enacted, "that every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors "who have proved under the commission ten shillings in the "pound, shall be allowed five per cent. out of such produce to "be paid him by the assignees, provided that such allowance "shall not exceed four hundred pounds; and every such bankrupt, if such produce shall pay such creditors twelve shillings "and sixpence in the pound, shall be allowed and paid as "aforesaid seven pounds ten shillings per cent., provided such "allowance shall not exceed five hundred pounds; and every "such bankrupt, if such produce shall pay such creditors fifteen "shillings in the pound or upwards, shall be allowed and paid "as aforesaid ten pounds per cent., provided such allowance "shall not exceed six hundred pounds; but if such produce "shall not pay such creditors ten shillings in the pound, such "bankrupt shall only be allowed and paid so much as the "assignees and commissioners shall think fit, not exceeding "three pounds per centum and three hundred pounds."

liable. Groome v. Potts, 6 Term R. 548.‖ The allowance is a vested interest, and transmissible to the bankrupt's representative. *Ex parte* Trap, 1 Atk. 208. *Ex parte* Calcot, *Id.* 209. 3 Atk. 814. S. C.] ‖According to the words of the above section the interest does not actually *vest* in the bankrupt till a dividend is declared. *Ex parte* Salford, 1 Deacon, 546. It is not necessary, however, that the bankrupt should be alive at the time of the declaration of the dividend. *Ibid.*; or that he should actually have obtained the commissioners' order for his allowance. 1 Atk. 209.; for where the bankrupt died before his estate paid 10*s.* in the pound, the Vice-Chancellor, after that dividend had been declared, ordered the assignees to pay the allowance to the bankrupt's personal representative. *Ex parte* Salford, *suprà*.‖ [The same person is not entitled to a double allowance; one, in respect of a joint, and the other, in respect of a separate estate. *Ex parte* Bate, Co. Bankrupt Laws, 592. Nor does the statute give a distinct allowance of 300*l.* to each partner, when joint creditors

ditors are paid 15*s.* in the pound. *Ibid.*] ‖And before the 3 G. 4. c. 81. § 12. if one partner only obtained his certificate no allowance was due to him. *Ex parte* Powell, 1 Madd. 68., this was altered by that statute, which was followed by the 129th section of the present act; but both the joint and separate creditors must receive a sufficient dividend. *Ibid.*; and see *Ex parte* Thurlow, 1 Rose Ca. 421. *Ex parte* Ferrell, Buck, 345. *Ex parte* Holmes, 2 Rose Ca. 95. The bankrupt's right to his allowance will be preferred to the claims of creditors for interest in the event of a surplus. *Ex parte* Morris, 3 Bro. C.C. 79. 1 Ves. jun. 132.‖

§ 129. By § 129. (in lieu of 3 G. 4. c. 81. § 12.) it is enacted, "that "in all joint commissions under which any partner shall have "obtained his certificate, if a sufficient dividend shall have been "paid upon the joint estate and upon the separate estate of "such partner, he shall be entitled to his allowance although his "other partner or partners may not be entitled to any allowance."

§ 132. And by § 132. (in lieu of 5 Eliz. c. 13. § 4. and 1 Jac. 1. c. 15. § 15.) it is enacted, "that the assignees shall, upon request "made to them by the bankrupt, declare to him how they have "disposed of his real and personal estate, and pay the surplus, "if any, to such bankrupt, his executors, administrators, or "assigns, and every such bankrupt, after the creditors who have "proved under the commission shall have been paid, shall be "entitled to recover the remainder of the debts due to him; but "the assignees shall not pay such surplus until all creditors who "have proved under the commission shall have received interest "upon their debts, to be calculated and paid at the rate and in "the order following; that is to say, all creditors whose debts "are now by law entitled to carry interest, in the event of a sur-"plus, shall first receive interest on such debts at the rate of in-"terest reserved or by law payable thereon, to be calculated from "the date of the commission, and, after such interest shall have "been paid, all other creditors who have proved under the com-"mission shall receive interest on their debts from the date of "the commission, at the rate of four pounds per cent." (*a*)

(*a*) Bills and notes will fall within this latter class, and not the former, since although interest is recoverable on them as damages at law they were not held entitled to interest out of the surplus before this act. *Ex parte* Kock, 1 Ves. & B. 342. 1 Rose, 317. *Ex parte* Williams, *Id.* 399.; and as to interest beyond the penalty of a bond, see Eden's B. L. 367.

Bromley v. Goodere, 1 Atk. 80. Co. B.L. 514; and see Banks v. Scott, 5 Madd. 493.

Where the debts have been fully paid and there is an overplus consisting of real and personal estate, the personal estate is first to be applied to payment of interest on debts carrying interest, and if that is deficient the real estate must come in aid. But where there is real and personal estate more than sufficient to pay the debts with interest, and the bankrupt is dead, the surplus real estate must be conveyed to his heir, and the personal estate among his next of kin.

Co. B.L. 514. Eden's B. L. 367.

Before the present statute, all creditors by bond or contract, or note, carrying interest on the face of it, or where interest was allowed by the course of dealing, were entitled to interest out of the estate before the bankrupt could receive the surplus.

Now by § 132. (above) all creditors whatever are entitled to interest according to the rates therein specified.

Ex parte Boardman, 1 Cox, 275.

Separate creditors are not entitled to interest till the joint creditors are paid 20*s.* in the pound. *Ex parte* Clarke, 4 Ves. 677.

Upon

Upon the principle that a partner jointly liable with the estate of his copartner can never stand in competition with their joint creditors, it is decided that the joint creditors are entitled to interest on their debts in preference to the right of the co-partner to prove against his partner's estate. *Ex parte* Reeve, 9 Ves. 588.; and see Eden's B. L. 369.

Creditors are not prevented claiming interest by having signed a receipt in full under a mistaken impression. *Ex parte* Deey, 2 Ball & B. 77.

If one partner is bankrupt under a separate commission and have the surplus of the joint and separate estate paid to him, the other partner may apply by petition for an account and payment of his share, and the Chancellor can make such an order, and the petitioner is not driven to a bill. *Ex parte* Lanfear, 1 Rose, 442.

A bankrupt pending the proceedings has a right to inspect the proceedings in respect of the surplus, but he will not be allowed to surcharge and falsify in the master's office accounts settled long ago; though palpable errors, specifically pointed out on petition, may be rectified. Twogood Swanston, 6 Ves. 485.

Of the Certificate; and herein,

1. Of granting, staying, and refusing the Certificate.

By 6 G. 4. c. 16. § 121. (taken from 3 G. 2. c. 30. § 7. and 46 G. 3. c. 135. § 4.) it is enacted, "that every bankrupt "who shall have duly surrendered and in all things conformed "himself to the laws in force concerning bankrupts at the time "of issuing the commission against him, shall be discharged "from all debts due by him when he became bankrupt, and "from all claims and demands hereby made proveable under "the commission, in case he shall obtain a certificate of such "conformity so signed and allowed, and subject to such provisions "as hereinafter directed; but no such certificate shall release "or discharge any person who was partner with such bankrupt "at the time of his bankruptcy, or who was then jointly bound "or had made any joint contract with such bankrupt." 6 G. 4. c. 16. § 121.

And § 122. it is enacted, (taken from the 5 G. 2. c. 30. § 10. and 49 G. 3. c. 135. § 18.), "that such certificate shall be signed "by four-fifths in number and value of the creditors of the "bankrupt who shall have proved debts under the commission "to the amount of twenty pounds or upwards (*a*), or after six "calendar months from the last examination of the bankrupt "then either by three-fifths in number and value or by nine-tenths "of such creditors, who shall thereby testify their consent to the "said bankrupt's discharge as aforesaid; and no such certificate "shall be such discharge unless the commissioners shall, in writing "under their hands and seals, certify to the Lord Chancellor that "such bankrupt has made a full discovery of his estate and "effects, and in all things conformed as aforesaid, and that "there does not appear any reason to doubt the truth or fulness "of such discovery, and also that the creditors have signed in "manner hereby directed, and unless the bankrupt make oath "in writing that such certificate and consent were obtained "without

(*a*) If there is a fraction, one creditor must sign for such fraction. 1 Christ. B. L. 338. The bankrupt is entitled to an inspection in order to ascertain the debts proved. *Ex parte* Morgan, 1 Glyn & Ja. 404.

"without fraud, and unless such certificate shall after such oath "be allowed by the Lord Chancellor (*b*), against which allow- "ance any of the creditors of the bankrupt may be heard before "the Lord Chancellor."

(*b*) The power to refer to the judges is omitted.

§ 124. And by § 124. (taken from 5 G. 2. c. 30. § 10. and 24 G. 2. c. 57. § 10.) it is enacted, "that the commissioners shall not "sign any certificate unless they shall have proof by affidavit in "writing of the signature of the creditors thereto, and of any "person thereto authorized by any creditor, and of the authority "by which such person shall have signed the same; and if "any creditor reside abroad, the authority of such creditor "shall be attested by a notary public, British minister, or "consul; and every such affidavit, authority, and attestation, "shall be laid before the Lord Chancellor with the certificate "previous to the allowance thereof."

§ 130. By § 130. (taken with alterations from 5 G. 2. c. 30. § 12.) it is enacted, "that no bankrupt shall be entitled to his certificate "or to be paid any such allowance, and that any certificate, if "obtained, shall be void if such bankrupt shall have lost by any "sort of *gaming or wagering* (*c*) in one day twenty pounds, or "within one year next preceding his bankruptcy two hundred "pounds; or if he shall, within one year next preceding his "bankruptcy, have lost two hundred pounds by any contract for "the purchase or sale of any government or other stock where "such contract was not to be performed within one week after the "contract, or where the stock bought or sold was not actually "transferred or delivered in pursuance of such contract, *or shall, "after an act of bankruptcy committed, or in contemplation of "bankruptcy, have destroyed, altered, mutilated, or falsified, or "cause to be destroyed, altered, mutilated, or falsified, any of "his books, papers, writings, or securities, or made or been privy "to the making of any false or fraudulent entries in any book of "account or other document with intent to defraud his credi- "tors;* or shall have concealed property to the value of ten "pounds or upwards;* or if any person having proved a false debt, "under the commission (*d*), such bankrupt being privy thereto or "afterwards knowing the same shall not have disclosed the same "to his assignees within one month after such knowledge."*

The clause as to advancing more than 100*l.* to a child on marriage is omitted.

(*c*) These words are instead of the enumeration of games in the former act, which it was decided did not comprize insuring in the lottery. Lewis v. Piercy, 1 H. Black. 29.; nor keeping a lottery-office. *Ex parte* Richardson, Co. B. L. 555.

The clauses within asterisks are new.

(*d*) The party proving may be a witness to prove the fraud. Edmonson v. Webb, 3 Esp. Ca. 264.; *sed qu.* and see as to proving fictitious debts, *Ex parte* Laffert, 1 Rose, 330. Freydeburgh's Ca. 3 Ves. & Bea. 142.

Ex parte Buckrer, Co. B. L. 439.

A debt which entitles a creditor to sign the certificate must be such a one as would entitle him to a dividend.‖

Ex parte Saumarez, 1 Atk. 85.

Green, 260.

[An executor may sign the certificate; but a person who hath a debt in his own right and another debt as executor, cannot sign in each distinct right, for to this purpose both are considered as his own particular debt. If the property of the principal creditor upon his death devolves upon the bankrupt, the bankrupt himself may sign the certificate; for otherwise his person could never be released, as no one else is or can be qualified to sign it for him.]

‖One

‖One partner may sign the certificate for another, and the other would be bound by such signature even after a dissolution of partnership (*a*); and so also one co-executor may sign for the other (*b*), but not one trustee for the other (*c*); nor can a party who has assigned his debt sign without the authority of the assignee. (*d*) A receiver cannot be allowed to sign though he may prove (*e*); and it seems that an executor, who is bankrupt and creditor on his own estate, in his capacity of executor cannot sign his certificate. (*g*)

(*a*) *Ex parte* Mitchell, 14 Ves. 597. *Ex parte* Hall, 17 Ves. 62. (*b*) Powell v. Evans, 5 Ves. 839. (*c*) *Ex parte* Rigby, 2 Rose, 224. (*d*) *Ex parte* Taylor, 1 Glyn & J. 399. (*e*) 1 Glyn & J. 151. (*g*) *Id.* 163.; and see further, as to signature of the creditors, Eden's B. L. 374. Deacon B. L. c. 14. § 1.

A creditor who has proved, and is fully paid by a surety, cannot afterwards sign the certificate. (*h*)‖ Ratcliffe v. Gunson, 6 Madd. 193.

[A certificate allowed in the bankrupt's lifetime may be confirmed after his death, for it deriveth its operative force from the consent of the creditors, and when confirmed hath relation to the time when such consent was given; but the relation doth not operate so as to defeat an execution, or to vest in the bankrupt effects coming to him between the signing and allowing of the certificate. 1 Atk. 77. Cullen v. Meyrick, 1 Term R. 361. Tredway v. Bourn, 2 Burr. 716.

It hath been said that a *mandamus* will not lie to compel the allowance of the certificate, for it is discretionary, first in the commissioners and afterwards in the Lord Chancellor, to grant or refuse it acccording to the behaviour of the bankrupt.] 1 Atk. 82. 2 Ves. 249.

‖It has been determined by Lord *Eldon*, after elaborate discussion, that the judgment of the commissioners on this point is not subject to the controul of the Lord Chancellor, who cannot compel them to sign it, nor to state their reasons for refusing, though he may recommend them to review their judgment. *Ex parte* King, 11 Ves. 417. S. C. 13 Ves. 181. S. C.

Nor will the Court of King's Bench grant a *mandamus:* but it is certainly the duty of the commissioners, under their oath, if the bankrupt has acted conformably, to certify; and whether he has so acted is alone what they have to consider.‖ 7 East, 92. *notâ.* *Ex parte* Joseph, 1 Rose Ca. 190. See 1 Ves. & B. 47. 1 Rose, 190. 15 Ves. 126.

[The Chancellor, having the power of granting or refusing the certificate, can of course postpone it; and this he will do if creditors live at a distance, in order to give them an opportunity of coming in and proving their debts. *Ex parte* Williamson, 1 Atk. 82. 2 Ves. 249. *Ex parte* Saumarez, 1 Atk. 84.

Or if the commissioners seem to have been over-hasty in signing it. But he will not stay it in order to give a creditor an opportunity of proving his debt who does not account for the delay in not applying earlier. *Ibid.* ‖*Ex parte* Adams, 2 Bro. Ch. R. 48. *Ex parte* Smith, 1 Glyn & J. 195. *Ex parte* Dyson, 1 Rose, 67.; and see *Ex parte* Birch, 1 Madd. 600., where the delay was excused on circumstances. See *Ex parte* Bentley, 2 Cox, 218. *Ex parte* Warwick, 14 Ves. 138. *Ex parte* Heath, 6 Ves. 613. *Ex parte* Cockayne, 2 Rose, 233.‖

Nor upon the application of creditors whose demands are not liquidated, but depend on an account to be taken, especially if they do not swear to a balance in their favour; for unless a person prove a debt, or shew reasonable ground for a claim, he *Ex parte* Johnson, 1 Atk. 81. 83. (*a*) *Ex parte* Whitchurch,

1 Glyn & J. 71. *Ex parte* Ramsbottom, 2 Christ. B. L. 501. (*b*) *Ex parte* Hadley, 1 Glyn & J. 193. (*c*) *Ex parte* Dodson, Buck, 225. *Ex parte* Enderby, 5 Madd. 76. *Ex parte* Lord, 2 Rose, 421.

is not competent to assert to or dissent from the certificate.] ‖The certificate may be stayed on petition of a mortgagee if he swear that a balance would be due after sale of the premises (*a*); or on petition of a partner of the bankrupt until the partnership accounts are taken (*b*); but not now on petition of a creditor having the bankrupt in custody on execution, or who has not come in under the commission, and has the means of trying the validity of the certificate at law (*c*); nor on petition of a creditor who tampers with the bankrupt. (*d*) A creditor under 20*l.* may petition for this purpose. (*e*)

(*a*) *Ex parte* Blaydes, 1 Glyn & J. 179. (*d*) *Ex parte* Paterson, 1 Rose, 402. (*e*) *Ex parte* Allen, 7 Vin. Ab. 134.

Ex parte Kennet, 1 Rose, 331. 1 Ves. & B. 193. *Ex parte* Hall, 1 Rose, 3.

The certificate may be stayed either on application to the discretion of the court in cases where, if granted, it would be good, or on any of those legal objections which would invalidate it at law, if granted. Though the court will not grant a certificate which, when granted would be void, yet it requires it to appear clearly that there has been a violation of the law, because, by withholding the certificate, it withholds an opportunity of having its validity tried before a jury.

Ex parte Henderson, Buck, 557.

Where the bankrupt on his last examination admitted a loss of 5*l.* at a horse-race, the court, on petition to stay the certificate, directed an issue to try the fact.

Ex parte Newman, 2 Glyn & J. 329.

A loss of twenty pounds in a day by gaming invalidates the certificate, though on the same occasion the bankrupt wins more than he loses.

Ex parte Thompson, 1 Rose, 285.

Though the court will not in general grant a certificate which is invalid at law, yet it is not a good ground of opposition that the bankrupt was uncertificated under a former commission; for though the certificate would be inoperative, the court, if circumstances required, would interfere by injunction to give it effect.

Ex parte Scott, Buck, 275.

Where the certificate is disputed on the ground of conduct amounting to felony, the court will not direct an issue.

Ex parte Black, 1 Rose, 60. *Ex parte* Bonsor, 2 Rose, 61.

It will not be stayed on the ground that the commissioners have not certified that the bankrupt has been bankrupt before, nor that there is a petition pending to supersede the commission.

Ex parte Gibson, 6 Ves 5.

Where a commission is taken out under a wrong description, the Lord Chancellor will stay the certificate till advertisements have been inserted for the creditors.

Ex parte King, 11 Ves. 426. *Ex parte* Cunningham, 2 Mont. Dig. 152.

Though formerly held otherwise, Lord *Eldon* has twice decided that there being no dividend is only a circumstance against the bankrupt, but not a conclucive reason for staying the certificate.

As to the practice on petitions to stay certificate, see Eden's B. L. 379. Deacon, c. 14. § 4.

2 Rose, 187. *Ex parte* Cawthorne, 19 Ves. 260. *Ex parte* Tellis, 1 Ball

In certain cases (as for instance where obtained by fraud) the certificate will be recalled, and this has been done although the bankrupt has been in possession of it two and three years; but a clear case must be made out, and such applications are not encouraged,

encouraged, and will not be granted if third parties will be prejudiced; and a certificate cannot be got rid of in every case in which it can be stayed. & B. 521. *Ex parte* Hood, 1 Glyn & J. 219. *Ex parte* Reed, Buck, 430. *Ex parte* Mawson, 6 Ves. 614.

And by § 125. (taken from 5 G. 2. c. 30. § 11.) it is enacted, § 125.
"that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor (*a*), or "for securing the payment of any money due by such bankrupt "at his bankruptcy, as a consideration or with intent to persuade "such creditor to consent to or to sign such certificate, shall be "void, and the money thereby secured or agreed to be paid "shall not be recoverable, and the party sued on such contract "or security may plead the general issue and give this act and "the special matter in evidence."

[(*a*) See Sumner v. Brady, 1 H. Black. 647. Robson v. Calze, Doug. 228. Jones v. Barkley, *Id.* 695. As it is illegal for a creditor to take, so it is for him to retain, money given him for signing the certificate. Smith v. Bromley, Dougl. 696. Cockshot v. Bennet, 2 Term R. 766. An agreement to pay a sum of money to the assignees if they will sign the certificate, is within the letter and reason of this clause. Dougl. 695.] ‖But if there are sufficient creditors in number and value signing *previous* to the creditor so induced, it seems the certificate will be good. Philips v. Dicas, 15 East, 248. Eden, 385. Whether the money is paid with or without the knowledge of the bankrupt the effect is the same. Holland v. Palmer, 1 Bos. & Pull. 95. *Ex parte* Butt, 10 Ves. 360. *Ex parte* Hall, 17 Ves. 63. But where the payment was unknown to the bankrupt, the Lord Chancellor cancelled the certificate, that the bankrupt might obtain a new one. *Ex parte* Harrison, cited Buck, 227. n. A bill of exchange given to a creditor to induce him to sign the certificate, is void in the hands of an innocent holder. 3 Carr. & P. 379.‖

2. Of the Effect of the Certificate, and the Mode of taking Advantage of it.

And by § 126. (taken from 5 G. 2. c. 30. § 7.) it is enacted, § 126.
"that any bankrupt who shall, after his certificate shall have "been allowed, be arrested, or any action brought against him "for any debt, claim, or demand hereby made proveable under "the commission against such bankrupt, shall be discharged "upon common bail (*a*), and may plead in general that the "cause of action accrued before he became bankrupt, and may "give this act and the special matter in evidence (*b*), and such "bankrupt's certificate and the allowance thereof shall be "sufficient evidence of the trading, bankruptcy, commission, and "other proceedings precedent to the obtaining such certificate; "and if any such bankrupt shall be taken in execution, or de-"tained in prison, for any such debt, claim, or demand, where "judgment has been obtained before the allowance of his cer-"tificate, it shall be lawful for any judge of the court wherein "judgment has been so obtained, on such bankrupt's producing "his certificate, to order any officer who shall have such bank-"rupt in custody by virtue of such execution to discharge such "bankrupt without exacting any fee, and such officer shall be "hereby indemnified for so doing."

[(*a*) If there is any appearance of fraud on the part of the bankrupt the court will not interfere in this summary way. Vincent v. Brady, 2 H. Black. 1. Sowley v. Jones, 2 Black. R. 725.] ‖And any of the grounds in § 130. may be shewn against the discharge, and wherever the validity of the certificate is disputed, the court will not relieve without giving an opportunity to try an issue. Stacey v. Federici, 2 Bos. & Pull. 390. Wooler v. Leicester, 6 Taunt. 75. Nowers v. Coleman, Buck's Ca. 5. Kemp v. Neville, 5 Moo. 21. Lester v. Mundell, 1 Bos. & Pull. 427. And as the case ought to be perfectly clear on a summary application, the court will not decide on motion on the effect of a foreign bankruptcy.

Quin

Quin v. Keefe, 2 Hen. Black. 553. Philpotts v. Reed, 1 Bro. & B. 13. 3 Moo. 244.‖ [(*b*) The defendant may plead thus generally, without stating that he hath conformed according to the bankrupt acts. Willan v. Geordini, Tr. 1782, *B. R.* The case of Paris v. Salkeld, 2 Wils. 139. *cont.* denied to be law. He must be careful to state, that the cause of action accrued before the bankruptcy, ‖and must plead according to the form given in the statute.‖ Charlton v. King, 4 Term R. 156. As this plea concludes to the country, the plaintiff may give the special matter, on which the action is brought, in evidence, to shew that he is not barred by the certificate; for it opens the whole merits of the question in evidence on both sides. Alsop v. Price, Dougl. 160. This point, however, hath been questioned by high authority; and it hath been thought, that the plaintiff should set out in his declaration, ‖*quære* replication,‖ the matter of which he wishes to avail himself.] ‖But it is now settled that the several matters which avoid the effect of the certificate may be given in evidence on the *similiter* to the general plea of bankruptcy, and that a special replication is bad. Wilson v. Kemp, 2 Maule & S. 549. Hughes v. Morley, 1 Barn. & A. 22.; but the commission cannot be impeached, — only the certificate. Bateson v. Hartsinck, 4 Esp. Ca. 43. The bankruptcy and certificate cannot be given in evidence on the general issue, but must be pleaded according to the statute. Gowland v. Warren, 1 Camp. 362. Stedman v. Martinnant, 12 East, 664. 13 East, 427. The plea must be delivered, not filed. Henderson v. Samson, 2 Barn. & A. 392., and in the K. B. need not be signed. Leigh v. Monteiro, 6 Term R. 496.; *aliter* in C. B. Pitcher v. Martin, 3 Bos. & Pull. 171. Under the act of 5 G. 2. it was settled that the certificate might be pleaded in bar, if obtained, any time before plea, though subsequent to the commencement of the suit. Harris v. James, 9 East, 82. contrary to the opinion expressed in 6 East, 416.; but *quære*, whether the words in the present statute, § 126. "after his certificate shall have been allowed" would not render it necessary to have the certificate before suit. The words in 5 G. 2. c. 30. § 7. were different. If a commission issues against a man by a wrong name, if he obtains his certificate he may plead it in bar to an action against him in his right name, shewing that he is the same party. Stevens v. Elizee, 3 Camp. 255. By the present statute the certificate, in order to be evidence must be entered of record according to §§ 125, 126.‖

§ 127. (*a*) The words of the 5 G. 2. c. 30. § 9. were "shall "remain liable "to his credi- "tors as be- "fore the "making of "this act;" which were construed to mean, that the estate remained liable to the claims of the individual creditors who might sue for them, and

And by § 127. (taken from 5 G. 2. c. 30. § 9.) it is enacted, "that if any person who shall have been so discharged by such "certificate as aforesaid, or who shall have compounded with "his creditors, or who shall have been discharged by any "insolvent act, shall be or become bankrupt, and have ob- "tained or shall hereafter obtain such certificate as aforesaid, "unless his estate shall produce (after all charges) sufficient to "pay every creditor under the commission fifteen shillings in the "pound, such certificate shall only protect his person from arrest "and imprisonment, but his future estate and effects (except his "tools of trade, and necessary household furniture, and the wear- "ing apparel of himself, his wife and children,) *shall vest in the "assignees under the said commission, who shall be entitled to seize "the same in like manner as they might have seized property of "which such bankrupt was possessed at the issuing of the commis- "sion.*" (*a*)‖

did not vest in the assignees under the commission. Hovill v. Browning, 7 East R. 154.; and see 1 Rose, 452. 2 Rose, 172. 19 Ves. 291.; but see 2 Christ. B. L. 329. The consequence was that a third commission might be supported, although 15*s.* in the pound were not paid under the second (or under the first after an insolvency or composition). The words of the present act obviate this inconvenience. As to third commissions anterior to the 1st of *September* 1825, see § 195.

Horsey's case, 5 P. Wms. 23. Twiss v. Massey, 1 Atk. 67. Wickes v. Strahan, 2 Stra. 1157.

[As to the effect of the certificate, it discharges the bankrupt from all debts, both joint and separate, that might have been proved under the commission; therefore, it discharges a bankrupt from a debt accruing before the act of bankruptcy, though judgment is not obtained till after the certificate allowed.

Ex parte

As where a bankrupt had given a bail-bond to the sheriff which

which was forfeited before the bankruptcy for nonappearance, and an action was brought upon this bail-bond, but judgment not obtained till after the certificate allowed; the court held there was a breach, and that the penalty was forfeited, and therefore the debt was due, though execution could not be taken out for more than the damages.] Simpson, 1 Atk. 138. *Ex parte* Goodwyn, 2 Vern. 696. Blackall v. Combs, 2 P. Wms. 70.

Bouteflower v. Coats, Cowp. 25. 2 Stra. 1042. Ca. temp. Hardw. 267. ‖Dinsdale v. Eames, 2 Bro. & B. 10‖

‖And so also where the commission of bankrupt issued on the 19th *April* (*b*), and the *quarto die post* of the return of the writ was on the 16th, the court held that the bail-bond was forfeited on the *quarto die post*, and the penalty might have been proved, and was consequently barred by the certificate. Coulson v. Hammon, 2 Barn. & C. 626. (*b*) It did not appear when the act of bankruptcy took place.

But where a bond was given by a trading member of parliament, pursuant to the 4 G. 3. c. 33. § 1. conditioned for payment of such sum as should be recovered by the plaintiff in an action then pending against the defendant, together with costs, and judgment in the former suit was not given till after the bankruptcy of the defendant, it was held that the bankruptcy and certificate could not be pleaded in answer to an action on such bond, since there was no forfeiture of the bond before the bankruptcy.‖ Jameson v. Campbell, 5 Barn. & A. 250. affirmed on error, 1 Bing. 320.; and see 3 Barn. & A. 275. *Qu.* whether such debt would now be considered contingent within the meaning of § 56. of 6 G. 4. c. 16., and in what manner could it be valued; and see *antè*, p. 601. as to proof of contingent debts.

[Again, *Jones* had employed *Bird*, who was an attorney, to recover a debt. *Bird* undertook the business, and recovered the money, but, as *Jones* alleged, had not paid over to him the fair balance, and in 1788 he applied to the Court of King's Bench, of which court *Bird* was an attorney, for the usual rule of reference to the master, on an undertaking to pay what should appear due. *Bird* shewed cause, but the rule was made absolute; after which, and before any proceedings upon it, *Bird* became bankrupt, and in 1788 obtained his certificate. A rule was now obtained to revive the former rules, but, on shewing cause, the court discharged that rule, saying the certificate was a clear bar to the demand. They also said, that after such lapse of time the court would not proceed to give relief in a summary way. The party might proceed as he should be advised. Bird v. Jones, Mich. 29 G. 3. *B. R.* Co. Bankrupt Laws, 566.

So if a person enters into a bond with a trader as a surety for him, and, for his own indemnity, takes a counter-bond payable the day before the first; though the trader become bankrupt before either of the bonds be payable, the party may yet prove his bond under the commission.] Martin v. Court, 2 Term R. 640. ‖But see 6 G. 4. c. 16. § 52.; and *antè*, p. 603. as to proof by sureties.‖

‖And the certificate is a bar, not only to any claim by the surety for the original debt paid for the bankrupt, but also to a claim for consequential damage arising from the nonpayment by the bankrupt. Thus, where the acceptor of an accommodation bill sued the drawer, who had become bankrupt, for not providing Van Sandau v. Corsbie, 3 Barn. & A. 13.

viding him with funds to pay the bill when due, whereby he incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, the certificate was held a bar.‖

Johnson v. Spiller, Dougl. 167. ‖See *antè* (E) as to debts provcable.‖

[*A.*, wanting money, prevails with *B.* to lend him his name, by endorsing his note to be discounted at the bank; and gives him, as a security, a debenture, making it negotiable. *B.* pledges the debenture with another person, for money advanced to him. *A.* pays the note at the bank, and soon afterwards *B.* becomes a bankrupt, and then *A.* redeems the debenture by paying the money, for which it remained a pledge. This is a debt proveable by *A.* under *B.*'s commission, and discharged by the certificate.

Walcot v. Hall, 2 Bro. Ch. Rep. 305.

If an executor becomes bankrupt, a vested legacy, though liable to be devested, may be proved under the commission, and is, of course, discharged by the certificate.

Miles v. Williams, 1 P. Wms. 249.

The certificate is a bar to an action brought against the husband for a debt due from the wife *dum sola*, because by the marriage it becomes a debt due from the husband.

Cantrel v. Graham, Barnes, 69. So in *debt* on the *reddendum* of a lease. Wadham v. Marlow, Mich. 25 G. 3. *B. R.*

In an action of *debt* for rent, the certificate will be a bar, because the assignment of the lease by the commissioners is considered as an assignment by the assent of the lessor, all persons being supposed to consent to an act of parliament, by the authority of which the commissioners assign the bankrupt's property; and therefore, as the bankrupt is no longer in the enjoyment of the thing demised, *debt* does not lie for the rent.

Mills v. Auriol, 1 H. Black. 433. *Secùs* of *covenant* for nonpayment of rent. *Ibid.* ‖By the 49 G. 3. c. 121. § 75. of the lease within the bankrupt was discharged in case the assignees *accepted* the lease, and now by 6 G. 4. c. 16. he is also discharged in case they *decline*, provided he give up fourteen days after notice of their declining; and if the assignees will neither accept nor decline, the lessor may petition the Chancellor who may make an order on them. *Qu.* If the assignees neither accept nor decline, and if the lessor does not choose to petition, how is the bankrupt to be discharged? As to what is an acceptance, see *antè*, p. 619.‖

Baker's case, 2 Stra. 1152. ‖Rex v. Stokes, Cowp. 136. Watt v. Atkinson, Cooper's R. 198.

If a man be attached for nonpayment of money in obedience to an award, and afterwards becomes bankrupt, the certificate entitles him to his discharge; for as the act discharges the duty, it would be hard to detain the person.

And so in case of attachment for non-payment of money pursuant to a rule of court. Rex v. Edwards, 9 Barn. & C. 652. And if an attorney has received money as an attorney, and afterwards has become bankrupt and obtained his certificate, the court will not compel him to pay over the money; for if an action were brought the certificate would be a bar. *Ex parte* Culliford, 8 Barn. & C. 220.‖

Davis v. Shapley, 1 Barn. & Adol. 54.

‖The discharge under § 121. *antè*, p. 661. extends to the goods as well as the person, and where a certificated bankrupt's goods, acquired after the bankruptcy, were seized under an execution for a debt due before the bankruptcy, the court set aside the execution.‖

Ballantine v. Golding, Mich. 24 G. 3. *B. R.* The bankrupt laws are now adopted in

On a motion to enter an *exoneretur* on the bail-piece, it appeared, that the defendant had been a bankrupt, and obtained a certificate under the great seal of *Ireland*. The original demand arose upon a bill of exchange drawn in *Ireland*, and payable by the defendant who resided there. Lord *Mansfield* said, it

it is a general principle, that where there is a discharge by the law of one country, it will be a discharge in another; that he remembered a case in Chancery of a *cessio bonorum* in *Holland*, which is held a discharge in that country, and it had the same effect here. The rule was enlarged, and was afterwards made absolute by consent, the counsel giving it up upon the authority of *Burrows* v. *Jemino.*] *Ireland. Ex parte* Burton, 1 Atk. 255. ‖See 2 Chitt. R. 53. 55.‖

‖What Lord *Mansfield* says as to the discharge by the law of one country being a discharge in another, means a discharge by the law of the country *where the debt is contracted.* This, by the comity of nations, is held a discharge every where.

Thus where the defendant gave the plaintiff (both being resident in *America*) a bill of exchange, drawn by the defendant on a person in *England*, and the bill was protested for nonacceptance; the defendant having become bankrupt, and obtained his certificate according to law in *America*, was held entitled to plead it in bar to an action brought against him by the plaintiff on the bill in *England*; for when the plaintiff agreed to take the bill in *America*, the promise of the defendant in effect was, to pay the money in *America* if it was not paid in *England.* Potter v. Brown, 5 East R. 124.

And so also the courts in *Scotland* have held, that the certificate under an *English* commission will bar the debts of *Scotch* creditors, if they are *proveable* under the *English* commission. Royal Bank of Scotland v. Cuthbert, 1 Rose, 462. and see Selkrig v. Davis, 2 *Id.* 291.

But if the debt is contracted in one country, and the discharge and certificate are obtained in another, they are no bar to a suit for the debt in the country where it was contracted. Thus, where the cause of action accrued to the plaintiff in this country, it was held to be no bar to an action here that the defendant, at the time of the cause of action, was inhabitant in the state of *Maryland*, and that he had obtained his discharge from all his debts under a commission of bankrupt against him in that state. Smith v. Buchanan, 1 East R. 6.; and see Co. B. L. 465.

So also where an accommodation bill of exchange was drawn by the defendant in *Ireland* on the plaintiff in *England*, and accepted and paid by the plaintiff in *England*, the debt was held to be an *English* debt arising where the bill was paid, and, consequently, that it was not discharged by the defendant's certificate under a commission of bankrupt in *Ireland.* Lewis v. Owen, 4 Barn. & A. 654. and the same principle is adopted in *Scotland*; see 2 Bell's Com. 693., and the courts there have held, that where the bill is payable in a particular country the debt is to be considered a debt due in that country. *Ibid.*

Where the plaintiffs, planters at *Demerara*, had shipped sugars to the defendant in *London*, for which they drew bills on the defendant, some of which the defendant accepted, and others he engaged by letter to accept, and the former were returned protested for nonpayment, and the latter for nonacceptance, and the defendant subsequently became bankrupt and obtained his certificate, of which bankruptcy plaintiffs had notice, after which he went to *Demerara* and was sued by the plaintiffs there for the Odwin v. Forbes, Buck's Ca. 57. (*a*) If the debt in this case is to be considered an *English* debt by reason of the bills being accepted and

the sugars delivered in *England*, the case is consistent with the principle of the former cases; but Mr. Eden thinks the case only supportable on the principle of the *Dutch* law (according to which the court professed to proceed), by which a *Dutch* discharge is a bar to foreign debts as well as *Dutch* debts. The privy council lately decided, that a certificate under an *English* commission was a bar to a debt previously contracted at *Calcutta*, though the creditor had no notice of the commission, and was resident at *Calcutta*. Neither the arguments nor the grounds of the written judgment appear. Edwards v. Ronald, 1 Knapp's P. C. Ca. 259. See as to discharge under a *French* commission. *Id.* 266.

the debt; it was held by the court at *Demerara*, and affirmed by the Privy Council on appeal, that the bankruptcy and certificate in *England* were a bar to the suit. (*a*)‖

Palmby v. Masters, Barnes, 368. Graham v. Benton, 2 Stra. 1196. 1 Wils. 41. Blandford v. Foote, Cowp. 138. Lewis v. Piercy, 1 H. Black. 29. ‖Scott v. Ambrose, 3 Maule & S. 326. Dinsdale v. Eames, 2 Bro. & B. 8. Beeston v. White, 7 Price, 909. *Ex parte* Poucher, 1 Glyn & J. 385. *Ex parte* Hill, 11 Ves. 646.; and see *antè*, p. 591.‖ (*a*) Calcraft v. Swan, Barnes, 204.; and *qu.* whether the courts would now put the party to that expense? ‖Where a bankrupt who obtained his certificate between issue and judgment, was after judgment rendered in discharge of his bail, the court liberated him on motion. Humphreys v. Knight, 6 Bing. 572.‖

[A certificate obtained pending an action, but too late to be pleaded, discharges the bankrupt from the original debt and subsequent costs. But it hath been determined that if, after the certificate, the bankrupt's goods are taken in execution, the court will not proceed in a summary way (*a*), but put the party to his *audita querela*.

Cowp. 25. Stra. 668. 1043. 1160. 1 Atk. 119. 129. 3 Wils. 13. 262. Rex v. Eggington, 1 Term R. 369. ‖But now by § 56. of 6 G. 4. c. 16. contingent debts are made provable, and are consequently barred by the certificate, (an alteration desired by Lord *Hardwicke*, 1 Atk. 120., and Lord *Eldon*, 9 Ves. 110.) see *antè*, p. 601. It is not true (as before seen, *antè*, p. 590.) that the right to prove and the discharge by certificate are co-extensive, since costs not provable are now in some cases held to be discharged. See *Ex parte* Poucher, 1 Glyn & J. 385.; and on the other hand, where a party has a double remedy (as for seizing and selling goods), one founded on a debt for the money received, and the other on the tort for the seizure, though he might prove the former, he may still sue in tort, and the certificate in such case will be no bar. Utterson v. Vernon, 3 Term R. 548. Parker v. Norton, 6 Term R. 695. Parker v. Crole, 5 Bing. 63.‖

A certificate does not discharge a bankrupt from a contingent debt which has not been reduced to a certainty, because it cannot be proved under the commission, and in questions, whether a debt is discharged or not by a certificate, the point agitated has always been, whether it could be proved or not; the creditor's right to prove, and the bankrupt's right to be discharged by the certificate, being reciprocal and co-extensive.

Mayor v. Steward, 4 Burr. 2443. Ludford v. Barber, 1 Term R. 86. ‖Bannister v. Scott, 7 Term R. 489. Hammond v. Toulmin, 7 Term R. 614.; and see *antè*.‖

A certificate will not discharge the bankrupt from his own express collateral covenant which doth not run with the land. Thus, on a covenant by the bankrupt to indemnify the assignor against covenants contained in a lease, which lease was assigned to the bankrupt before his bankruptcy, for his sole benefit; the question was, whether the bankrupt's obtaining his certificate would bar this action of covenant? The court were clearly of opinion, that as this was not a case between lessor and lessee, but a distinct, detached, collateral, independent covenant and contract, and as the assignor could have no remedy under the commission, the bankrupt was not discharged by his certificate.

Cockeril v. Owston, 1 Burr. 434.

The certificate obtained after judgment upon a bail-bond against the bankrupt himself will not discharge the bail-bond, although

although it discharged the original debt, for it is a new and distinct cause of action. ‖This question depended on the relative times of the bankruptcy and the forfeiture of the bail bond. If the bankruptcy happened before the forfeiture, *i. e.* before the *quarto die post* of the return in actions by original or before the return in actions by bill, then the bond, not being provable, the certificate was no bar to an action on the bond; — *aliter* if the *quarto die post* or return day was past before the bankruptcy. See Dinsdale v. Eames, 2 Bro. & B. 8. Coulson v. Hammon, 2 Barn. & C. 626., and *antè* p. 663.; but now the debt on the bail-bond appears to be proveable before forfeiture as a contingent debt under § 56. of 6 G. 4. c. 16. and would appear, consequently, to be barred in all cases; but *quære* the mode of valuing such a contingency under this section?‖

Bankruptcy is no plea in bar to an action of *trespass for mesne profits*; for where damages are uncertain, they cannot be proved under the commission. Goodtitle v. North, Dougl. 584. Gulliver v. Drinkwater. 2 Term R. 261. A demand in *trover*, if for a liquidated amount, may be proved. Dougl. 168. But if *A.* lend stock to *B.*, to be replaced as stock, without naming any particular day, and *B.* become a bankrupt before any request by *A.* to replace the stock, *A.* cannot come in under *B.*'s commission. Utterson v. Vernon, 4 Term R. 570. ‖The late act has not altered the law as to unliquidated damages, since they cannot be considered as debts payable on a contingency within § 56. See Boorman v. Nash, 9 Barn. & C. 145.‖

A bankrupt executor pleading a false plea, after the commission issued, is liable to execution for the costs; for he becomes a debtor by his false plea, which amounts to contracting a new debt subsequent to the commission. Howard v. Jemmet, 1 Black. 400.

The crown not being affected by the bankrupt laws, the certificate will not discharge the bankrupt from a commitment under an extent. Anon. Atk. 262.

The allowing of the certificate of a bankrupt will not discharge his sureties; and if they are forced to pay the debt after the commission, the certificate will be no bar to their recovering it of the principal. 1 Atk. 84. See Taylor v. Mills, Cowp. 525. Young v. Hockley, 2 Stra. 1043. 1 Atk. 84.

But if a bankrupt obtains his certificate before his bail are fixed, it will discharge them. *Secùs*, if not till after they are fixed. Wooley v. Cobbe, 1 Burr. 244. Tudway v. Bourn, 2 Burr. 716. Walker v. Giblet, 2 Black. 812. ‖But now by 6 G. 4. c. 16. § 52. the surety may prove though he pays the debt after the commission; and bail are expressly named; and see *antè*, p. 603. as to debts proveable.‖

A certificate under a second commission will not protect future effects, unless fifteen shillings in the pound are paid under the second commission, notwithstanding the first has been superseded ‖by consent; for the creditors having accepted the dividend, it is in fact a composition within the meaning of the statute.‖ Thornton v. Dallas, Dougl. 46. ‖Cullen, 394.‖

But a certificate under a second commission, during the subsistence of the first, is a mere nullity.] Martin v. O'Hara, Cowp. 823. *Ex parte* Proudfoot, 1 Atk. 252. *Ex parte* Brown, 4 Bro. Ch. R. 210.

‖A *third* commission is void, where the bankrupt has not paid a dividend under the first and second. A certificate under such a commission will not entitle him to discharge as to a debt contracted before the commission. Fowler v. Coster, 10 Barn. & C. 427. Till v. Wilson, 7 *Id.* 684.; and see Todd v. Maxfield, 3 *Id.* 222.

A composition in order to affect the certificate under the second commission must be a composition for the benefit of *all* the Norton v. Shakspeare, 15 East,

Slaughter v. Cheyne, 1 Maule & S. 182. *Qu.* Whether the subsequent payment of the creditors in full after the composition will do away the effect of the composition on the certificate under the second commission? Reed v. Sowerby, 3 Maule & S. 78.

the creditors; and where a composition was confined to joint creditors only, it was held not within the statute. But if it embrace *all the creditors*, the circumstance of some of them not coming in is immaterial.

Gill v. Scrivens, 7 Term R. 27. Coverley v. Morley, 16 East, 225. Edmondson v. Parker, 3 Bos. & Pull. 187. Jelfs v. Ballard, 1 Bos. & Pull. 467.; but now, instead of the future estate remaining liable to the suits of the creditors, it is to go to the assignees. 6 G. 4. c. 16. § 127. And under that clause it has been held that no action lies against a certificated bankrupt for a debt due before the commission, though he has compounded with his creditors, and his effects have not produced 15*s.* in the pound. Eicke v. Nokes, 1 Moo. & Malk. 303.

In a *scire facias* on a judgment against a bankrupt who has been twice a bankrupt, it is necessary for the plaintiff to aver on the record that the defendant has been twice a bankrupt, and that his estate has not paid 15*s.* in the pound; but the burden of proving the affirmative, that the estate has paid 15*s.* in the pound, or will pay it, seems to lie on the bankrupt.‖

Ex parte Burton, 1 Atk. 255. Twiss v. Massey, *Id.* 67. Truman v. Fenton, Cowp. 544. The payment of interest by the *bankrupt himself* on a bond, will be such an admission as will make him liable on a new debt. Alsop v. Brown, Dougl. 192. See too, Besford v. Saunders, 2 H. Black. 116. But if the bankrupt promise to pay, *when he is able*, *quære* whether it be not incumbent on the plaintiff to prove his ability?

[As the certificate dischargeth only such debts as are provable under the commission; — as the statutes leave the bankrupt at liberty to enter into new engagements, and contract new debts; — and as the debts provable under the commission are, notwithstanding the certificate, due in conscience, a new promise or agreement by the bankrupt, to pay the whole or part of such debt, will therefore be obligatory on him.]

‖But now, by the 6 G. 4. c. 16. § 131. no bankrupt shall be liable on such contract, promise, or agreement made after the issuing the commission, unless such contract, promise, or agreement were made in *writing*, signed by the bankrupt or by some person thereto lawfully authorized by him.

Peers v. Gadderer, 1 Barn. & C. 116.; and see 3 Maule & S. 595.; but see Drew v. Jefferies, 8 Price, 531. Blackburne v. Ogle, 8 Price, 526. *cont.* *Qu.* Whether the words in the statute "arrested for *such debt*" properly apply to an arrest on a new promise creating a new cause of action? By a similar construction the bankrupt might plead his bankruptcy if impleaded for such new cause of action, which he cannot do.

But it appears to be now settled, after conflicting decisions, that the bankrupt cannot be arrested on any such subsequent promise, since the statute (§ 126.) declares, that if arrested for such debt, he shall be discharged on common bail.‖

1 P. Wms. 386. 1 Atk. 145. 1 Vern. 208. 2 Ch. Ca. 292. Sel. Ch. Ca. 46. 1 Atk. 135. 146. 2 P. Wms. 545. 4 Bro. Ch. R. 432.

[The certificate determines the power of the commissioners; and, of course, incapacitates them from making a subsequent assignment.

The certificate may be entirely defeated by a *supersedeas*.

And the writ of *supersedeas* may be issued at the discretion of the Chancellor, when the creditors who have proved agree to supersede the commission; or because the party appears not to have been a trader, or was an infant, or had not committed an act of bankruptcy, or that the commission was not opened till six months after it issued, or that it has not been prosecuted within fifteen

fifteen days from the date of it, if executed in *London*, or within twenty-nine days, if in the country, or that he has paid all his creditors.

‖16 Ves. 416. 2 Ves. 40. 8 Ves. 533.‖

So if the petitioning creditor had not a legal debt to the amount specified in the statute, or if his debt accrued subsequent to an act of bankruptcy ascertained by a trial at law, or if it issued against an uncertificated bankrupt, or on a debt barred by the statute of limitations, or if at the time it issued the petitioning creditor had the debtor in execution, or if it was fraudulently issued — in which case, indeed, the court will punish the parties concerned by commitment, and by making them pay the costs.

2 Black. R. 702. 1 Stra. 653. 4 Bro. Ch. R. 210. 3 Wils. 271. 1 Ves. jun. 394.

But upon an application to the Lord Chancellor, on the part of the bankrupt, to supersede the commission upon a legal objection to it, if the case appear unfavourable (as if a great length of time has intervened between the issuing of the commission and the application), the Chancellor will not grant an issue to try the bankruptcy, but leave the party to bring his action. However, if creditors apply to have the commission superseded, it seemeth the Chancellor will order the bankruptcy to be tried in an issue, because they can have no action at law in which the validity of the commission can be contested, as the bankrupt's certificate is a conclusive bar against them, that of itself being evidence of the commission, *&c.*

1 Atk. 102. *Ex parte* Gulston, 1 Atk. 139. 193.

Though the usual course is for the Lord Chancellor to order a feigned issue to try the bankruptcy at law, yet if the commission appears plainly to have been taken out fraudulently and vexatiously, the court will at once supersede it, and order the petitioning creditor's bond to be assigned.

Richardson v. Bradshaw, 1 Atk. 128. 218. *Ex parte* Gayter, 1 Atk. 144.

But where a commission is superseded merely because there is a defect in form as to the petitioning creditor's debt, and no doubt as to the act of bankruptcy, the costs of the *supersedeas* only shall be allowed; but it would be otherwise if the act of bankruptcy was not fully proved.]

Ex parte Goodwin, 1 Atk. 100.

‖By the 5 G. 2. c. 30. § 24. in cases where the petitioning creditor compounded with the bankrupt, the Lord Chancellor was compelled to supersede the commission. But this is now altered by the eighth section of 6 G. 4. c. 16., by which the Lord Chancellor is allowed either to supersede or continue the commission in such case; so that a discretion is now vested in the Lord Chancellor in all cases.

5 G. 2. c. 30. § 24.

By the eighty-seventh section of the 6 G. 4. c. 16. no title to any real or personal property sold under the commission, or under any order in bankruptcy, shall be impeached by the bankrupt or any person claiming under him, in respect of any defect in the issuing out of the commission, or in any of the proceedings, unless the bankrupt shall have commenced proceedings within twelve months from the issuing thereof.‖

See 8 Ves. 533. 19 Ves. 204. Buck's Ca. 262. n.; and see, as to the supersedeas, Cooke's B. L. 515. Eden's B. L. 408.

[(O) Of Partners.

Allen v. Hartley, M. 25 G. 3. *B. R.* Co. Bankrupt Laws, 7. ‖By the new act,

A SEPARATE commission may issue against one partner without making the rest bankrupts. But where a joint commission is prosecuted, all the partners must be included; for a commission against two or more of several partners is neither joint nor separate.]

§ 16. a joint creditor may sue out a commission against one or more partners, though it does not include *all*.‖ But by stat. 10 Ann. c. 15. § 3. the certificate, under a separate commission, will not discharge any other than the bankrupt partner from a joint debt. It was formerly the practice to take out a separate commission against each partner, and then a joint commission against all; the Chancellor, upon recent application, directing the former to be superseded, in order to give validity to the latter, under which both sets of creditors might have their proper relief. 1 Atk. 98. 138. But it seemeth now to be holden, that whilst there is a separate commission subsisting a joint one cannot be supported. Cowp. 824. 1 Atk. 252. 4 Bro. Ch. R. 210. Co. Bankrupt Laws, 9. ‖Though the joint commission is in strictness a nullity as to those partners against whom separate commissions have issued, yet if the bankrupt's estate will be benefited the Chancellor in his discretion will suspend or supersede the separate commissions, and order the joint commission alone to proceed. 1 Cox. 397. 15 Ves. 115., and Glyn & J. 256. 8 Ves. 540. And the petitioning creditor under the separate commission will in such case be indemnified for his costs. 1 Rose, 432. 1 Ves. & B. 60. And in some circumstances a separate commission will be preferred, and a joint one superseded. See 1 Rose, 89. 17 Ves. 403., and Deacon, c. 5. § 4.‖

Ex parte Hamper, 17 Ves. 403. *Ex parte* Matthews, 18 Ves. 125. *Ex parte* Hodgkinson, 19 Ves. 294. Dubois v. Ludert, 5 Taunt. 609. S. C. 1 Marsh. 246. But it seems now settled,

‖As to what constitutes separate and joint debts from partners, see title "MERCHANT AND MERCHANDIZE (Partners)." In general, the rules respecting what amounts to a joint or to a separate debt are the same at common law and under the Chancellor's jurisdiction in bankruptcy. On the subject of dormant partners there have been, however, some difference between the decisions at law and those in bankruptcy. In bankruptcy it has been long the practice to hold, that where a creditor has no notice of the existence of a dormant partner it is at his option to consider himself either as a separate or joint creditor; but at law it has been held, that a partner sued alone may plead the nonjoinder of a dormant partner in abatement. (*a*)‖

that the non-joinder of a dormant partner cannot be pleaded. See 1 Stark. Ca. 340. 3 *Id.* 8. 1 Moo. & Malk. 88. (*a*) At law, notwithstanding the joinder of all partners, the plaintiff may have separate executions against the estate of each; but in bankruptcy, where the debt is joint, the creditor cannot come on the separate estate of each partner, unless in certain excepted cases. See *post*, in this head.

Co. Bankrupt Laws, 297.

Ex parte Sandon, 1 Atk. 68.

Ex parte Crowder, 2 Vern. 706. *Ex parte* Bond, 1 Atk. 98. *Ex parte* Rowlandson, 3 P. Wms. 405. Goss v. Du Fresnoy,

[Joint creditors are entitled to a distribution of the joint or partnership estate, without the separate creditors being permitted to participate with them; but notwithstanding separate creditors are not entitled to share the dividend of the joint property, until the joint creditors have received twenty shillings in the pound, yet they are, upon petition, let in to prove their respective separate debts under the joint commission, *paying contribution to the charge of it:* and as the joint or partnership estate is in the first place to be applied to pay the joint or partnership debts, so in like manner, the separate estate shall be in the first place applied to pay all the separate debts. This is settled as a rule of convenience; and it is resolved, that if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be allotted in due proportion to the separate estate of such

such partner, and applied to pay the separate creditors. And if there be on the other hand a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors.

Davies, 373. *Ex parte* Cook, 2 P. Wms. 501.

This mode of adjusting the rights of each class of creditors, where a joint commission is taken out, seems at one time to have been extended by the court into a rule, to direct the proof of debts under a separate commission, by virtue of which the separate estate only can be assigned; and therefore it was holden, that joint creditors could not prove under such a commission, except for the purpose of assenting to or dissenting from the bankrupt's certificate.

Ex parte Baudier, 1 Atk. 98. *Ex parte* Oldknow, *May* 8. 1783, Co. Bankrupt Laws, 299.

But it is now fully established, that joint creditors may be permitted to prove under separate commissions, and receive a dividend in proportion with the separate creditors.]

Ex parte Hodgson, 2 Bro. Ch. R. 5. *Ex parte* Page, *Id.* 119. *Ex parte* Flintam, 1 Bro. Ch. R. 120. *Ex parte* Hayden, 24th *June* 1785. *Ex parte* Copland, 24th *Dec.* 1787.

‖But subsequent to the cases in the text, Lord *Rosslyn* reverted to the old doctrine, which had been departed from by Lord *Thurlow* in those cases, and adopted the principle, that the joint creditors could not be permitted to receive a dividend along with the separate creditors.

Ex parte Elton, 3 Ves. 238. *Ex parte* Abell, 4 Ves. 837.

And Lord *Eldon*, unwilling to change a rule so repeatedly acted upon, has followed Lord *Rosslyn* in several subsequent decisions, allowing the joint creditors to prove under a separate commission for the purpose of assenting to or dissenting from the certificate, but not for the purpose of receiving a dividend (*a*); and a provision to this effect is now contained in § 62. of the new act.

Ex parte Clay, 6 Ves. 814. *Ex parte* Alcock, 11 Ves. 603. (*a*) See Mr. *Christian*'s observations on this rule and its inconveniences. 2 Christ. 36. He suggests that as each partner has to pay his private debts and his proportion of the joint debts, his separate estate and his share of the joint estate should be thrown together, and on that fund each joint creditor should prove his proper proportion of his debt, and each separate creditor his whole debt, and that on such proofs they should receive dividends equally. Certainly the present rule seems objectionable, since it is not, in fact, on the mere credit of partnership effects that partnership debts are contracted, but in a great degree on the solidity and credit of each individual partner: and bankers, brokers, factors, &c. contract large partnership liabilities with a very trifling amount of joint estate. and see Evans' Bankrupt Stat. 211.

There are, however, exceptions to this rule; first, in case of a joint creditor, who is petitioning creditor under a separate commission. As he is entitled to sue out a separate commission, and as the commission is in nature of an execution for the petitioning creditor's debt, it necessarily follows that he must take dividends with the other creditors; and this although part of his debt is as trustee for another joint creditor who could not himself receive dividends.

Ex parte Tait, 16 Ves. 193. See 6 G. 4. c. 16 § 62. *Ex parte* Crisp, 1 Atk. 133. *Ex parte* Hall, 9 Ves. 349. *Ex parte* Ackerman, 14 Ves. 604. *Ex parte* De Tastet, 1 Rose, 10. 17 Ves. 247.

A commission against *A.* as *surviving partner* of *B.* is a joint and not a separate commission; so that, under it, the petitioning creditor cannot come on the separate estate.

Ex parte Barned, 1 Glyn & J. 309.; and see 6 G. 4. c. 16. § 62.

A second exception to the rule against joint creditors receiving a dividend on the separate estate is, where there is no joint estate and no solvent partner. However small the joint estate is, the rule applies; as in one case where it only amounted to 1*l.* 11*s.* 6*d.*, unless indeed it is so situated as to be out of the reach of the joint creditors. A partner is considered a solvent partner, unless a commission of bankrupt has issued against him, whatever may be his circumstances. And though there is no joint estate, if there is a solvent partner the joint creditor cannot claim on the separate estate.

Ex parte Sadler, 15 Ves. 52. Cowell v. Sykes, 2 Russ. 191. *Ex parte* Machell, 2 Ves. & B. 216. *Ex parte* Peake, 2 Rose, 54. *Ex parte* Hill, 2 New R. 191. n. *Ex parte* Kensington, 14 Ves. 447.

Ex parte Janson, 3 Madd. 229. *Ex parte* Pinkerton, 6 Ves. 814. n.

A third exception is, where there are no separate debts, or where the joint creditors undertake to pay them.‖

Ex parte Chandler, 9 Ves. 35.; and see *Ex parte* Hubbard, 13 Ves. 424. *Ex parte* Taitt, 16 Ves. 193. *Ex parte* Jones, 18 Ves. 283.

[Where the assignees under a separate commission possess themselves of the joint property, it may frequently be to the interest of the joint creditors, that distinct accounts should be kept of the joint and separate estate, and each applied to the payment of the respective creditors; and an order to this purpose may, *with consent*, be obtained upon petition; but as the solvent debtor hath an interest in the distribution of the joint property, and the demands which may be made upon it, if he do not consent, relief cannot be had without a bill.

Hankey v. Garrat, 3 Bro. Ch. R. 457. *Ex parte* Lydiard, 19th *May* 1790. Lasabloniere v. Swinton, 18th *June* 1793. Co. Bankrupt Laws, 311, 312.

Where persons in trade have been connected in various partnerships, and a joint commission is taken out against them all, an order hath been made for keeping distinct accounts of the different partnerships, as well as the separate estates of each partner. But where there have been various partnerships, and a joint commission is taken out against one firm, in which some of the parties were not engaged, there can be only the common order for keeping the distinct accounts of the joint and separate estate.

Ex parte Marlin, 2 Bro. Ch. R. 15.

Ex parte Parker, 22d *Dec.* 1791. Co. Bankrupt Laws, 314.

Where there is a joint and several creditor, he must, according to the rule of the court now firmly established, make his election whether he will come in upon the joint or the separate estate, that is, which he will come in upon in *preference;* for whichever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. And in order to make his election (*a*), he must have a reasonable time to enquire into the state of the different funds; and it hath been determined, that he is entitled to defer his election until a dividend.]

Ex parte Blankenhagen, *June* 23. 1785. *Ex parte* Banks, 1 Atk. 106. *Ex parte* Bond and Hill, 1 Atk. 98. *Ex parte* Rowlandson, 3 P. Wms. 405. ‖*Ex parte* Turner, 1 Mont. & Mac. 255.‖

(*a*) *Ex parte* Clowes, 2 Bro. Ch. R. 595. ‖*Ex parte* Bavan, 10 Ves. 107. *Ex parte* Hay, 15 Ves. 4. *Ex parte* Mason, 1 Rose, 159.‖

‖In certain cases, however, the creditor is not driven to his election, but may make his proof on the joint and separate estate. Thus where the parties drawing and accepting or otherwise liable on bills or notes, appear on the bill and are in fact trading under distinct

Ex parte Laforest, Cook B. L. 276. *Ex parte* Benson, *Id.* 265 *Ex*

distinct firms or establishments, although they may be all jointly interested and in partnership, still the creditor is at liberty to prove against the estate of each firm, and this as it seems whether he has or has not notice of the joint connection at the time of taking the bill.

Ex parte Adam, 2 Rose, 36. 1 Ves. & B. 493. *Ex parte* Bonbonus, 8 Ves. 546.

Ex parte Walker, 1 Rose, 441.; and see 2 Christ. 308. 2 Glyn & Ja. 27. 246. 250.

But where the parties to the bill or note are not in fact distinct firms, but only parts of the same firm, (as one partner drawing a bill which is accepted by the firm,) in such case if the holder takes the bill with notice of the partnership he must make his election; but *quære*, if he takes it without such notice?

Ex parte Bigg, 2 Rose, 37. *Ex parte* Liddel, *Id.* 34. *Ex parte* Bank of England, 2 Rose, 82.

A creditor must in general make his election before a dividend is declared of the estate against which he proves.

Ex parte Bielby, 13 Ves. 70.

Where a creditor has done any act in the character in which he has proved, as signing a certificate or being a party to a petition, he will in general be considered to have made a conclusive election, so that his proof cannot be transferred.‖

Ex parte Knott, 1 Mott. Dig. 244. *Ex parte* Husband, 5 Madd. 418.; and see *Ex parte* Bolton, 2 Rose, 389.

[*A.* lent money upon bond to *B.* and *C.*; *B.* became bankrupt, and afterwards *A.* sued *C.* upon the bond, and took him in execution, but consented to his discharge. Upon application by *A.* to Lord *Harcourt*, to prove under *B.*'s commission, his lordship permitted him to come in as a creditor for a moiety; and said he would have admitted him for the whole, if, in fact, the whole had been lent to *B.*

Ex parte Smith, 1 P. Wms. 237.

If one trustee suffer a co-trustee to detain a sum of money belonging to the trust estate, they are both liable, and if they afterwards become bankrupt, the debt may be proved under both their commissions.

Keble v. Thompson, 3 Bro. Ch. R. 112.

Partners being joint-tenants in their stock and effects, both original and accruing, and therefore seised *per my et per tout*, upon an account being taken each is entitled to be allowed against the other any thing he has brought in as a partnership transaction, and to charge the other in account with what that other has not brought in, or has taken out more than he ought; and nothing is to be considered as his share, but his proportion of the residue upon balance of the account. Upon this principle, where one of three partners had embezzled and wasted the joint stock, and contracting private debts became a bankrupt; the court seemed to think, that out of the produce of the goods, the debts owing by the joint trade ought to be paid in the first place, and that out of the bankrupt's share, satisfaction must be made for what he had wasted or embezzled; and that the assignees could be in no better case than the bankrupt himself, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

West v. Skipp, 1 Ves. 242. Cowp. 471. 2 Ld. Raym. 871. 1 Salk. 392. 1 Show. 173. Dougl. 650. 2 Ch. Ca. 139. 12 Mod. 446. Richardson v. Goodwin, 2 Vern. 293. See too, Goss v. Dufresnoy, Davies, 371. Hankey v. Garrat, 3 Bro. Ch. R. 457.

An act of bankruptcy, if followed by a commission, is a dissolution of the partnership, by virtue of the relation in the statutes

Hague v. Rolleston, 4 Burr.

2176. Cowp. 471.

which avoids all the acts of the bankrupt from the day of the bankruptcy, and from the necessity of the thing; all his property being vested in the assignees, who cannot carry on a trade.

Fox v. Hanbury, Cowp. 448. ‖Smith v. Stokes, 1 East, 363. Smith v. Oriel, *Id.* 369. Ramsbotham v. Cator, 1 Stark. Ca. 228.‖

Upon a question, Whether assignees under a joint commission against two partners, taken out after the bankruptcy of both, could maintain an action of *trover* against a person in possession of goods under a sale, or consignment, *bonâ fide*, for a valuable consideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partner; the court held, the action could not be maintained, because the act of the partner, who, at the time of the consignment, had not committed any act of bankruptcy, bound both, and also because, supposing the consignment avoided by the act of bankruptcy of the other party, then it is an action of *trover* by one tenant in common against another, which cannot be.]

Harvey v. Crickett, 5 Maule & S. 336.

‖And the solvent partners having notice of the act of bankruptcy of the other partner at the time of the assignment of the property, makes no difference as to the validity of the assignment.

Meyer v. Tharpe, 5 Taunt. 74.; and see Ramsbottom v. Lewis, 1 Camp. 278.

But a partner having a mere interest in profits, without any interest in the *property*, cannot, after an act of bankruptcy of the owner, transfer the property as against the assignees of the owner.‖

Smith v. De Silva, Cowp. 469.

[One of three partners in a ship and cargo, the cost and outfit of which was 4,568*l.*, pays only 410*l.* in part of his third share, and gives his notes for the remainder; but, before they become due, is declared a bankrupt. The other partners cannot, by voluntarily discharging the notes, stand in his place for any share of the profits; but the assignees are entitled to a full third, both of the profits of the adventure, and the value of the ship.

Ex parte Hunter, 1 Atk. 227. Co. Bankrupt Laws, 602. *Ex parte* Batson, 1 Ves. jun. 267.

If a partner is a creditor upon the partnership-fund, he can have no satisfaction but out of the surplus which shall remain after the joint creditors are paid. And Lord *Hardwicke* said, that where there are joint and separate creditors, if one partner lends a sum of money to the partnership, the creditors of his separate estate have a right to this in the first place.

Ex parte Burrell, 22d *July* 1783. *Ex parte* Pine, 2d *Aug.* 1783. Co. Bankrupt Laws, 605. ‖*Ex parte* Reeve, 9 Ves. 588.‖

But the contrary has been determined in a case where there was a joint commission against two partners, and a separate one against one of them. The petitioners, assignees under the separate commission, petition to be admitted creditors under the joint commission, for a sum of money brought by their bankrupt into the partnership beyond his share, and as being therefore a creditor on the partnership for that sum; but were refused on the principle, that he cannot be a creditor on the partnership in competition with the joint creditors.

Ex parte Batson, 20th *Jan.* 1791. Co. Bankrupt Laws, 608. In the case of

So where one partner hath taken more than his share out of the partnership-fund, the joint creditors, as the rule seems to be now settled, cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied, unless it can be shewn that the partner acted

acted fraudulently, with a view to benefit his separate creditors at the expense of the joint creditors.

Fordyce, who had taken property from the partnership fund, and applied the same to his own use, without the knowledge of his partners, the assignees, on the behalf of the joint creditors, were allowed to prove against the separate estate. *Ex parte* Cust, 29th *March* 1774. Co. Bankrupt Laws, 609.; ‖and see 2 Ves. & B. 210. In order to admit the proof on the separate estate the property must be clearly taken without any authority, express or implied, from the other partner. *Ex parte* Yonge, 3 Ves. & B. 35. *Ex parte* Harris, 1 Rose, 457. *Ex parte* Smith, 6 Madd. 2. *Ex parte* Watkins, 1 Mont. & Mac. 57. In such case there is the same right of proof by solvent partners as by their assignees, in case all the partners are bankrupt. 3 Ves. & B. 35. Solvent partners paying the debts of the partnership may prove against a bankrupt co-partner as "sureties or persons liable" within 49 G. 3 c. 121. (now re-enacted by § 52. of 6 G. 4. c. 16.) 3 Ves. & B. 133. 2 Maule & S. 195. 2 Rose, 175. 17 Ves. 115.; and see 1 East, 20.‖

Where there were two partners, and one had taken out more money from the partnership-stock than his share amounted to, and therefore became a debtor for so much; Lord *Talbot* was of opinion, that the partnership creditor had a right to come upon the separate estate of the partner who was so indebted.] *Ex parte* Drake, cited in 1 Atk. 225. Craven v. Knight, 2 Ch. R. 226.

‖And so also in cases where there are distinct firms composed partly of the same members, and the business is distinct, and both become bankrupt, here the one firm may prove against the estate of the other, although some of the members of each firm are the same; provided, however, that the estate seeking to prove is not liable for the joint debts of the estate against which the proof is to be made. *In re* Shakeshaft, &c. 6 Ves. 123. 743.; and see 4 Ves. 414. *Ex parte* Ring, Co. B. L. 538.

Thus where *A.* and *B.* were in partnership, and *A.* carrying on a separate trade, furnished the partnership with goods, for which they incurred a debt to him, and *B.* became bankrupt; Lord *Eldon* held, that *A.* could not prove against the estate of *B.*, since he was himself liable jointly for the same debts. *Ex parte* Hesham, 1 Rose, 146.

But in the case of a firm of *A. B. C.* and *D.*, proving against a firm of *A. B. C.* and *E.*, the former firm are not liable for any joint debts with the latter. *Ex parte* Adams, 1 Rose, 306.; and see *Ex parte* Castell, 2 Glyn & Ja. 124.

In a late case it was decided by Lord *Eldon*, after an examination of the original records of all the decisions on this subject, that in order to entitle a minor firm consisting of members of a larger aggregate firm, carrying on a different business, to prove against such aggregate firm the debt must have arisen on articles of the trade furnished by the one firm to the other; and the debt here having merely arisen from advances of money procured by the one firm for the other, his Lordship considered it as a case of partners claiming to prove on the partnership estate, and disallowed the proof.‖ *Ex parte* Sillitoe, 1 Glyn & J. 374. As to partner's right to prove without receiving dividends, see 1 Mont. Dig. 245.

[If one partner is an executor or trustee, and, *with the knowledge of his copartner*, lends the trust-fund to the estate, it becomes a debt which may be proved against the joint estate: *Secùs*, if *without* the knowledge of the copartner.] *Ex parte* Apsey, 3 Bro. Ch. R. 165.

‖And where one of three trustees and a partner in a banking house forged the names of his co-trustees to a power of attorney, whereby his co-partners were enabled to sell out the trust stock, and the proceeds of the sale were paid into another banker's, *Ex parte* Bolland, 1 Mont. & Mac. 315.; and see *Id.* 255. 2 Glyn &

J. 118.; and see Stone v. Marsh, 1 Ry. & Moo. 364., and Hume v. Bolland, *Id.* 371.

to the account of the banking house, and the trustee who had forged the power afterwards drew out the fund, and he and his partners became bankrupt; it was held, that as the partner who drew out the money had no authority from his co-trustees to do so, he must be taken to have drawn out the money as partner in the banking house, and therefore it was a debt provable against the joint estate.‖

BARGAIN AND SALE.

2 Inst. 672. [See further, West Symb. part 1. lib. 2. § 393. Termes de la Ley, tit. Bargain and Sale. Cowel, tit. Bargain and Sale.

BARGAIN and sale is a contract in consideration of money or money's worth, passing an estate in lands, if of inheritance or freehold, by deed indented and enrolled. This manner of conveying lands is created and established by the 27 H. 8. c. 10., which executes all uses raised; and, as this hath introduced a more secret way of conveyancing than was known to the policy of the common law, therefore the enrolment of the deed of bargain and sale was made necessary by the 16th chapter of the statute; but the learning on this head depending on statutes, it is first proper to recite that,

27 H. 8. c. 10. Ld. Bacon's Use of the Law, Mo. 41. Touchst. 221. 2 Black. C. 338. So there is a bargain and sale, where a man makes a contract with another for the sale of goods or chattels, and at the same time makes the sale of them. Com. Dig. tit. Bargain and Sale (A). Touchst. 221. It is said that a *bargain* and *sale* is not so strong a conveyance as a livery; for, if I have a rent-charge out of the manor of *D.*, and afterwards purchase the manor; and afterwards, by deed indented and enrolled, I bargain and sell the manor, the rent-charge shall not pass. 1 Leon. 6. By *feoffment* or *fine*, all uses and possibilities are conveyed by reason of the forcible operation; but it is otherwise by *bargain* and *sale*. 1 Leon. 33. A bargain and sale doth not pass away or affect a *contingent* use in the bargainor; but a feoffment or fine would transfer it. Hardr. 416.]

By the 27 H. 8. c. 10., "Where any person or persons stands "or is, or stand or are seised of or in any honours, *&c.*, lands, "tenements, rents, services, *&c.*, to the use, confidence, or trust "of any other person or persons, or body politic, by reason of "any bargain, sale, feoffment, *&c.*; such person or persons, *&c.*, "that have any such use, shall be deemed and adjudged in "lawful seisin, estate, and possession thereof, to all intents and "purposes, of or in such like estates as they have in the use, "*&c.*; and the estate, right, and possession of him and them so "seised to any use, *&c.*, shall be deemed and adjudged in him "or them which have the use, *&c.*, after such quality, manner, *&c.* "as they had before in or to the use," *&c.*

27 H. 8. c. 16. [Deeds were enrolled at common law for their preservation, though not to pass any estate. Sty. 370. The

By the 27 H. 8. c. 16., "No manors, lands, tenements, or "other hereditaments shall pass from one to another, whereby "any estate of inheritance of freehold shall be made or take "effect, or any use thereof to be made, by reason only of any "bargain and sale, except by writing indented, sealed, and "enrolled in one of the courts at *Westminster*, or else within "the county or counties where the lands, *&c.* so bargained "and

" and sold lie, before the *custos rotulorum*, and two justices " of peace, and the clerk of the peace of, *&c.*, or two of them, " whereof the clerk of the peace to be one; the same enrol- " ment to be made within six months after the date of the " same writing indented. Provided this act extends not to " any lands, *&c.* lying within any city, borough, *&c.*, wherein " the mayors, *&c.* or other officers have used to enrol any " evidences, deeds, or other writings within their precinct or " limits."

estate passeth not by the statute of enrolment, but by the statute of uses. Dimmock's case, Hob. 136. The objects of the statute of enrolment evi-

dently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently, the presence of a witness; and, lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrolment for the more ancient one of livery. But the latter part of this provision, which, if it had not been evaded, would have introduced an almost universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences, however, from this insufficiency of the statute are now, in some measure, prevented by the 29 Car. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. Hargr. Co. Lit. 48. a. n. 3.]

By the 5 Eliz. c. 26., " Bargains and sales of lands, *&c.* in " the county of *Lancaster*, being within six months enrolled in " the Chancery at *Lancaster*, or before the judges of assize there, " of lands, *&c.* in *Cheshire*, in the Exchequer at *Chester*, or be- " fore the judges of assize there, of lands, *&c.* in the bishoprick " of *Durham*, in the Chancery at *Durham*, or before the justices " of assize there, shall be as effectual as if enrolled in any courts " at *Westminster*. Provided this act extends not to any lands " lying within any city, *&c.* wherein the mayors, *&c.*" 5 Eliz. c. 26.

[By 5 Ann. c. 18., Bargains and sales of any manors, lands, *&c.* within the *West Riding* of the county of *York*, which shall be enrolled before the registrar for the said *West Riding*, or his deputy for the time being, in the public office at *Wakefield*, shall be as good and available as if the same had been enrolled in one of the king's courts of record at *Westminster*, or before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the said *West Riding*, or two of them, according to the statute of the 27th H. 8. — By 6 Ann. c. 35. § 16., the like provision is made for enrolling bargains and sales in *Beverley* of lands within the *East Riding* of the county of *York*, or the town and county of the town of *Kingston-upon-Hull*; and by § 30. of that statute it is enacted, " that in all deeds of bargains and sales " enrolled in pursuance of that act, whereby *any estate of inherit-* " *ance in fee-simple* is limited to the bargainee and his heirs, the " words *grant*, *bargain*, and *sell*, shall amount to and be construed " and adjudged, in all courts of judicature, to be express cove- " nants to the bargainee, his heirs and assigns, from the bar- " gainor, for himself, his heirs, executors, and administrators, " that the bargainor, notwithstanding any act done by him, was " at the time of the execution of such deed seised of the heredi- 5 Ann. c. 18.

taments

" taments and premises thereby granted, bargained, and sold, of " an indefeasible estate in fee-simple, free from all incumbrances " (rents and services due to the lord of the fee only excepted), " and for quiet enjoyment thereof against the bargainor, his " heirs and assigns, and all claiming under him, and also for " further assurance thereof to be made by the bargainor, his " heirs and assigns, and all claiming under him; unless the " same shall be restrained and limited by express particular " words contained in such deed; and that the bargainee, his " heirs, executors, administrators, and assigns respectively, shall " and may, in any action to be brought, assign a breach or " breaches thereupon, as they might do in case such covenants " were expressly inserted in such bargain and sale." — By 8 G. 2. c. 6. § 21., the enrolment of bargains and sales of lands in the *North Riding* of the county of *York* is authorized in the register-office for that Riding.

33 G. 2. c. 30. § 10. By the 33 G. 2. c. 30. § 10., being an act for widening certain streets, *&c.* in *London*, it is enacted, that all bargains and sales made and acknowledged by any person or persons whomsoever, *which shall be enrolled in the hustings of the said city*, of any lands, tenements, and hereditaments, purchased by virtue of and for the purposes of that act, shall have the force, effect, and operation in law, to all intents and purposes, which any fine or fines, recovery or recoveries whatsoever, would have if levied or suffered by the bargainor or bargainors, or any person or persons seised of any estate in the premises, in trust for, or to the use of, such bargainor or bargainors, in any legal manner or form whatsoever.]

We shall now consider,

(A) Who may bargain and sell, and to whom.

(B) What may be bargained and sold [and how a Bargain and Sale shall be taken].

(C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made use of.

(D) Of the Consideration.

(E) Of the Enrolment: And herein,

1. *The Relation between the Enrolment and the Deed.*
2. *What Estates are to be enrolled; and herein of the Exception as to Lands in Cities, Boroughs,* &c.
3. *The Time of Enrolment.*

(F) The Manner of pleading Bargains and Sales.

(A) Who

(A) Who may bargain and sell, and to whom.

THE king, and all other persons that cannot be seised to a use, cannot bargain and sell (*a*); for at common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed and becomes a bargain and sale by the statute; but antecedent to any such execution there must be a use well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king, who is the universal judge of property, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee.

Bro. Feoffment to Uses, 37. Hard. 468. Popb. 72.

‖(*a*) *Cont.* Holland v. Boins, 2 Leo. 121. 3 Leo. 175., in which case the court rejected an exception made against a bargain and sale, on the ground that a bargain and sale by a corporation is not good. *Vide* Com. Dig. tit. Bargain and Sale (B), 3. The distinction was taken, that though a corporation could not take an estate to another's use, yet they might charge their possessions with a use to another; but this is very questionable. 1 Rep. 127. a. and Cru. Dig. vol. iv. 109. Preston on Conv. vol. ii. 255. A bargain and sale by a *sole* corporation will be good during the office of the person by whom the bargain and sale is made. Bac. on Uses, 57.‖

If tenant in tail bargains and sells his land in fee, this passeth an estate determinable upon the life of tenant in tail (*b*); for, at common law, the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore when he sells the use in fee, *cestui que use* hath a kind of inheritance yet determining within the compass of a life; and the statute executes it in the same manner as he hath the use, and consequently he will have some properties of a tenant in fee, and some of a tenant for life only: but if tenant for life bargains and sells in fee, this passeth only an estate for life (*c*), for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party hath the use.

10 Co. 96. 98. Sand. 260, 26 r. Co. Lit. 359 b.

‖(*b*) A base fee passes, and the estate continues till avoided by the issue in tail by entry. Machell v. Clarke, 2 Ld. Raym. 778. The bargainee's wife is entitled to dower, determinable in like manner by issue in tail by entry. He is dispunishable for waste. The estate is not devisable according to the stat. 32 H. 8. c. 1. and 34 & 35 H. 8. c. 5. Carter, 208.‖

(*c*) And creates no forfeiture, 4 Leon. 194.

If a husband, seised of lands in right of his wife, or tenant in tail, bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away.

‖Bulstr. 5. in Billingsby and Hersey's case.‖

If a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release. (*d*)

Kelw. 84. Co. Lit. 265. But if the son makes a feoffment of the inheritance of his father, this passeth an estate during the son's life; for it is a *disseisin* to the father; and the son, after the father's death, cannot avoid it; for no man can allege an injury in any voluntary act of his own. Co. Lit. 265 a. (*d*) But if the son releaseth with warranty, he and heirs are for ever hereafter barred by the rebutter. Co. Lit. 265 a.

If there be two joint-tenants, and one of them make a bargain and sale of his own estate in fee, and the other die before enrolment, the other moiety shall survive to the bargainor; for since the freehold is in the bargainor, the inheritance continues; but if

Cro. Jac. 53. Co. Lit. 186. Bulstr. 3.

[(*a*) This distinction is not

warranted by the authorities referred to, nor is it to be found in any

if such joint-tenant had bargained and sold *totum statum suum* in fee (*a*), though he died before enrolment, yet if the deed were afterwards enrolled, the moiety would not survive, but would pass to the bargainee.

case-book wherein this case is reported. Bro. tit. Faits enroll. p. 11. Cro. Car. 217. 569. Bac. Max. Reg. 14. Brook, in his Abridgment, useth the general words, "all his lands and tenements in *D.*;" and saith, that they will not pass the entirety, because the enrolment hath relation to the delivery of the deed; and, of course, can pass no more than the bargainor had at the time of the delivery. The bargain and sale, it hath been said, occasions, of itself, *before* enrolment, a severance of the joint-tenancy. Owen, 70. *arguendo.*]

Cro. Eliz. 402. cited as adjudged in 10 Eliz. Bac. Max. Reg. 14.

[If a mortgagor entreats a stranger to redeem the land at the day, and covenants by indenture, that after such redemption the stranger shall have the land to him and his heirs; and that he, in consideration of such a sum, will stand seised to the use of him and his heirs; the stranger redeems the land at the day the mortgagor enters, and the deed is enrolled within six months; yet nothing passeth, because he had not any estate or interest therein at the time to contract for it.]

2 Inst. 673.

If an infant bargains and sells his land by deed indented and enrolled, he may plead nonage at any time; for, notwithstanding the statute, the bargainee claims by the deed as at common law, which was, and therefore is still, defeasible by nonage.

2 Inst. 673. 10 Co. 43. [But a fine, and recovery upon it will bind the wife. Mo. 22. By custom, the

If a wife joins with her husband in a bargain and sale by deed indented and enrolled of her lands, yet it shall not bind her; for the wife cannot be examined by any court without writ, and there is no writ allowed in this case, which is for the better security of wives, who are by our law entirely subjected to the will of the husband.

deed itself will bind her. Bro. Abr. tit. Faitsenroll. pl. 10.]

10 Co. 24. 34. 2 Roll. Abr. 788.

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity.

7 Co. 40. 2 Co. 24. Cro. Eliz. 394. Vent. 137. Lev. 56.

A man may bargain and sell to his son, but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of a bargain and sale: but this shall operate as a covenant to stand seised, if there be none but the consideration of natural love and affection expressed.

(B) What may be bargained and sold [and how a Bargain and Sale shall be taken].

2 Co. 54. Dyer, 309. 2 Inst. 671. ‖(*b*) Vested remainders

ANY freehold or inheritance in possession, reversion, or remainder (*b*), upon an estate for years, for life, or in tail, may be bargained and sold, but the deed shall be enrolled.

and reversions in fee may be transferred by bargain and sale. Vaughan, 51. Remainders in tail can only be conveyed by fine. 3 Co. 84. a. Contingent remainders can only be conveyed by fine by way of estoppel, and perhaps by a common recovery. Weale v. Lower, Pollex. 54.‖

2 Inst. 671. 2 Roll. R. 204. *cont.* 2 Inst. 671.

But a man seised of a freehold may bargain and sell it for years, and this shall be executed by the statute of uses; but it need not be enrolled by the statute of enrolments.

A man

A man possessed of a term cannot bargain and sell it so as to be executed by the statute. 2 Co. 35, 36. Poph. 76. Sir T. Jones, 217.

A rent *in esse* may be bargained and sold, because this is a freehold within the statute; and before the statute a rent newly created might have been bargained and sold, because when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them: but it seems, that since the statute, a rent newly created cannot be bargained and sold (*a*), because there ought to be a freehold in some other person, to be executed in *cestui que use*; but here can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. 1 Co. 126. Andr. 327. Jones, 179. [Upon a bargain and sale according to the statute, a rent may be reserved. 2 Co. 54.]

‖(*a*) But though a bargain and sale cannot be made to one person, to the use of another, a bargain and sale may be made to one person, to the intent that a recovery shall be suffered to the use of another; for, in that case, the uses do not arise from the seisin of the bargainee, but from the seisin of the demandant in the recovery. And in bargains and sales from commissioners of bankrupt, and under similar common law authorities, uses may be declared upon the seisin of the bargainee, for they pass a seisin at common law, and enrolment and other formalities are only necessary when prescribed by the authority.‖

If *A.*, by indenture enrolled, bargains and sells lands to *B.* and his heirs, with a way over other of the lands of *A.*, this is void as to the way; for nothing but an use passes by the deed, and there can be no use of a thing not *in esse*, as a way, common, *&c.*, before they are created. Cro. Jac. 189. Beaudly v. Brook.

[Before the statute of H. 8., if a man had bargained his land for money generally, without the words "his heirs," the Chancellor would oblige him, according to conscience and the intent of the parties according to the value, to execute an estate in fee, for uses were then things merely in trust and confidence; but since the statute they are transferred and made into an estate in the land; and therefore without the word "heirs" the bargainee hath only an estate for life. 1 Co. 87 b. 100 b. Co. Lit. 10 a. Bro. tit. Contract, Bargaine, et Achate, pl. 1.

If one, in consideration of 10*l.*, bargain and sell his land to *A.* and his heirs, to have and to hold to *A.* to the use of the bargainor for life, the remainder in tail to *A.*, the remainder to the right heirs of the bargainor; the *habendum* in this case is void, and *A.* and his heirs shall have the land for ever.] Tyrrel's case, Dy. 155. 1 Andr. 37. S. C. 1 Co. 136 b. Co. Lit. 271 b.

Though a use could not rise as a use upon a use, whether equity would not support it as a trust? Ash v. Gallen, 1 Ch. Ca. 114.

‖But where Sir *C. H.*, tenant in tail in possession of certain hereditaments subject to an outstanding term, by indenture, in order to bar the estate tail and all remainders expectant thereupon, and to limit the same to himself in fee, and in consideration of 10*s.*, granted, bargained, and sold the said hereditaments and the reversion thereof to *A.* and *B.*, their heirs and assigns, to hold to them *A.* and *B.* to the use of *A.*, that he might become tenant of the freehold of the said premises, in order to suffer a recovery; and the deed was afterwards duly enrolled as a bargain and sale: it was held, that it operated as a grant of the reversion to *A.* and *B.*, and that *A.* became solely seised of the Haggerston v. Hanbury, 5 Barn. & C. 101.; and see Shep. Touch. 83. (Preston's edit.)

the premises so as to be a good tenant of the freehold of the entirety.‖

(C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made use of.

2 Inst. 675. Dyer, 229. Poph. 48. Dalt. 63. And therefore lands in cities, boroughs, ‖or towns corporate, not being within the act, might, since the passing of it,‖ till the 29 Car. 2. c. 3. have been bargained and sold by word only. 2 Inst. 676. Yelv. 124. See *post*.

AT common law lands might be bargained and sold by words only, for it was the consideration that in equity raised the use, but, since the statute of 27 H. 3. c. 16. lands cannot pass without indenture.

2 Inst. 672. Cro. Jac. 210. Mo. 34. Cro. Eliz. 166.

It is not necessary to use the words bargain and sale, but any words equivalent are sufficient, and whatever words upon valuable consideration would have raised an use of any lands, *&c.* at common law, the same amount to a bargain and sale within this act; as if a man by deed, *&c.* for a valuable consideration covenants to stand seised to the use of another, *&c.*

2 Inst. 673.

Though the deed may be either in parchment or paper, yet the enrolment must be in parchment only, for that is implied when an enrolment is to be in any of the courts of record at *Westminster;* and in the clause of enrolment by the clerk of the peace, it is particularly provided, that he shall sufficiently enrol and engross it in parchment.

2 Co. 35. Hayward's case.

A man demises, bargains, and sells a manor, part in demesne, and part in tenants' hands, for seventeen years, the party may choose either to take it by way of lease at common law, and then the tenants must attorn; or by way of bargain and sale without attornment; and this agrees with the policy of the common law, to take every man's grant, so as to pass such an interest as shall be most advantageous for the grantee; and since, in this case, the words allow a double way of taking it, the grantee shall be judge which is most beneficial.

2 Roll. Abr. 787. pl. 5. 3 Lev. 16.

‖Also if a man grants, bargains, sells, enfeoffs and confirms, with letter of attorney in the same deed to make livery, the party hath his election to take either at common law, or by way of use, and that way which first executes the estate shall stand.‖

Lord Ewre v. Strickland, Cro. J. 240.

[A bargain and sale made to one with the addition of knight, who is not so, is good.]

(D) Of the Consideration.

1 Co. 176. Mo. 569. 1 Leon. 170. *Vide infrà*, and Plowd. 533.

IF a man bargains and sells lands for divers good causes and considerations, it is void, unless money be averred; for selling *ex vi termini* supposes a transferring a right of something for money, the common medium of commerce; but if there be no such consideration it may be an exchange, a covenant to stand seised, grant, *&c.*, but it can be no sale within the statute.

Mo. 570. Dy. 90 a. Touchst. 222. [(a) But

If there be a consideration of money expressed in the deed, no averment nor evidence can be admitted against it, for the affirmative

affirmative is proved by the deed (*a*), and it is impossible to prove the negative. see Thurle v. Madison, Sty. 462.]

‖A reservation of a peppercorn rent is a sufficient consideration to raise a use for a term of years, but not for a freehold estate.‖ Barker v. Keate, 1 Mod. 263. 2 Mod. 249. Anon. 1 Freem. 249. 2 Vent. 55.

If the deed says for a competent sum of money, it is sufficient, without averring the sum, for it is a sale if there be any money. Moor, 570.

A man in consideration of 70*l.* bargains and sells to his daughter and *J. S.* in tail, who intermarry; it may be averred *tam in consideratione maritagii, quam in consid. de* 70*l.* for a man may aver any consideration consistent with that in the deed. 1 Leon. 170. 1 Co. 176. 2 Co. 76. a.

If a man in consideration that *J. S.* was bound in a recognizance, and other bonds for him, and for divers other good causes and considerations, bargains and sells his land to him and his heirs, it is not good. Cro. Eliz. 394.

If a man in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day the party hath an action for the money, for it is a sale by the money paid presently or hereafter. Dyer, 337 a.

[*A.* by deed indented and enrolled, in consideration of 100*l.* paid by *B.*, bargains and sells land to *B.*, *C.* and *D.*, parties to the indenture; in this case the land passeth to all; for although the valuable consideration be expressed to be paid only by one, yet it must be intended that it was paid by all, that the land may pass to all according to the meaning of the parties; and consideration given by one, is sufficient to convey the land to all.] 2 Inst. 672.

‖If a man bargain and sell his land in consideration of 100*l.* paid by *J. S.*, though in this case the consideration ariseth from a stranger, yet that will pass the use to the bargainee.‖ Buckley v. Simon, Winch, 61.

(E) Of the Enrolment: And herein,

1. *The Relation between the Enrolment and the Deed.*

AT common law the use passed from the delivery or date of the deed, and by the statute 27 H. 8. c. 10. the possession passed as the party had the use at the time of the delivery of the deed; but it was thought proper to add some further circumstances, which is done by *cap.* 16. and therefore, if these circumstances are observed, it hath the same effect it had before at common law, to wit, to raise the uses from the delivery; for the words of the statute are only to add some things, and not to abolish or set aside the force it had formerly. Dyer, 218. Hob. 136. 2 Inst. 674. Cro. Jac. 408. Roll. Abr. 627. Owen, 149, 150.

If *A.* bargains and sells lands to *B.* and his heirs, and before enrolment *B.*, reciting this bargain and sale to be by indenture enrolled, bargains and sells to *C.* and his heirs all the estate which Cro. Jac. 52. Bellingham v. Alsop, 2 Inst. 675. Vent. 360.

‖(a) Cited as adjudged *cont* in Dymock's case. Ow. 149. Cro. Jac. 409. Hob. 136.; but it is clear from Coke's report of the same case, 2 Inst. 675. that the bargainee may convey before enrolment.‖

which he had by the said indenture enrolled, and after the first, and then the second deed is enrolled; by *Daniel* and *Kingsmill*, the lands are well conveyed to *C.*, for when the first indenture was enrolled, the estate was in *B. ab initio* to bargain, sell, *&c.* and the words in the second deed are apt enough to pass the land, and the recital of the enrolment immaterial; but *Anderson* and *Warburton cont.*; for a man cannot pass what he hath not, and till the deed was enrolled *B.* had nothing; and he passed only what he had by indenture enrolled; but *Walmsley* held, the land passed not by reason of the misrecital, but that otherwise it would have passed; and it was adjudged for the defendant, according to the opinion of the three last judges. (*a*)

Wood's Inst. 259. Mo. 41. Cro. Jac. 409. Bro. Faits Enrol. 328 a. pl. 9.

[If two bargains and sales are made of the same lands to two several persons, and the last deed is first enrolled, and afterwards the first deed is also enrolled within six months, the first buyer shall have the land; for when the deed is enrolled, the bargainee is seised of the land from the delivery of the deed, and the enrolment shall relate to it.]

Thomas v. Popham, Dyer, 218.

‖And the same is the case, if after the first bargain and sale to the one, a bargain and sale be made and fine levied to another.‖

Hob. 165. Owen, 70.

[But if the first deed is not enrolled, and the last is enrolled within the time, then the last is good.

1 Roll. R. said to be so adjudged, Mo. 10. Eliz. in Mocket's case. (*b*) 1 Ro. R. *Id.*

If a disseisor bargain and sell land, and the disseisee release to the bargainee before enrolment, it is void. But a release (*b*) to the disseisor before enrolment had been good; and then the enrolment should pass the estate to the bargainee, and he should take advantage of the release.]

Bulstr. 8, 9.

If a man bargain and sell his manor, to which there is an advowson appendant, the bargainee can make no title to present before enrolment.

Cro. Jac. 53. Lit. 186. Bulstr. 3. Bro. tit. Fait's enrol. p. 11. Cro. Car. 217. 569. Bac. Max. Reg. 14.

If there be two joint tenants, and one of them make a bargain and sale of his own estate in fee, and the other die before enrolment, the other moiety shall survive to the bargainor. ‖And though the words of the bargain and sale comprised the whole estate, only a moiety would pass;‖ but if such joint tenant had bargained and sold *totum statum suum* in fee, though he died before enrolment, yet if the deed were afterwards enrolled, the [his] moiety would not survive, but would pass to the bargainee.

4 Co. Hind's case. Mo. 681. 2 Andr. 3. 162. 203. 4 Leon. 4. Poph. 49. Hob. 222.

If a man bargains and sells his land, and then suffers a recovery, levies a fine, or makes a feoffment to the bargainee, and then the deed is enrolled, the land passeth by the recovery, fine, or feoffment; for since the freehold and the use is in the bargainor till enrolment, it must pass by the recovery, *&c.*; and when it hath passed by the recovery, the use cannot rise, nor possession be executed from the date of the deed.

2 Inst. 674. Hob. 136. Andr. 229. 337.

If the bargainor or bargainee die before enrolment, it may, notwithstanding, be enrolled, for here are parties to give and take the interest when it begins to vest; for it vests from the date of the deed; otherwise, in the case of an attornment.

‖And

‖And the heir will take and be in by descent, and shall be in ward.‖ Dymock's case Cro. Jac. 409. Owen, 149. Hob. 136.

If a man bargains and sells his land, the bargainee may be tenant to the *præcipe* before enrolment, and may receive a release before enrolment. Vent. 361. 2 Burr. 1131.

But where the commissioners of a bankrupt had assigned the bankrupt's lands to the lessor of the plaintiff, and the indenture was afterwards enrolled, but the declaration was upon a demise made after the indenture, and before the enrolment; it was adjudged, that this declaration was not sufficient. 1 Vent. 360. 2 Show. R. 156. S. C. 2 Jones, 196. S. C. Carth. 178. S. P. adjudged on the authority of this case. Show. 207. S. C. where it is said, that *Holt* C. J. held, that it was not amendable.

If a man bargains and sells a reversion, and the rent is incurred, and afterwards the deed is enrolled, the bargainee shall have the rent unpaid; but if the rent be paid to the bargainor, the tenant is not only excused, but the bargainor is not accountable; because the contract had not any effect to pass the estate from the bargainor before enrolment; and the relation of a law cannot make void an act that was lawful; for it cannot be set aside but by an express and positive law. Owen, 150. Godb. 209. Sid. 310.

If a man makes a lease for life, reserving rent, with clause of re-entry, and then bargains and sells the reversion, the bargainee demands the rent, and the lessee refuses, and then the deed is enrolled, the bargainee cannot enter for the forfeiture; for, till enrolment, he is not grantee of the reversion within the statute capable of the duty; and consequently, at the day, could make no legal demand, which was precedently necessary to this entry. Owen, 69. 150. Godb. 156. Latch. 157. Sid. 310. Cro. Car. 217.

If a man, seised in fee, is bound in a recognizance, and then bargains and sells all his lands, and then the recognizance is forfeited, and then a *scire facias* is sued out against the land in the hands of the bargainor, and then the deed is enrolled, this *scire facias* is not maintainable. 2 Andr. 160. Owen, 69, 70. 2 Inst. 674. Cro. Car. 217.

‖A bargainee may maintain an assise before enrolment. 2 Andr. 161.

If tenant for life be impleaded after a bargain and sale of the reversion, and then the deed is enrolled, the bargainee shall be received; though no man shall be received by the statute of *Westm.* 2. that purchases the reversion *pendente lite.* Owen, 70.

If, before enrolment, a bargainee grants rent out of the land, and afterwards the bargain and sale is enrolled, the grant is good.‖ 2 Inst. 675. Gawen v. Stacy, Cro. Car. 217.

If, before enrolment, the bargainor and bargainee grant a rent, *&c.* after enrolment, by operation of the statute, it shall be the grant of the bargainee, and confirmation of the bargainor. Co. Lit. 147 b.

‖But if the deed be not enrolled, it shall be the grant of the latter, and confirmation of the former.‖

If lands are bargained and sold, and the bargainee dies before enrolment, his wife shall not be endowed; so if a man bargains and sells lands by indenture, and then takes a wife and dies, and after, the deed is enrolled, the wife shall not be endowed. Andr. 161. Cro. Car. 569. But if lands are bargained and sold, and a stranger enters, and then the deed is enrolled, the bargainee dies, his wife shall be endowed; but for this *vide* tit. *Dower.*

Northcott v. Underhill, 1 Ld. Raym. 388. 1 Salk. 199.

[A covenant in a bargain and sale not enrolled, is binding.]

2. What Estates are to be enrolled; and herein of the Exception as to Lands in Cities, Boroughs, &c.

2 Inst. 671.

All estates of freehold and inheritance must be enrolled; but if a man bargains and sells his lands for any number of years, the deed need not be enrolled.

7 Co. Bedel's case.

If a man bargain and sell land to his son in consideration of money, the deed must be enrolled; but if the father, in consideration of natural love and affection, and also for money, grant land to his son, this need not be enrolled; for covenants to stand seised are not within the words of the statute, and where the consideration of blood is expressed, it may enure as a covenant to stand seised; but it is only a sale when the consideration of money is alone expressed, for that excludes all other tacit considerations.

2 Inst. 676. Dyer, 229. Dalis. 63. Yelv. 124. See *ante* (C).

Lands in cities, boroughs, *&c.* that have the privilege of enrolments, are not within the act; for though the intent of the statute be, to have excepted them from enrolments in the courts of *Westminster* only, yet the statute is so worded, that they are discharged from any enrolment at all; and therefore the possession of such lands is executed from the date of the deed.

3. The Time of Enrolment.

2 Inst. 674. 6 Co. 62.

It must be enrolled within six months from the date, which shall be accounted according to the computation of twenty-eight days *per* month; for month, in its proper and original signification, is the space of time measured by the complete course of the moon; as the year is the time measured by the complement of the sun's course.

Hob. 410. Mo. 40. 42. 2 Inst. 674. 6 Co. 1 b. Dyer, 218 b. 4 Leon. 4. pl. 18. 3 Lev. 438. 2 Salk. 413. pl. 1. Cowp. 718 Dougl. 463. 3 Term R. 623.

From the date, and from the day of the date, in this case, is taken as all one, as it is in all other cases of computation, and therefore the enrolment may be on the day of the date, or on the last day of the sixth month after the day of the date; for though when an interest passeth from the day of the date, the day itself is excluded, yet when a time is stinted, in which an act ought to be done, it is in order to hasten the doing of that act; and therefore, the doing of it on the day from whence the period is first reckoned, is within the time appointed; and the last day of the sixth month is within the words of the time given.

Hob. 140. 2 Inst. 674. Mo. 42.

If the deed has no date, the six months are to be reckoned from the delivery, but not otherwise.

(F) The Manner of pleading Bargains and Sales.

Co. Lit. 225 b. 251 b. 2 Inst. 673. 4 Co. 71.

A BARGAIN and sale is a deed enrolled, and as such must be pleaded; and the deed itself, whereby the use originally passeth, being a matter *in pais*, must be produced and not the tenor

tenor of the deed, which is on the roll of *record:* for though the enrolment being on record is of undoubted veracity, being the transaction of the court, yet the private deed has not the sanction of a record, though publicly acknowledged and enrolled; for it might have been falsely and fraudulently dated or ill executed. 5 Co. 55. 2 Roll. R. 119.

The party that claims by any bargain and sale must shew in what court the deed is enrolled, because he must shew all things in certain that make out his title; otherwise his adversary would be put to an infinite search before he could traverse with security. Yelv. 213. Worly and Purly. Cro. Jac. 291. S. C.

In debt for rent the plaintiff declared upon a lease made by a stranger, who after bargained and sold the reversion to the plaintiff *per indenturam debito modo irrotulat. in curiâ Cancellariæ;* and after verdict for the plaintiff, judgment was arrested, because it was not alleged that the enrolment was within six months, nor *secundum formam statuti;* and *debito modo* will not help it, for it might be so at common law. Allen, 19. King and Somerland, Carter, 221. Stile, 34. S. C. and judgment arrested accordingly; for *debito modo* may be an enrolment at common law.

If a man makes a lease for years the 10th of *May*, and afterwards bargains and sells his lands, and antedates the deed by making it the 10th of *April*, and the enrolment is also as of that time, the lessee is without remedy, for he cannot aver against the record. For this *vide* Owen, 138. Leon. 185. 2 Leon. 121. 3 Leon. 175, 176. Savil, 91.

cont., and head of *Pleas and Pleadings.*

In pleading a bargain and sale the party ought regularly to aver payment of the money. Leon. 170. *Vide* Moor, 404. But the want thereof is helped after verdict, upon *non concessit;* for it must be intended proved at the trial. Lev. 308. 2 Stra. 1269. Ld. Raym. 111. Vent. 108. T. Raym. 200. [By 10 Ann. c. 18. § 3., if a bargain and sale enrolled be pleaded with a *profert*, a copy examined, and proved on oath, signed by the proper officer, having custody of such enrolment, shall be of the same effect as the original. — The endorsement on the deed, by the proper officer, is always received as sufficient evidence of the enrolment. Dougl. 56. If divers persons seal a deed, and but one of them acknowledge it, and it be thereupon enrolled, this is a good enrolment within the statute, and it may be given in evidence, as a deed enrolled. Thurle v. Madison, Sty. 462.]

BARON AND FEME.

(A) Who are esteemed Husband and Wife; and herein of the Legality of the Marriage, and Marriage Contracts.

(B) Of the Power given the Husband by Law over the Person of his Wife; and herein of her Remedy for any Injury done by him.

(C) Of his Interest in her Estate and Property: And herein,

1. *Of the Real Estate in her Right.*
2. *Of her Chattels Real, or Leasehold Interests.*
3. *Of her Personal Estate in Possession, and* Choses in Action.

(D) Of the Husband's Right to Things accruing to the Wife during Coverture.

(E) Of the Wife's Acts and Agreements before Marriage, in what Cases revoked and made void by the Marriage.

(F) Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Administratrix.

(G) Where she alone shall be punished for a Criminal Offence; and where the Husband shall be answerable for what she does in a Civil Action.

(H) Of her Contracts for Necessaries; and how far the Husband is bound by such Contracts.

(I) What Acts done by the Husband or Wife, alone or jointly with the Wife, will bind the Wife; and herein of her Agreement or Disagreement to such Acts after the Death of the Husband.

(K) Where the Husband and Wife must join in bringing Actions.

(L) Where they must be jointly sued.

(M) Where a Wife shall be considered as a Feme Sole; [and herein of her separate Estate.]

What right accrues to the representatives of either of them, on the dissolution of the marriage, *vide* head of "EXECUTORS AND ADMINISTRATORS."

(A) Who are esteemed Husband and Wife; and herein of the Legality of the Marriage, and Marriage Contracts.

For the learning on this division of the subject, see tit. "MARRIAGE and DIVORCE," Vol. V.

(B) Of

(B) Of the Power given the Husband by Law, over the Person of his Wife; and herein of her Remedy for any Injury done her by him.

THE husband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her (*a*), but not in a violent or cruel manner; for, in such case, or if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace by suing a writ of *supplicavit* out of Chancery (*b*); or may apply to the Spiritual Court for a divorce *propter sævitiam*.

(*a*) Crom. 28. 136. F. N. B. 80. F. 238. E. Hetl. 149. *cont.* Sid. 113. 116. 1 Black. Com. 444. (*b*) Dalt. c. 68 Lamb. 78. Crom. 133. 1 Hawk. P. C.

[Or by application to the Court of K. B. or a justice of the peace. Fost. 359. 253. Ca. temp. Hardw. 74. 2 Stra. 1202. 1 Burr. 621. 703. 11 Mod. 109. And the husband may demand surety of the peace against the wife. 2 Stra. 1207.]

But a wife cannot, either by herself or her *prochein amy*, bring a *homine replegiando* against her husband; for he hath by law a right to the custody of her, and may, if he think fit, confine her, but he must not imprison her; if he do, it will be a good cause for her to apply to the Spiritual Court for a divorce *propter sævitiam*; and the nature and proceedings in the writ *de homine replegiando*, shew that it cannot be maintained by the wife against her husband.

Preced. in Chan. 492. *per curiam.*

A wife separated by articles, in consideration of money received by the husband, with covenants from him, cannot be seized by him, or forced to live with him. (*c*)

Burr. Rep. 542. 1 Stra. 478. (*c*) In cases of unreasonable or improper confinement, the courts will relieve the wife, on *habeas corpus*. Lord Ferrers's case, 1 Burr. 634. &c. ‖Lord Vane's case, *infrà*.‖ [If, upon the return of a *habeas corpus* sued out by the husband to bring up the wife, it appear that he had used her ill, and she exhibit articles of the peace against him, the court will not order her to be delivered to him. Anne Gregory's case, 4 Burr. 1991.]

‖Lady *Vane* exhibited articles of the peace against her husband *propter sævitiam*, charging that she was separated from her husband under articles; that at *Christmas*, 1742, she was seized by his servants and carried to his house, and confined eleven days; that she escaped, and that she had heard and believed that a servant said he was ordered by my lord to bring her alive or dead, and therefore she swore her life was in danger. These articles were exhibited in *Michaelmas* term 1743; and in *Hilary* term following Lord *Vane* came into court, and moved by counsel to discharge these articles, because it did not appear on the face of the articles that Lord *Vane* had done any one act to induce his lady to swear the peace against him, or make it necessary for him to give security for keeping the peace; that the husband has a right to seize his wife, to carry her home, and even to confine her if he think proper: that by the common law he had power to govern, rule, and chastise her reasonably, and although she may sue a *supplicavit* in Chancery against her husband for cruelty, and to find sureties that he do not beat or evil treat her, yet even in that case there is a proviso *aliter quam ad virum suum, ex causâ regiminis et castigationis uxoris suæ, licite rationabiliter pertinet*. F. N. B. 542.

Lord Vane's case, 13 East, 171. *notâ.*

(8th edit.); that as to the articles of agreement they were set aside in equity as unconscionable; and a copy of the order was produced, but the court said they could take no notice of it.

Upon a rule to shew cause it was answered, and so resolved by the court, that every person was entitled to exhibit articles of the peace for the security of his person, and to allow them was the constant course of the court, as a security against immediate danger: that it was not usual to enquire into the truth of circumstances charged in the articles, but the same must be received as true till the contrary appears upon a proper prosecution; that in the present case, taking all these articles together, and that Lord and Lady *Vane* were under agreement to live separate (*a*), and that he seized her by force and confined her eleven days, that he had threatened to seize her again, and ordered her to be brought home dead or alive; it doth appear upon the whole that she had a reasonable foundation to require sureties of the peace against him. *Vide* Fitz. N. B. 542. (8th edit.) If the wife be in fear or doubt of the husband that he will beat or kill her, she may sue a *supplicavit* in Chancery against her husband to find sureties that he doth not beat or evil entreat her.

(*a*) A deed providing for a future separation between husband and wife is void. Westmeath v. Westmeath, 1 Dow. P. C. N. Ser. 519. Hindley v. Westmeath, 6 Barn. & C. 207.

It was likewise said by Sir *John Strange*, that, taking this case up upon the articles of agreement only, if Lord *Vane* should force his wife to a cohabitation she has a right to be relieved; and for that purpose he cited *Listor's* case, *Trin.* 8 G. 1. Captain *Listor*, after articles of separation between him and his wife, the Lady *Rawlinson*, seized her by force, and carried her home, in order to compel her to live with him. She brought a *habeas corpus*, and after argument at the bar it was agreed by the court, that if a wife will make an undue use of her liberty by squandering away her husband's effects, or going into bad company, it was lawful for her husband to lay her under restraint; but where that did not appear, he could not confine her as a prisoner, though even in his own house; and because it appeared in that case that they were parted by consent, and under articles to live separate, the court ordered that she should have her liberty. ‖

(C) Of his Interest in her Estate and Property: And herein,

1. *Of the Real Estate in her Right.*

10 Co. 42. 2 Inst. 510. Sid. 11. Roll. Abr. 347. ‖See Roper on Husband and Wife, c. 2. (2d edit.)‖

FROM the time of the intermarriage, the law looks upon the husband and wife but as one person, and therefore allows of but one will between them, which is placed in the husband, as the fittest and ablest to provide for and govern the family; and for this reason, the law gives the husband an absolute power of disposing of her personal property, no act of hers being of any force to affect or transfer that which by the intermarriage she has

has resigned to him: but the freehold and inheritance of the wife is subject to other rules and regulations; for the husband by the marriage does not become absolute proprietor of the inheritance; but, as the governor of the family, is so far master of it as to receive the profits of it during her life, but hath no power to make an absolute sale of it without her consent.

If a man marries a woman seised in fee, he gains a freehold in right of his wife. [But it must be pleaded, that the husband and wife, in right of the wife, were seised in fee, not of freehold merely.] Co. Lit. 351 a. 273 b. Dougl. 329. [The husband may make a tenant of the *præcipe* of his wife's estate, for the purpose of suffering a common recovery of it without the wife's joining him in a fine. Robinson v. Cummins, Cruise on Recoveries, 52. Co. Lit. 326 b. note. Pig. 72. Ro. Abr. tit. Recovery (A), pl. 4.] Where the husband or wife are attainted, and the lord by escheat shall enter, or the king have the pernancy of the profits, and how far such freehold will work a *remitter* to the husband, *vide* title *Curtesy of England.*

2. *Of her Chattels Real, or Leasehold Interests.*

The marriage is a gift in law to the husband of all the wife's chattels real, as a term for years in right of the wife; so of estates by statute-merchant, statute-staple, *elegit*, &c.; and of these he may alone dispose, forfeit, or they may be extended for his debts; but if he makes no disposition of them in his lifetime, they survive to the wife (*a*), and therefore he cannot devise them: ‖if he do not alien them and he survive the wife, the law gives them to him as a marital right, and no administration is necessary to be taken out by him.‖ 7 H. 6. 1. b. Bro. 24. Co. Lit. 46. 351. ‖Doe dem. Roberts v. Polgrean, 1 H. Black. 535.‖ [An assignment of the real estate of the wife will bind her, though it be made without a consideration. So if the wife has a judgment, and it is extended on an *elegit*, the husband may assign it without a consideration: so if a judgment is given in trust for a feme sole, who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest: and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration; for it is in nature of an extent. 3 P. Wms. 200.] (*a*) The husband is only possessed of a term in her right, and the term or legal interest continues in her. 7 H. 6. 2. Roll. Abr. 342. Co. Lit. 351.

If a woman lessee for years takes husband, and he after purchaseth a new lease to them both for their lives of the same lands, this is a surrender in law of the first term, and shall bind the wife, because it amounts to an actual disposition thereof, which the husband had power to make. 2 Roll. Abr. 495.

If the husband possessed of a term for seventy years in right of his wife, makes a lease of those lands for twenty years, to begin after his death, this is good, and shall bind the wife; because the term being but a chattel, he had power to dispose of it wholly, and by consequence may dispose of any less interest thereout as he thinks fit; and this being a present disposition which he cannot revoke, binds the interest of the lands immediately, though it takes not effect in possession till after his death; and therefore this differs from a devise of such term, or any part thereof, by the husband, by his will; for that not taking effect, nor binding the interest at all till after his death, comes too late to prevent the operation of law, which, at the instant of death, immediately casts Poph. 5. 97. 145. Co. Lit. 46 b. 351 a. Cro. Car. 344. Plowd. 418. Cro. Eliz. 33. 279. Co. Lit. 300 a. Bro. tit. Charge, 3. 8 Co. 97. Roll. Abr. 851. 343, 344. Godb. 279. 3 Keb. 299. Vent. 259. *Note;* It

casts it upon the wife surviving, and so defeats and destroys the operation of the devise: but as to the residue of the term, whereof the husband makes no disposition in his life-time, the wife, if she survives, will be entitled to it; because, as to that, the law is left to take place, as it would have done for the whole, if he had not prevented it by such his disposition of part. But if the husband had granted away the whole term upon condition, and died, though the condition were afterwards broken, and his executors entered for breach thereof, yet would the wife be for ever barred to claim any interest in the said term, because there was a total disposition thereof by the husband in his life-time, and the breach or nonperformance of the condition was perfectly contingent and uncertain: besides, that the breach of the condition happened not till after his death, and so the disposition continued perfect and uninterrupted during his life; for, if the condition had been broken during his life, and he himself had entered for breach thereof, it might be a great question if the wife surviving should not have the term after his death; because, by his re entry, for the condition broken, he is restored to the whole term *in statu quo;* and then being possessed of it in right of his wife, as he was before, it seems but reasonable the wife should have it, if she survives the husband, as she would have had if no such disposition had been made, since that disposition is now defeated and gone. Also such term, whereof the husband is possessed in right of his wife, may be extended for the debts, or forfeited for the crimes of the husband, for these are legal dispositions thereof which shall bind the wife; but if the husband should grant a rent, common, *&c.* out of such term, and die, this would not bind the wife surviving, because the term or possession itself being left to come entire to the wife, all intermediate charges or grants thereout by the husband determine with his death; for the title of the wife to such term hath relation to the time of their intermarriage, and so is paramount to all collateral charges or grants made thereout by the husband after. But a grant by the husband of the herbage or vesture of such land which he held in right of his wife for years, will be void after his death, because they are part of the land itself, and not collateral to it.

appears by all the above cited books, that if husband makes a lease of part of the wife's term, rendering rent, and dies, that his executors shall have the rent, and not the wife; though she hath the reversion, because not party or privy to the lease; and the rent is not incident to the reversion. ‖It appears, that although the wife were a party to the under lease, she would not be entitled to the arrears of rent due on her husband's death; but if the rent had been reserved by the husband to himself and wife, she would have been so both to the future rent and arrears due, because, they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal, the term, survive to the wife. 4 Vin. Abr. (D), a. 117. Roper, Baron and Feme, c. 5. § 2.‖

Co. Lit. 46 b. Roll. Abr. 345. ‖*Sed vide* 4 Vin. Ab. 50. pl. 18. in margin. Judgment for husband in *quare impedit* for the wife's advowson:—th husband dies, the wife presents. Hal. MSS. Co. Lit. 46 b. n. (*b*) ‖

If the husband and wife be evicted of a term which he hath in right of his wife, and the husband bring an ejectment in his own name, and have judgment to recover, this makes an alteration in the term, and vests it in the husband; because, not making his wife a party to the recovery, he takes the whole wrong to be done to himself; and consequently, if he recovers, it must be by virtue of that right whereof he was dispossessed.

1 Roll. Abr. 345. 1 Vern. 396. 2 Leon. 104. *Sed vide*

‖It seems that if there be a dispute between the husband claiming a term for years in right of his wife, and another person relative to their title, and they refer the matter to arbitration, and

and an award is made of the term to the husband, the property in it will be changed by the arbitrament so as to amount to a reduction of the term into possession, which will defeat the wife's right by survivorship. ‖

cont. Vin. Abr. Arbitrament (A). Doe v. Rosser, 3 East, 11.; and see 1 Roper, Husband and Wife, 185.

If a term for years be granted to a feme-covert and another; or if a feme-sole and another be joint-tenants of a term for years, and the feme take husband, yet in both cases the joint-tenancy still continues; for the marriage makes no severance or alteration of it, but gives the husband the same power his wife had before, by an actual disposition of her moiety to break the joint-tenancy, and bind his wife's interest therein: but without such disposition the joint-tenancy continues; and, if the husband dies, the whole shall go accordingly. So if such joint-tenants are ousted of the term, the wife shall join with the husband and the other joint-tenant in ejectment, and the wife shall have judgment to recover as well as the husband; and if in such case, before any actual disposition made by the husband, his wife die, the whole term shall go to the surviving joint-tenant, and no part thereof to the husband; because, though the husband, if he survives, is by law to have all chattels real and personal of his wife's, and this term was a chattel real, yet the title of the other joint-tenant, to have the whole by survivorship, coming at the same instant, and being the elder title, shall prevail against the husband.

Plowd. 418. Co. Lit. 185.

A lease was made to the husband and wife for years, they enter, and the lessor afterwards enfeoffs the husband, who dies seised, the wife survives and claims the term; and betwixt her and the heir of the husband the dispute was, Whether the term was extinguished? And *per totam Curiam*, by acceptance of the feoffment the husband hath surrendered the term, and then it is extinguished, and the wife barred of any title thereto: but they held that it would have been otherwise if the conveyance had been to the husband by bargain and sale enrolled, or by fine; for these meddle not with the possession, but only carry such interest as the reversioner had in him, and then the husband might have the term in right of his wife, and the inheritance in his own right; but by the feoffment he admits the lessor to have power to come upon the possession to make livery; which, if the term should stand in his way, he could not do; and therefore such admittance amounts to a surrender thereof.

Cro. Eliz. 912. Downing and Seymour. *Qu.* In case of the bargain and sale, or fine, if the term, in this case, would not be surrendered? because the lease being made after marriage, when there are no moieties between husband and wife, the husband cannot be said to be possessed thereof in her right, more than in his own, but both are possessed by entireties therefore it should seem in that case likewise, that the term would be merged.

A husband possessed of a term for years in right of his wife, with remainder to himself in fee, by deed enrolled, bargains and sells the land for money, and dies, and his wife enters, claiming the residue of the term; and the opinion of the book seems to be, that her claim was good; for though a feoffment, in such case, by the husband, would have passed the term which he had in right of his wife by way of union and extinguishment, yet by bargain and sale nothing passeth but a use; and by creation and grant

Mo. pl. 304.

Plowd. 423.

grant of the use, the term which he had *in jure uxoris* shall not pass; so that this being no disposition of the legal interest of the term, but only of a use, (which, in respect of his inheritance in remainder, he might well create,) this was good as to the term during the life of the husband only; and then the wife, after his death, shall have the lease discharged of it, as if the husband had granted a rent, *&c.* out of the wife's term; but if there had been the words *grant, assign,* or any other word which would have passed the legal interest of the term, this would have barred the wife; but the words *bargain and sell,* by 27 H. 8. c. 16., could have no operation to raise a use which shall be executed in possession, but only out of the reversion whereof the husband was seised, as the statute speaks; and therefore, this being a term in gross, whereof the husband was not seised, but only possessed, the bargain and sale passed only a use thereof at common law, and not by virtue of that statute; and then, not being executed in possession, the use at common law, which was collateral to the land, fell off with the death of the husband who created it, as other collateral charges of his would do; and by consequence, the wife's title to the residue of the term continues good; but if the husband had been possessed of such term in gross in his own right, without an inheritance in him, and had made a bargain and sale thereof, though this would not have been executed by the statute in possession, for the reason before mentioned, yet it would have passed a use at common law, which would have made him trustee in equity for the bargainee.

Roll. Abr. 343. Lane, 54, 55.

If a man marries a woman who has a term for years settled on her in trust, the husband may as well dispose of this trust, as if the legal interest was in her. (*a*)

[(*a*) It is true, that the husband is entitled to dispose of the trust of the wife's term equally with the term itself, and that whether it be the trust of a present actual and vested interest in the term; Prec. Ch. 418. Factor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 207.; or of a possible or contingent interest, if it is a legal interest, that is, such an interest as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife; unless, perhaps, in those cases where the possibility or contingency is of such a nature that it cannot happen during the husband's lifetime. Co. Lit. 46 b. 10 Co. 51 a. Hutt. 17. 1 Salk. 326. But it is an exception to this rule, at least in equity, that if a future or executory interest, in a term or other chattel, be provided for the wife, with the consent of the husband, the husband cannot dispose of it from her; as it would be absurd and unfair in the highest degree, that he should be allowed to defeat his own agreement. But this supposeth the provision to be made *before* marriage; for if it be made *subsequent* to the marriage, it is a mere voluntary act, and void against an assignee for a valuable consideration. Doyly v. Perfull, 1 Ch. Ca. 225. Turner's case, 1 Vern. 7. Pitt v. Hunt, *Id.* 18. Walter v. Saunders, 1 Eq. Ca. Abr. 58. Co. Lit. 351 b. note.]

Stead v. Creagh, 9 Mod. 43. Druce v. Dennison, 6 Ves. 385.; and see 1 Scho. & Lef. 52.

‖And if the husband covenant or agree to grant an under lease of the wife's term for years, such agreement is a good disposition of the term in equity, and will bind the wife in case of the husband's death without granting the lease.

Pitt v. Pitt, 1 Turn. Ch. R. 180.

Where the wife was entitled to a leasehold estate, subject to a mortgage, and upon transfer of the mortgage the husband covenanted for payment of the money, and the equity of redemption was reserved to the husband and wife, their executors, administrators,

trators, and assigns; it was held, that the wife's right by survivorship was not affected.

If the husband mortgages the wife's term, and by payment of the money at the day the estate of the mortgagee ceases, it seems that the interest of the wife in the term will not be affected. If the money be not paid at the day the estate of the mortgagee becomes absolute, and the alienation of the term being complete at law, the wife's legal right by survivorship is defeated; and if the equity of redemption be reserved to the husband alone, it seems that her right will also be defeated in equity by analogy to the cases, in which it has been held, that she is bound by the husband's voluntary assignment of her equitable chattels real. Radford v. Young, 2 P. Wms. 366.

But if the equity of redemption were reserved to the husband and wife, she would be entitled to it by survivorship. Pitt v. Pitt.

If in either case the husband, after the estate of the mortgagee has become absolute, pays the money and takes an assignment to himself, the property will be altered, and it seems the wife's right will be excluded. 1 Preston on Abst. 345.

The husband's agreement to mortgage the wife's term will, however, be enforced against her only to the extent of the money due. Bates v. Dandy, 2 Atk. 270. 1 Russell R. 33. *note.*

If the husband survive his wife, and upon that event become entitled to her term for years, he succeeds to it, subject to all the charges and equities which affected it in the wife's hands. Moody v. Mathews, 7 Ves. 174.

On mortgages, by husband and wife, of the wife's estate, the equity of redemption is sometimes not reserved to the wife; and the question arises, how far she is bound by a reservation of the equity in any other manner.

The principles deduced from the cases have been thus laid down. — 1st. When the mortgage-deed contains no limitation of the estate beyond the security, and reserves the equity of redemption to the husband alone, in that case the wife's original sole interest will be preserved to her, on the principle, that she being the sole owner of the estate, the mere form of the reservation of the equity of redemption is insufficient, of itself, to alter or change the prior title to the property; for the circumstance of the reservation having been made otherwise than to the owner of the estate, (the wife in the present instance,) is presumed by law to have originated either in the inaccuracy of the language of the clause, or in the mistake of the person who prepared or engrossed the deed, neither of which circumstances is allowed to prejudice the person having the prior title. But, 2 Chan. Ca. 98. 161. Ruscombe v. Hare, 6 Dow. P. C. 1.

2d. When the mortgage-deed contains a settlement of the wife's estate, and the mortgage, or the form of reservation of the equity of redemption, has nothing to do with the subsequent limitations of the property, but is perfectly distinct from them, as, where the mortgage is for a term of years, and the limitations apply to the inheritance, in that case, these limitations, through the medium of the wife's fine, will take effect; and the persons entitled to redeem, will be, not the wife under her prior title, but 1 Chan. R. 116. 2 Vern. 437. 2 Bro. P. C. 1. Jackson v. Innes, 16 Ves. 356. 1 Bligh P. C. 104.; and see Reeve v. Hicks, 2 Sim. & Stu. 403.

but the persons interested in the estate under the uses or limitations contained in the mortgage-deed.‖

3. *Of her Personal Estate in Possession, and* Choses in Action.

Doct. and Stud. Dial. 1. c. 7. Co. Lit. 351. (*a*) And therefore chattels personal which she has in *auter droit* as executrix, or guardian in socage, &c. shall not go to the husband. Co. Lit. 351. But a bare possession of personal goods is not by the marriage given to the husband; for if goods are bailed to a feme sole, or if she finds goods, and after marries, the action of detinue must be brought against both husband and wife. Co. Lit. 351. The civil, or scarce any law, gives so great a power to the husband over the estate of the wife, as the common law does. Sid. 111. by three judges *arguendo*. [The wife's paraphernalia are, by the common law, excepted out of the power of the husband, so that he cannot devise them. 1 P. Wms. 729. But by articles before marriage, expressly barring her of every thing she can claim out of her husband's estate by common law, custom, or otherwise, the husband is entitled to these. 2 Atk. 642. It seemeth doubtful, whether the paraphernalia are exempted from the claim of creditors. 2 Atk. 79. Ambl. 6. 2 Ves. 7. ‖17 Ves. 273. 3 Atk. 393. Roper, Husband and Wife, c. 17. § 3.‖ Her necessary apparel certainly is. 2 Black. Com. 436. 2 Atk. 105.]

All the personal estate, as money, goods, cattle, household furniture, *&c.*, that were the property, and in the possession of the wife at the time of the marriage, are actually vested in the husband (*a*); so that of these he may make any disposition in his life-time, without her consent, or may by will devise them, and they shall, without any such disposition, go to the executors or administrators of the husband, and not to the wife, though she survive him.

Co. Lit. 351. 3 Mod. 186. But where the goods of a feme sole are in the possession of another by trover or bailment, and she marries, the property which continued in the wife is vested in the husband, and he alone, without his wife, may bring detinue for them. Sid. 172. Keb. 641. Moor, 25. pl. 85. Vent. 261. 2 Lev. 107. [In equity, a settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in the wife's lifetime, to the whole of her things in action; but it hath been said, that if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which hath not been reduced into possession by the husband in his lifetime: so, if it is in consideration of a particular part of her fortune, such of the things in action as are not comprised in that part, it hath been said, survive to the wife. Cleland v Cleland, Pr. Ch. 63. 2 Vern. 502. Adams v. Cole, Ca. temp. Talb. 168. In the case of Blois v. The Countess of Hereford, 2 Vern. 501., a settlement was made for the benefit of the wife, but no mention was made of her personal estate. Lord *Keeper* decreed, that it should belong to the representatives of the husband; and said, that, in all cases where there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there be no agreement for that purpose. Eq. Ca. Abr. 69.] ‖And it appears that if the settlement is made in consideration of her fortune, without saying more, it entitles the husband to all her *then* personal property, but not to such as afterwards accrues to her; but *aliter* if it appears that it was the agreement between the parties that he should have not only her then present, but all subsequently acquired personalty; and where any of her *choses in action* are not purchased by the husband by settlement, they will be subject to her rights of survivorship and of provision by settlement. Druce v. Dennison, 6 Ves. 395. Burdon v. Dean, 2 Ves. jun. 607. Elibank v. Montolieu, 5 Ves. 737. Mitford v. Mitford, 9 Ves. 89. Carr v. Taylor, 10 Ves. 574. Beresford v. Hobson, 1 Madd. 371.‖ (*a*) Administration of right is to be granted to the husband. 1 Roll. Abr. 910. And by the stat. 29 Car. 2. c. 3. § 25. it is enacted, *that the statute of distributions shall not extend to the estates of feme coverts.* [And the representative of the husband is entitled as much to this species of his wife's property as to any other; for the right of administration follows

But *choses in action*, as debts due to the wife by obligation, *&c.*, which are to be demanded by action, though they are likewise so far vested in the husband that he may reduce them into possession, yet if he dies before any alteration made by him, they shall go to his wife; nor shall they, without such alteration, survive to the husband upon the death of the wife, or he have any right to them, but as he is entitled as administrator to his wife. (*a*)

follows the right of estate; and ought, in case of the husband's death, after the wife, to be granted to the husband's next of kin. Bacon v. Bryant, Vin. Abr. tit. Executors (K), pl. 25. Humphry v. Bullen, *Id.* pl. 27. Elliot v. Collier, 3 Atk. 526. 1 Ves. 15. 1 Wils. 168. Bouchier v. Taylor. Hargr. Law Tracts, 4737. Bro. Rep. 414. If, therefore, administration *de bonis non* of the wife be granted to any third person, he is a trustee for the representative of the husband. Squib v. Wyn, 1 P. Wms. 378. Cart v. Rees, *Id.* 381.]

[Money due upon mortgage is considered as a thing in action, and subject to the disposal of the husband only, whether it be a mortgage in fee or for a term: for though in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt.] ‖And if the husband survives the wife, the heir of the wife, who has the legal estate, is a trustee for the husband‖ Whether there is not a distinction in this respect between a mortgage in fee, and for a term of years. 1 Scho. & Lef. 176. 1 Roper, 226.‖

Bosvil v. Brander, 1 P. Wms. 4078. Bates v. Dandy, 2 Atk. 208. ‖Turner v. Crane, 1 Vern. 170. Powell on Mort. v. 2. 683. *Sed qu.*

If a feme sole obligee marries, and the husband makes a letter of attorney to *J. S.* to receive the money, who receives it accordingly, and the feme dies, the husband shall have an action of account for the money; for, by the receipt, this was become a thing in possession.

Roll. Abr. 342. Moor, 452. Golds. 160.

If a legacy be devised to a feme, who takes husband, and the baron makes a letter of attorney to *J. S.* to receive the legacy, and he receives it accordingly, this, by his receipt, is become the chattel of the husband.

Golds. 160. Roll. Abr. 342.

So if the baron and feme had made a letter of attorney to *J. S.* to receive the legacy, and he had received it accordingly, by this receipt this ceases to be a thing in action, and is become a thing in possession; and the husband or his executor, after the death of the feme, may have an account upon this receipt against *J. S.*

Moor, 452. Roll. Abr. 342. 350. Golds. 159, 160.

In one case (*a*) it is ruled, that a voluntary assignment by the husband of the wife's *choses in action*, though void as between the husband and the assignee, will yet have the effect of altering the property as between the husband and wife. But it seemeth to be now settled (*b*) that the husband's assignment in such case must be for a valuable consideration, and that beyond the consideration the assignment will not bind the wife surviving.

(*a*) Squib v. Wyn, 1 P. Wms. 378. (*b*) Bates v. Dandy, 2 Atk. 207. Jewson v. Moulson, *Id.* 417. Saddington v. Kinsman, 1 Bro. Ch. R. 44. ‖Wright v. Rutter, 2 Ves. jun. 673. Becket v. Becket, 1 Dick. 340. Johnson v. Johnson, 1 Jac. & W. 472. Stamper v. Barber, 5 Madd. 157.‖ Volunteers, and general assignees (whether by operation of law, or otherwise) are subject to the same equity, with respect to the wife's property, as the husband is. 2 Atk. 420. 1 P. Wms. 382. 4 Bro. Ch. R. 139. It doth not seem to have been yet determined, that a court of equity will interfere and interrupt the *legal* right of the husband, or of such assignees, where they can get possession of the wife's property without the aid of the court. Winch v. Page, Bunb. 86. Anon. Pr. Ch. 548. Harrison v. Buckle, 1 Stra. 248. Gardner v. Walker, *Id.* 503. Jewson v. Moulson, 2 Atk. 420. ‖See 1 Roper on Husband and Wife, 228.‖ But where the property is a subject of *equitable* jurisdiction, where they are obliged to go into equity in order to enable them to recover it, there the court will oblige them previously to make a provision for the wife. Jacobson v. Williamson, 1 P. Wms. 382. But as against an assignee of some *particular chose in action*, or trust term of the wife, for a *full valuable consideration*, such equity, it seemeth, doth not arise. But see Sir Edward Turner's case, 1 Vern. 7. Pitt v. Hunt, *Id.* 18. Tudor v. Saniano, 2 Vern. 270. Packer v. Wyndham, Pr. Ch. 412. Walter v. Saunders, 1 Eq. Ca. Abr. 58. pl. 5. Bates v. Dandy, 2 Atk. 207. ‖See the report of this case from Lib. Reg.

1 Russell R. 35.‖ Pope v. Crashaw, 4 Bro. Ch. R. 326. *Qu.* Whether in these cases of *particular* assignments, any distinction hath been made between a trust term, and a *chose in action* of the wife? Cox's note in 1 P. Wms. 459.

‖It seems to be now settled that the *choses in action* of the wife will survive to her, notwithstanding an assignment by the husband (whether by his own act or by bankruptcy or insolvency), unless the assignee, in the husband's life, reduce them into possession, and this whether her interest be immediately recoverable by action, or be in reversion and expectancy.

Mitford v. Mitford, 9 Ves. 87. See 2 Sim. R. 167.

A. bequeathed certain stock to trustees to place at interest, and to pay such interest to *B.* for life, or until she married, and upon her death or marriage *A.* gave the capital amongst *C.*, *D.*, and *E.* the wife of *M.*, equally; *M.* the husband of *E.* became bankrupt, obtained his certificate, and died, leaving *E.* surviving; *B.* afterwards married. Upon the bill of the surviving trustee to ascertain the rights of the widow *E.* and of her late husband's assignees, the Master of the Rolls decided that *E.*'s title by survivorship prevailed against the general assignees of the husband.

Worral v. Marlar, 1 P. Wms. 459. note.

A distinction was suggested in the case last cited, between a general and particular assignee for a valuable consideration; and it has been held that the wife's title to her reversionary *choses in action* is barred by the husband's assignment for a valuable consideration; but it is now decided that her title will prevail against both general and particular assignee.

Hornsby v. Lee, 2 Madd. 16.; and see Grey v. Kentish, 1 Atk. 280. Woodlands v. Crowcher, 12 Ves. 174.

Husband and wife assigned a reversionary interest of the wife in certain trust stock, as a security for an annuity granted by the husband; the husband took the benefit of the insolvent debtors' act, and a general assignment was made of his property. The person on whose death the wife was to take died, and then the husband died, without having done any other act to reduce the stock into possession. It was held, by Sir *T. Plumer* M. R. that the assignee was placed in the same situation as the husband, and, in the event of the husband surviving the wife, he would have been entitled to the property; but, as the wife survived the husband, she was entitled against both the particular and the general assignee.

See Roper, Husb. and Wife, (2d edit.) c. 6. § 2., and also Addenda to Vol. II. of that work.

This decision in *Hornsby* v. *Lee* having been called in question, was fully considered by the same learned judge in another case of a similar kind, wherein he confirmed his former judgment.

Purdew v. Jackson, 1 Russ. R. 1. This case is confirmed by Honner v. Morton, 5 Russ. 65. and Watson v. Dennis, *Id.* 90. before Lord Chan. *Lyndhurst.*

A. by will gave stock to trustees upon trust to pay the dividends to *B.* for life, and after his decease to the testator's granddaughter *C.* during her life, and after the decease of the survivor of *B.* and *C.* in trust for the children of *C.* share and share alike, the shares to be vested at twenty-one or on marriage with consent, notwithstanding the postponement of the time of payment until after the decease of *B.* and *C.* *C.* died, and one of her daughters married *D.*, and, during the life of *B.*, joined with her husband in selling and assigning by deed her share in the stock expectant on *B.*'s decease. The husband and *B.* both died, leaving the wife surviving; and the question was, whether the wife

wife was entitled to the stock by survivorship on the decease of *B.*, or whether the purchaser for value of the reversionary interest was entitled to it under his deed. And Sir *Thomas Plumer* M. R., after full argument and a review of the cases, and of the former decision in *Hornsby* v. *Lee*, held, that the assignment of the reversionary interest could not be considered a reduction into possession, and that there was no distinction between the case of a particular and that of a general assignee, and, consequently, that the wife's right by survivorship was paramount to that of the assignee.

On a suit in the joint names of husband and wife for a legacy due to the wife, a decree for an account, or even for actual payment, is not a sufficient reduction into possession to bar the wife's right by survivorship. Adams v. Lavender, 1 M'Clel. & Y. 41.; and see 10 Ves. 91.

1 Eden's R. 502. 1 Jac. & W. 472. 1 Roper, 218.

And where a wife is entitled to a legacy, a mere appropriation by the executor of so much of the testator's assets as is necessary to discharge it is not a sufficient reduction into possession. Blunt v. Bestland, 5 Ves. 515.

And the husband's receipt or possession of the *chose in action* must be in his character of husband, in order to defeat the wife's title by survivorship. Thus, where a trustee and executor married one of the residuary legatees in the will, his possession of the testator's personal estate was held not a reduction into possession of the wife's share of the residue, his possession being only as trustee and executor. Baker v. Hall, 12 Ves. 497.

So where a married woman is entitled to stock, the transfer of it to the husband along with another person, as trustees for her, is not a reduction into possession. Wall v. Tomlinson, 16 Ves. 413.

But it seems a transfer into his sole name is a reduction into possession, being equivalent to a receipt of money. 1 Roper, 221.; *et vide* Doswell v. Earle, 12 Ves. 473.

The father of *C.*, a married woman, after the marriage drew a check in her favour for 10,000*l.*, and she received in lieu of it a promissory note from the bankers for that amount, and *C.*'s husband received on the note 1000*l.*, and also interest upon it up to the time of his death. On the husband's death it was held that *C.* the wife was entitled to the note as a *chose in action*, and that it was not reduced into possession by the husband's receiving the 1000*l.* and interest. Nash v. Nash, 2 Madd. 133.

So where Mrs. *W.*, then being married, became entitled to stock as next of kin of an intestate, and the administrator transferred it into her name, describing her as the wife of *J. W.*, and so it stood till *J. W.*'s death, except that she had sold and transferred a part with his assent, the court held that the husband had not reduced it into possession, and it survived to the wife. Wildman v. Wildman, 9 Ves. 174.

The interest of the wife's separate property is always payable to the husband if he maintains the wife. But where he receives a great part of her fortune (*a*), and will not settle the rest, a court of equity will not only stop the payment of the residue of her fortune, but will even prevent him from receiving the interest of the residue, that it may accumulate for her benefit. 2 Ves. 561. (*a*) 5 Atk. 21.

If

Pr. Ch. 414. Squire v. Dean, 4 Bro. Ch. R. 326.

If trustees pay the wife's separate fortune to the husband, it is irrecoverable. ‖The wife's assent was presumed; and see 4 Ves. 146. 16 Ves. 126.‖

As to what things shall survive to the wife, and what go to the husband's executors, see tit. "EXECUTORS (H), 4." As to the separate property of the wife, *vide infrà*.

(D) Of the Husband's Right to Things accruing to the Wife during Coverture.

Co. Lit. 351. Salk. 115. Carth. 251. Where they cannot take by moieties, *vide* head of *Joint-tenants and Tenants in Common.*

HUSBAND and wife are considered as one person in law, and as having but one will between them, which is seated in the husband as the head and governor of the family; and therefore the law gives him the same right over any real estate accruing to the wife during coverture, as if she were seised of it before marriage; so of chattels real accruing to the wife: it also gives him an absolute power over any personal estate or interest accruing to the wife by gift, devise, or her labour.

Glover v. Proprietors of Drury Lane Theatre, 2 Chitt. R. 117.

‖And where the wife had actually received the amount due for her personal services, it was held that the husband could recover it over again, the money having been paid after notice by the husband not to pay the wife.‖

Carth. 251. Salk. 114. pl. 2. S. C. 4 Mod. 156. S. C. Buckley & Ux v. Collier. (c) But if a special *indebitatus assumpsit* had been brought on an express promise made the wife, it seems it would be good, though they had both joined. *Vide* Cro. Eliz. 61. 96. Cro. Jac. 77. Cro. Car. 439. 2 Sid. 128.

Indebitatus assumpsit was brought by husband and wife against the defendant, in which they declared, that he was indebted to them in such a sum of money for periwig-makers' work done by the wife, *ad damnum ipsorum*; and on demurrer, judgment was given against the plaintiffs; for this being a general *indebitatus assumpsit* implied by law, the law will not imply any promise made the wife (a), for she is a servant to the husband, who is at all the charges in furnishing hair, *&c.*, and therefore the law implies that the promise was made to him only, for breach of which he alone ought to have sued.

Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. Chamberlain and the wife of Colonel Hewson.

If a feme covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release these costs, for the marriage continues, and whatever accrues to the wife during coverture belongs to the husband: *Per Holt* C. J., on a motion for a prohibition.

Roll. R. 426. 3 Bulstr. 264. Roll. Abr. 343. 2 Roll. Abr. 295.

But if the husband and wife be divorced *a mensâ et thoro*, and the wife have her alimony and sue for defamation or other injury, and there have costs, and the husband release them; this shall not bar the wife, for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband.

Salk. 115. pl. 4. 1 Vern. 261. Decreed in Chancery.

A legacy was given to a feme covert who lived separate from her husband (a), and the executor paid it to the feme, and took her receipt for it; yet, on a bill brought by the husband

band against the executor, he was decreed to pay it over again, with interest.

(a) *Qu.* If such separation had been by agreement, and the agreement and separate maintenance decreed in Chancery? If husband and wife are divorced *a mensâ et thoro*, and a legacy is left to her, the husband may release it. Roll. Abr. 345. 2 Roll. Abr. 301. Moor, 665. Cro. Eliz. 908. Noy, 45. Roll. Rep. 426. 3 Bulstr. 264. Salk. 115. pl. 4. ‖See 1 Roper, 241. 3 Barn. & C. 291.‖ [But in an anonymous case, 9 Mod. 43., the husband, though divorced *a mensâ et thoro;* and though the wife had alimony, was restrained by injunction from selling a term which belonged to the wife. And in Newsome v. Bowyer, 3 P. Wms. 37., it was holden, that the husband being attainted of felony, and pardoned on condition of transportation; and the wife becoming afterwards entitled to some personal estate, as orphan to a freeman of *London*, it belonged to her as a feme sole.] Though a man may by deed or will give any thing in trust for the separate use of a feme covert, and this shall be out of the power of the husband, [yet it was formerly very much doubted, whether the feme could take an estate to her separate use, unless trustees were interposed. Harvey v. Harvey, 2 Vern. 659. 1 P. Wms. 126. S. C. Burton v. Pierpoint, 2 P. Wms. 79. But in Bennett v. Davis, 2 P. Wms. 316., it was holden, that where one devised lands in fee to his daughter, being a feme covert, for her separate use, without appointing any trustees, it should be a trust in the husband; for that there is no difference where a trust is created by act of the party, and where by act of law; and so it was decreed in Rolfe v. Budder, Bunb. 187. Darly v. Darly, 3 Atk. 399.; ‖and see Parker v. Brooke, 9 Ves. 583. Rich v. Cockell, *Id.* 375. Davison v. Atkinson, 5 Term R. 434. *acc.*‖ And equity will not only raise a trust, where the object of the gift is to the separate use of the wife, but will also, from the nature of some gifts, infer them to be to the separate use of the wife. Graham v. Londonderry, 3 Atk. 393. As to agreements by the husband after marriage, by which the wife claims a separate estate, it was formerly understood that the wife must take through the medium of trustees, or others, and not immediately from her husband; for unless by particular custom, as by the custom of *York*, (Fitz. Prescription, 61. Bro. Custom, 56.) a feme covert is incapable of taking any thing by the gift of her husband, Co. Litt. 3., except by will, Litt. § 168. See also Moyse v. Giles, 2 Vern. 385. Beard v. Beard, 3 Atk. 72. But in Lucas v. Lucas, 3 Atk. 270, Lord *Hardwicke* observed, that in equity, gifts between husband and wife had been often supported, though the law does not allow the property to pass. See Slanning v. Style, 3 P. Wms. 334.; and Calmady v. Calmady, there cited. Bletsow v. Sawyer, 1 Vern. 245. Moore v. Freeman, Bunb. 265.; and Mitchell v. Mitchell, there cited. Bell v. Hyde, Pr. Ch. 328. Gilb. Eq. Rep. 83. Pybus v. Smith, 3 Bro. Ch. R. 340. Lord *Hardwicke*, indeed, alluded to cases, in which the courts would not support such gifts; but those seem to be where their allowance would prejudice creditors, Slanning v. Style; and where the gift is of the whole of the husband's estate, Beard v. Beard, 3 Atk. 72. But though the wife may take a separate estate from her husband, and even have a decree against her husband in respect of such estate, Cecil v. Juxon, 1 Atk. 278.; yet, if she do not demand the produce during his lifetime, and he maintain her, an account of such separate estate shall not be carried back beyond the year. Powell v. Hankey, 2 P. Wms. 82. Thomas v. Bennet. *Id.* 341, Fowler v. Fowler, 3 P. Wms. 355. Lord Townshend v. Wyndham, 2 Ves. 7. Peacock v. Monk. *Id.* 190. Blagrave v. Blagrave, Mich. 1789. This rule, however, proceeds on the notion of the wife's consent: but if, during the husband's lifetime, she demand such account, and he promise to pay whatever is due to her, she shall be allowed to come upon his estate, as a creditor, for the amount. Ridout v. Lewis, 1 Atk. 269, Countess of Warwick v. Edwards, 1 Eq. Ca. Abr. 140. pl. 7. Fonbl. Notes on Eq. Tr. 94, 95.] ‖And if the wife is *non sanæ memoriæ*, her consent to waive her claim, of course, cannot be presumed. Brodie v. Barry, 2 Ves. & B. 39.‖

‖A bill of exchange payable to the wife is a chattel personal, and not a mere *chose in action*, and it vests absolutely in the husband, without any indorsement by the wife, so that he may sue on it alone in his own name.

M'Neilage v. Holloway, 1 Barn. & A. 218; and see 1 East, 432.

Money in the Court of Chancery belonging to a married woman, if less than 200*l.*, will be ordered to be paid to the husband, though she has been deserted by him and opposes the petition.

Foden v. Finney, 4 Russ. 428.; and see 1 Jac. & W. 69.

The fund of a married woman, standing in the name of the accountant-general to her account, may be pledged by her husband.‖

Sansum v. Dewar, 3 Russ. 91.

(E) Of the Wife's Acts and Agreements before Marriage; in what Cases revoked and made void by the Marriage.

4 Co. 60. 5 Co. 10. Kelw. 162. Co. Lit. 55. Hetl. 72. Cro. Car. 304.

BY the marriage the husband and wife become one person in law, and therefore such an union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to her disadvantage.

5 Co. 10. Henstead's case. Kelw. 162. Co. Lit. 55. Cro. Car. 304.

But in things which would be manifestly to the prejudice of both husband and wife, the law doth not make her acts void; and therefore if a feme sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void; nor can she herself, without the consent of her husband, determine the lease in either case.

Salk. 117. pl. 9. ‖1 Show. 89. Loft. 329. 3 Burr. 1469. 7 Mod. 53.‖

So where a warrant of attorney was given to confess a judgment to a feme sole, the court gave leave, notwithstanding the marriage, to enter up judgment, for that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a feme sole, who marries before attornment, yet the tenant may attorn afterwards; otherwise, if a feme sole gives a warrant of attorney, and marries, for that is to charge the husband.

4 Co. 60. Forse and Hembling. [Cotter v. Layer, 2 P. Wms. 624. S.P. 2 Black. Com. 499. S.P. It is so totally revoked, that it will not revive in the event of her surviving her husband. Mrs. Lewis's case, 4 Burn's E. L. 48. And where the intended husband agrees to give his wife power of making a will *after* marriage, and she afterwards makes one *before* marriage, the marriage will revoke it. Hodsden v. Lloyd, 2 Bro. Chan. R. 534. 2 Term R. 684.]

But if a feme sole makes her will, and devises her land to *J. S.*, and afterwards marries him, and then dies, yet *J. S.* takes nothing by the will, because the marriage was a revocation of it; for as the law will not allow a woman under coverture to make a will, lest she should be influenced by her husband in the disposition of her estate; so, for the same reason, a will made by a feme sole is revoked by the marriage, lest she should be influenced by her husband (if it continued after the coverture) to revoke it, or let it stand, as it best answered his interest.

George v. ——, Ambl. 627.

[A surrender of a copyhold estate by a feme sole to the use of her will, if not made absolutely void, is at least suspended by a subsequent marriage; in either of which cases its operation is prevented.]

Roll. Abr. 332. Ruled on demurrer between White and Gifford. ‖Charnley v. Winstanley, 5 East, 266.‖

If *A.* on the one part, and *B.* and *C.*, a feme sole, on the other part, submit themselves to the award of *J. N.*, and after *C.* takes *J. S.* to husband, and after the arbitrator, before any notice of the marriage, makes an award that *B.* and *C.* shall pay 30*l.* to *A.*, yet this shall not bind *J. S.* and *C.* his wife, nor *B.*; for the submission by the marriage of *C.* is revoked as to *B.* also, and this without any notice.

A man

A. entered into a bond with his intended wife, conditioned to leave her at his death 1000*l.* if she survived him, *&c.*; *A.* died intestate, and the wife took out administration to him; in an action of debt brought against her as administratrix for rent incurred due in the life-time of her husband, she pleaded this bond, and that 250*l.* only came to her hands, which she retains in part of satisfaction, and that she had not assets *ultra*; on demurrer the whole court agreed, that contracts and debts *in præsenti*, also such as were contingent, and might happen during the coverture, were extinguished by the marriage: but two judges in this case, against *Holt* C. J. held, that this bond with a condition, was like a promise or covenant before marriage to leave the wife so much, (which were agreed to be good,) and being to be paid *in futuro*, was not extinguished by the marriage, but was *in custodiâ legis*, to preserve a right, and answer the intention of the parties; but *Holt* held, that the bond and condition were distinct, and that upon the execution of the bond there was a debt *in præsenti*, which was extinguished by the marriage; but the defendant had judgment.

Salk. 325. Gage v. Acton. Comb. 242. Carth. 511. S. C. Holt, 509. Freeman, 512. 515. Comyns, 67. Ld. Raym. 515. Lil. Ent. 214. 2 Vern. 480. Chan. Pre. 237. Where it is said that a writ of error was brought in the Exchequer-chamber, but the plaintiff in error perceiving the court inclined to affirm the judgment, did not proceed.

Note. By the cases on this head, in which there are various opinions, the better opinion seems to be that such a bond is extinguished; ‖5 Term R 381. *contrà*;‖ but if the husband enter into a bond with a stranger, conditioned to leave the wife so much, it will be good. 2 Vern. 290. Also a promise or covenant with the intended wife is good, not being a debt *in præsenti*. Jenk. R. 166. 221. Roll. Abr. 343. 2 Roll. Abr. 407. Hob. 216. Hutt. 17, 18. Noy, 26. Cro. Jac. 571. Palm. 99. 2 Roll. R. 162. 3 Sid. 58. Lit. R. 32. Hetl. 122. *Vide infrà.*

A man enters into a bond to his intended wife, conditioned to leave her 1000*l.*; he mortgages his estate, and dies, not leaving personal assets to discharge the bond: it was decreed in equity, that though the bond was void by law, being extinguished by the marriage, yet it should be made good in equity; and that the wife might redeem and hold the land till she was satisfied her debt.

2 Vern. 480. How far equity will support such contracts, *vide* Chan. Ca. 21. 117. 1 Vern. 408. 2 Vent. 343. Preced. in Chan. 237.

[2 P. Wms. 243. 2 Atk. 97. It is now settled that such a bond may be enforced *at law* against the heirs of the husband. Milbourn v. Ewart, 5 Term R. 381. and Hayes *ex dim.* Foord v. Foord there cited.]

‖Marriage does not release a demand which the woman may have on her husband in a representative character. Thus where a woman residuary legatee married the sole executor, her share of the residue was held to survive to her.

Baker v. Hall, 12 Ves. 497.

Where an action was brought against a widow, the executrix of her husband, by a bond creditor of the husband, and the widow pleaded that, prior to the marriage, her husband gave a bond to two trustees, conditioned to leave to her at his death if she survived him 400*l.*, that he appointed her executrix, and that the debt was due, and then *plene administravit* except 5*l.*, which she claimed to retain in part satisfaction of her bond debt: the plaintiff demurred, on the ground that the bond was made to the trustees, and not to the wife; but the court overruled the demurrer, observing, that if the money had been made payable *to* the trustees it would have been fatal to the plea, though in that case she might have paid the money to the trustees and have

Marriott v. Thompson, Willes R. 186.

insisted upon the payment, or she might have paid it out of her own funds and retained assets *pro tanto*, but that since by the condition of the bond payment was to be made *to the widow*, she was entitled to retain, and whether the words were to *leave* or to pay to the widow would make no difference.

Thompson v. Thompson, 9 Price R. 464. *Sed vide* Loane v. Casey, 2 Black. 965.

It has been held, however, that a widow and administratrix cannot retain for an annuity secured by her husband's covenant with trustees, and payable to her.

Loomes v. Stothard, 1 Sim. & Stu. 458.

If the husband devise his real estate to his wife, and his personalty be insufficient for payment of his debts, the widow may retain the amount of a sum secured to her by bond or covenant, out of the produce of the estate, as against the other specialty creditors.‖

For this *vide* 2 Chan. R. 79. 81. 2 Vern. 17. [2 Freem. 29. Gilb. Lex Prætor. 267. 267. 2 P. Wms. 535, 536. *Id.* 358. 674. Mos. 177. 2 Ves. 264. 2 Bro. Chan. R. 345. Fonbl. Notes on Eq. Tr. 98, 99.]

Also equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive and cheat the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent: so where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, and it was decreed to be delivered up.

Vern. 408. Hunt and Matthews. [Newstead v. Searles, 1 Atk. 265. Doe v. Routledge, Cowp. 711.] ‖De Manneville v. Crompton, 1 Ves. & Ben. 354.‖

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees, in trust for children by her former husband; though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account.

(F) Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Administratrix.

20 H. 6. 22. b. Moor, 468. Roll. Abr. 352. 3 Mod. 186.

THE husband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and hath the receipt of the rents and profits of her real estate during coverture; and whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should

should prejudice another, the law makes the husband liable to those debts with which he took her attached.

But if a feme sole, indebted, marries and dies, the husband shall not be charged; for the debts must be recovered in the lifetime of the wife. 10 H. 6. 10. 12. 20 H. 6. 22. Roll. Abr. 351.; ‖and see Jordan v. Foley, Sel. Chan. Ca. 19.‖

‖And if the husband dies before the debt is recovered, the wife surviving is liable.‖ Woodman v. Chapman, 1 Camp. 189.

So, though there be a judgment in debt against a feme sole, and she marry and die, the baron shall not be charged therewith, for he is not liable to her debts before coverture, unless recovered in her lifetime. 3 Mod. 186. Agreed *per curiam*; but where a feme sole bought goods, but did not pay for them, and the goods came to her husband's hands, and the creditors after her death brought a bill in equity against the husband, to which he demurred; the demurrer was over-ruled, my Lord Chancellor with earnestness saying, he would change the law in that point. 1 Chan. Ca. 295. But *Qu.* For where a man married a woman trader, who died, and at her death was indebted to several persons for wares which she had bought of them, and which were by her in *specie* at the time of her death, and came to the hands of her husband; on a bill brought against him that he may either pay for those goods, or let the person have them again, it was holden, that he may plead that he is neither executor nor administrator to his wife, and therefore not liable to her debts, and that all her goods belong to him by law. Abr. Ca. Eq. 60. [But *Qu.* A court of equity cannot make the husband liable in respect of the fortune he may have had with the wife. Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461. Heard v. Stamford, 3 P. Wms. 410. Ca. temp. Talb. 173. S. C.] ‖*Sed vide* Ball v. Smith, 2 Freem. 231. *cont.* And it is otherwise as to property of the wife as administratrix coming to the husband's hands, see *infrà*.‖

If baron and feme are sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment hath altered the debt. Sid. 337. So if husband and wife had recovered in right of the wife, and had judgment, the husband might sue out execution after the death of the wife. Cro. Car. 208. Sid. 337. Salk. 116. pl. 7. Carth. 415. 2 Ld. Raym. 1050.

If there be judgment in debt upon a bond against a feme sole, and she marry, and after upon two *scire facias* against the baron and feme, and *nihils* returned, judgment be thereupon had against the baron and feme, and so it rest for a year and a day, and then the wife dies, a *scire facias* will lie against the baron, to shew cause why execution should not go against him upon the first judgment, for the award of execution was absolute against the baron and feme, and so it became his debt, whereas before it was only the debt of the wife. Carth. 30. Obrian and Ram, 3 Mod. 186. S. C. Ld. Raym. 1050. Com. R. 32. Salk. 116. pl. 7. Carth. 415. S. C. cited, and allowed to be law.

If a man marries an administratrix to a former husband, who in her widowhood wasted the assets of her intestate, the husband is liable to the debts of the intestate, during the life of the wife; and this shall be deemed a *devastavit* in him. Cro. Car. 603. King v. Hilton. For this *vide* head of *Executors and Administrators*, and Roll. Abr. 351. Moor, 761. Cro. Car. 208. 227. 458. Sid. 337. *Note.*—That in equity the creditors of the first husband may follow the assets in the hands of a second husband, although the wife be dead. Chan. Ca. 80. Vern. 309. 2 Vern. 61. 118. *A.* married an administratrix to her former husband, to a share of whose personal estate the plaintiff was entitled, the administratrix was likewise entitled to a third; and before her second marriage had wasted great part of the estate, and then died; and a bill was brought against her husband to have an account of the estate, and a satisfaction for his share; an account was decreed to be

be taken of what estate had come to the hands of the administratrix before her second marriage, and the plaintiff to have satisfaction against the defendant absolutely for so much as came to his or his wife's hands after marriage, and for what came to her hands before her second marriage, to have satisfaction against the defendant so far as he had any estate of his wife's. 1 Abr. Ca. Eq. 60, 61.

In re M'Williams, 1 Scho. & Lef. 172.

‖If an executrix marry, and she and her husband, on being sued by a creditor in equity, admit assets, the assets become a debt due from the husband, and may be proved under a commission of bankrupt against him.

Clarke v. Cobley, 2 Cox R. 173.

A woman on marriage was indebted on two promissory notes, and the husband gave his bond to the creditor, who gave up the notes. On the bond being put in suit, the husband pleaded infancy. The Court of Chancery ordered the notes to be returned to the plaintiff, and ordered the defendant not to plead the statute of limitations if sued upon them, or any plea which he could not have pleaded at the time of giving the bond; but the court would not order the immediate payment of the money.

Mitcheson v. Hewson, 7 Term R. 348. Richardson v. Hall, 1 Bro. & Bing. 50.

Where an action is brought for a cause of action arising before the marriage, the husband and wife must be joined as defendants; but where the wife rented a house under a parol tenancy, at a rent payable half-yearly, and she married in the middle of a half-year, having previously given notice to quit at the end of the half-year, it was held that the husband could not be sued in *assumpsit* for her use and occupation before the marriage.‖

(G) Where she alone ‖or jointly with her Husband‖ shall be punished for a Criminal Offence; and where the Husband shall be answerable for what she does in a Civil Action.

Kelw. 31. S. P. C. 26. 142. H. P. C. 65. 27 Ass. 401. ‖Fitz. Corone, 160. 199.‖

A FEME covert is so much favoured in respect of that power and authority which her husband hath over her, that she shall not suffer any punishment in committing a bare theft in company with, or by coercion of, her husband. Hawk. P. C. 2. She shall not be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her. 3 Inst. 108. H. P. C. 65. 2 Hawk. 451. — [Nor a principal, though the husband's offence be treason; for she is *sub potestate viri*, and bound to receive him. Neither is she affected by receiving jointly with her husband any other offender. 1 Hale, 48. For she cannot be admitted as a witness to discover, even collaterally, her husband's guilt. Brownl. 47. Dalt. 540. 1 Hale, 301. O. B. 1785. 1 Hawk. P. C. 4. note.] ‖See Phillipps on Evid. 1. 74. In cases of personal violence to the wife, she may be a witness against her husband. Lord Audley's Ca. 1 Sta. Tri. 393.; and see 1 Ry. & Moo. Ca. 552.‖

Kelw. 31. 10 Mod. 63. 1 Hawk. P. C. 4. note. ‖The reason above given in 10 Mod. 63. is only stated *arguendo* by counsel, and

[This exemption extends to burglary, and seemingly to robbery, as an offence of a nature certainly not more heinous. The reason of this rule is said to be "because the wife cannot know "what property her husband may claim in the goods taken." If this be the true principle, the cases of burglary and robbery are in some measure distinguishable, for in burglary the absence or presence of the party is immaterial; but in robbery presence is an essential ingredient to the crime, and affords to the wife

wife an opportunity of judging in what sort of right the goods are taken.]

seems too narrow. *Blackstone* states the wife's exemption to extend to all civil offences against the laws of society, and treats her responsibility in case of murder, treason, and the like, as exceptions in respect of their heinousness, as *mala in se*, and so also does Lord *Hale*. But although *Blackstone* says that this doctrine is as old as the laws of the *West Saxons*, it does not seem to have been settled in early times; for *Bracton*, lib. iii. c. 32. § 9, 10., lays down the contrary; and so does the author of Fleta, lib. i. c. 38., — that husband and wife, in such case, are both guilty, and shall both suffer punishment; and Lord *Hale* says, "and so it hath been practised by some judges, but "the practice has obtained that if the husband and wife commit burglary and larceny together, "the wife shall be acquitted and the husband only convicted;" and with this agrees the old book 2 E. 3., Corone 160.; and this being the modern practice, and *in favorem vitæ*, is fittest to be followed. 1 Hawk. P. C. 4. note (7). Black. Com. 4. 28.; and see note of the learned editor of the 16th edition, as to the origin of the exemption, and its not applying to murders, &c. or misdemeanors. And Hale P. C. 45.‖

‖On an indictment for disposing of forged notes it was ruled that a woman was protected by being the wife of a man indicted, who disposed of them in her presence, and with whom she was indicted.

Rex v. Atkinson, Russell on Cri. 20.

But where a woman was indicted for falsely swearing herself to be next of kin, and procuring administration, it appears to have been held by all the judges that she was guilty of the offence, though her husband was present when she took the oath.

Rex v. Dicks, 1781. Russell on Cri. 16.

And so where a wife, by her husband's order and procuration, but in his absence, knowingly uttered a forged order and certificate for payment of prize-money, it was held by all the judges, except *Dampier absentem*, that the presumption of coercion at the time of uttering did not arise, as the husband was absent, and that the wife was properly convicted of the uttering, and the husband of the procuring; and in a similar case *Thompson* Baron thus laid down the law on the subject: The law out of tenderness to the wife, if a felony be committed in the presence of her husband, raises a presumption *primâ facie*, and *primâ facie* only, as is clearly laid down by Lord *Hale* (H. P. C. 516.), that it was done under his coercion; but it is absolutely necessary that the husband should in such case be actually present, and taking a part in the transaction. The coercion must be at the time of the act done: but when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him accessory to the felony of the wife) can be referred to what was done in his absence.

Rex v. Morris, MS. *Bayley* J. Russ. & Ry. Ca. 270.

Rex v. Hughes, 1815. Russ. on Cri. 18.

Where the husband and wife were found guilty by the jury, on a joint charge of receiving stolen goods, and it was not left to the jury to say whether the wife received the goods in the absence of the husband, the judges held that the conviction could not be supported.‖

Archer's case, 1 Ry. & Moo. C. Ca. 143.

But if she commit a theft of her own voluntary act (*a*), or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole.

H. P. C. 65. Dalt. 104. 27 Ass. pl. 40. Fitz. Coron. 4 Black. Com. 29. 199.

Or receive stolen goods of her own separate act without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty

as accessory. 22 Ass. 40. Dalt. 157.; for the coercion which is supposed to be conveyed by the command or presence of the husband is only a presumption of law, and like other presumptions may be repelled. 1 Hale, 516. And though the husband be an agent in the transaction, yet if he be ignorantly so by the artifice of the wife, she alone is punishable. Hammond's case, Leach's Cas. 354.] (*a*) But she is not guilty of felony in stealing her husband's goods*, because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them, for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force against her will. Hawk. P. C. 141. ‖But the stranger is liable in trespass. 1 Hale, 514. East P. C. 558. And if the wife deliver the goods to *B.* her *adulterer*, it will be felony in him. Dalt. C. 104. pl. 268, 269.; and see Harrison's case, 1 Leach, 47.‖

[* It was the same in the *Roman* law, which gave to the husband in such a case the *actio rerum amotarum* against the wife, but allowed not the *actio furti* to be instituted against her.]

Rex v. Squire *et Ux.* 1799. Russ. on Cri. 16.

‖In a singular case of murder, however, the wife was held not to be jointly responsible with the husband. *Charles Squire* and his wife were indicted for the murder of the husband's apprentice boy, and the surgeon gave evidence that, on opening the boy, he found that the boy died from want of proper nourishment, and not of wounds, though he had been cruelly treated, both by the husband and wife; upon which *Lawrence* J. held, that as the wife was servant of the husband, it was not her duty to provide the boy with food, though if the husband had given her food for the boy, and she had withholden it, she would have been guilty; and that, though in *foro conscientiæ* she was equally guilty with her husband, yet in law she could not be said to be guilty of not providing the apprentice with sufficient food.‖

9 Co. 71. Hawk. P. C. 4. *Vide* Moor, 813. Hob. 93. Noy, 103. Savil, 25. Cro. Jac. 482. 11 Co. 61. That the husband is not

A feme covert generally shall answer as much as if she were sole, for any offence not capital against the common law or statute (*a*); and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy.

liable to pay the forfeiture recovered on an indictment against the wife; and therefore *quære*, whether a conviction of a feme covert upon an indictment, can be pleaded to an information against her and her husband. Hawk. P. C. 27. (*a*) She cannot be indicted for barratry. Roll. R. 39. But *Qu.* Whether she may be indicted for forestalling? *Qu.* Sid. 410. 2 Keb. 634. may be indicted for a scold, and judgment against her to be ducked; but scolding once or twice is not sufficient to constitute this offence, which lies in the frequent repetition of it to the disturbance of the neighbourhood. 6 Mod. 213. 239. A feme covert may be guilty of a forcible entry by entering in person, and may be imprisoned for it. Hawk. P. C. 283. Where the husband may be proceeded against for the recusancy of his wife. *Vide* Hawk. P. C. 25. *Qu.* If not alone? Hob. 96. She may be indicted together with her husband for keeping a bawdy-house. Hawk. P. C. 2. If a woman bring a malicious appeal for the death of her husband, known by her to be alive, she may be imprisoned for her false appeal till she make fine to the king, and her husband shall go at large. 8 H. 4. 17. Fitz Coron. 73. Bro. Imprisonment, 100. [She may be convicted alone under 9 G. 2. c. 23., for selling gin. 2 Stra. 1120. She may be committed for disobeying an order of bastardy. 3 Burr. 1679.]

Rex v. Hurrell, 1 Ry. & Moo. 296.

‖If a feme covert is indicted for stealing out of a lodging room on 3 & 4 W. & M. c. 9. § 5. the room may be described as *let to her*, if that is the fact, and the husband does not cohabit.‖

Skin. 348. pl. 17. Barnet

A feme covert lent 20*l.*, to be paid at 20*s.* by the week, and 1*s.* 6*d.* interest; the borrower paid the interest, which amounted to

to 30*s.*, which the wife exacted and received; and this appearing on evidence, in an action brought by the husband for the money, *Holt* C. J., ruled it to be an usurious contract by the husband, sufficient to discharge and avoid the obligation *civiliter*, though not sufficient to charge the husband *criminaliter*. and Tompkins.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same, as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. *Vide* Hawk. P. C. 3. and the authorities there cited.

If a feme covert, pretending herself to be sole, marries a second husband, he shall have no action against the first, because this action is founded upon the communication and contract of the wife (*b*), which will not bind the husband; besides this is felony. Sid. 375. Lev. 247. Shall be answerable for a trespass done by her, or for slanderous words spoken by her. *Vide* 2 H. 6. 22. Kelw. 61. Roll. Abr. 251. Leon. 122. Cro. Car. 376.

(*b*) Where the husband shall be bound by some of her acts, as in selling goods, receiving money for him, *vide* the next head, and 2 Inst. 713. Sid. 114. Cro. Eliz. 245. 3 Leon. 267. Chan. Ca. 38. 6 Mod. 162. Comb. 450. Jenk. R. 4. 23. Ld. Raym. 224.

Several goods were devised to *A.*'s wife for life, and after her decease to *J. S.* in this case, though *A.* and his wife were parted, and there had been great suits for alimony, and she, during the separation, had wasted the goods, yet the Lord Keeper thought it reasonable that the husband should be charged for this conversion of the wife's, *A.*'s title being paramount to the feme's. Vern. 143.

(H) Of her Contracts for Necessaries, and how far the Husband is bound by such Contracts.

IT is clear that a husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink, clothes, physic, *&c.* suitable to the husband's degree, estate, or circumstances: it seems also settled that the wife is not to be her own carver, and that she hath not an absolute power of binding the husband by any contract of her's, though for necessaries, without his assent, precedent or subsequent: the law therefore in these cases, as it seems established by usage and practice, is to leave it to the jury to find whether the husband consented or not; and though no express consent or agreement of his be proved, yet if it appears that she cohabited with her husband and bought necessaries (*a*) for herself, children, or family, the husband shall be chargeable, and the jury may find, on their oaths, that they came to the husband's use, he being by law obliged to provide for them: also if she cohabits with her husband, and is ever so lewd, he shall be liable for her necessaries, for he took her for better for worse; so if he runs away from her, or turns her away, or forces her by cruelty or ill usage to go away from him; but if he allows her a separate maintenance (*b*), or prohibits (*c*) particular persons from trusting her, he shall not be liable during the time that he pays such separate maintenance, nor for necessaries taken up of those persons particularly 11 H. 6. 30. Fitz. Debt, 41. Brownl. 47. All. 61. Lit. R. 307. Hutt. 105. Jenk. R. 4. Roll. Abr. 350, 351. Sid. 109, 110, &c. Mod. 128. 2 Vent. 155. Keb. 69. 80. 87 2 Vent. 42. Lev. 4, 5. Salk. 116. 118. pl. 10. 2 Ld. Raym. 1006. 6 Mod. 171. 2 Show. 283. Skin. 348. pl. 17. [1 Term R. 5. 1 H. Black. 334. 348. Co. Bank. Laws, 32. 36. See 2 Bro. Chan. R. 377.

Fontbl. Notes on Eq. Tr. 100. (*a*) But the contract in such case will not avail, if made under illegal circumstances.

particularly prohibited; for in these cases no consent, but rather the contrary, appears; but a general warning or notice in the *Gazette*, or other newspaper, not to trust her, is not a sufficient prohibition. Also the jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered, and give a verdict, and assess damages accordingly.

2 Stra. 1122. (*b*) Or if she goes away with an adulterer, whether the tradesman have notice of it or not. 1 Stra. 647. 706. 2 Stra. 875. 1 Salk. 119. See 2 Black. R. 1079. (*c*) But if he turns away his wife causelessly, he will be liable, notwithstanding a particular prohibition. 2 Stra. 1214. — Where the husband claimeth to be discharged from liability to his wife's debts, in respect of her having a separate maintenance, it seemeth that it must be a provision proceeding from himself, and not from a third person. 4 Burr. 2177. ‖*Sed vide* Liddlow v. Wilmot, 2 Stark. R. 86. *cont.*‖ The modern cases with respect to a separate maintenance have gone very far: for it hath been lately adjudged, that the wife may in such case contract and be sued as a feme sole; that she continues liable, though she alien or exhaust the whole of the distinct fund; that the husband is not liable even for necessaries; and that the second husband is accountable for debts contracted during the state of separation from a former. Corbet v. Poelmitz, 1 Term R. 5.] ‖Ringstead v. Lady Lanesborough, and Barwell v. Brooks, Cook's B. L. 28. 31. in opposition to two former cases. 2 Black. 1074. *Id.* 1195. But the old law on the subject is now re-established; and it is settled that a feme covert, though separated from her husband, and having a separate maintenance, cannot be sued for necessaries, although the husband, by reason of the maintenance allowed, be discharged from responsibility. Marshall v. Rutton, 8 Term R. 547. And it is the same although the husband be domiciled and resident in a foreign country. Marsh v. Hutchinson, 2 Bos. & Pull. 226. Boggett v. Friar, 11 East, 301. Farrer v. Granard, 1 New R. 80. Unless in case of the wife of an alien who has never been in this country. Kay v. Duchess de Pienne, 3 Camp. 123. De Gaillon v. L'Aigle, 1 Bos. & Pull. 357. And so although the wife be divorced *à mensa et thoro*, still, the relation of marriage subsisting, she cannot be sued as a feme sole. Lewis v. Lee, 3 Barn. & C. 291. Hookham v. Chambers, 3 Bro. & Bing. 92. Fairthorne v. Blaquiere, 6 Maule & S. 73. Ellah v. Leigh, 5 Term R. 679. But if the husband be banished or abjure the realm for life she may be treated as a feme sole. Belknap's case, Weyland's case, Co. Litt. 133. Wilmot's case, Moor R. 851. Newsome v. Bowyer, 3 P. Wms. 37. Sparrow v. Carruthers, cited 2 Black. R. 1197. Or if he be transported for years. Carroll v. Blencow, 4 Esp. Ca. 27. But *quære*, Whether she can be so treated after the term of transportation is expired, and the husband not returned. 2 Bos. & Pull. 233. Though a woman has held herself out as a feme sole, she is not estopped from setting up coverture as a defence. Davenport v. Nelson, 4 Camp. 26.; and see 3 Camp. 393.‖

But the learning on this head will be best explained by inserting the celebrated case of *Scot* and *Manby*, with my Lord Chief Baron *Hale*'s argument at length.

Manby and Scot, adjudged in the Exchequer-chamber on a special verdict, by eight judges; against three but *Atkins*,

A woman departs from her husband without his consent, and during her absence the husband prohibits several persons, and among the rest *J. S.* to trust her; and after, she makes a request to cohabit again with her husband, and he refuseth to receive her; and yet *J. S.* sells to her silk and velvet to the value of 40*l.* which is found suitable to the degree of her husband: the husband shall not be charged.

one of the eight, agreed with the three if there had been no special prohibition; and *Bridgman* C. J. one of the eight, held, that admitting otherwise, *viz.* that the husband was liable, yet he might make such special prohibition to a particular person, and it would excuse him. 1 Sid. 109, 110, &c. and 1 Mod. 128. 1 Lev. 4, 5. 1 Keb. 69. 80. &c. S. C.

Lord Chief Baron *Hale*'s argument in the Exchequer-chamber, in the case of Manby v. Scot.

1. I will say something of the nature of contracts.

2. I will apply it to our case, in consideration of the verdict, as it is found.

3. I will shew in what particulars we all agree, and where we differ, and so state the question.

4. I

4. I will speak to the question as it shall be so stated.

1. A contract is the consent of two or more, whereby to bring in an obligation of one to the other; and the parts requisite to such a contract, are 1st, parties; 2dly, consent; 3dly, an obligation.

1st, It is requisite that the parties be not disabled to contract; and as to that, in law some are disabled to contract *quoad hoc* and *ex parte*, as an infant, *non compos*, *&c.*, and some have an absolute disability; as a feme covert, who can no way in our law contract.

2dly, As to the consent, that must be either express, or implied; express must be either precedent, concomitant, or subsequent; implied is raised by law; as where a man is made bailiff, steward, or housekeeper, a general authority is given him; when goods come to a man's use, he having had notice of the contract; it is an assent the law will imply, and make the contract oblige him; and if either of these had been found in this special verdict, it had been well; for then there had been fact enough for the law to have made construction upon. There is, besides all this, evidence of a consent in fact, which must induce a jury, if there be no circumstances against it. As if I send a servant always with ready money, and he buys upon trust, here is no evidence; but if I usually send him upon trust, and where he takes up goods I stand to his bargain, and pay for them, this is evidence that I would have all the world trust him; and this a jury may apply to make a consent to any particular contract; but then they must find the assent in fact; for that which is the evidence to them we cannot judge upon.

3dly, As to the obligation, it is necessary that this be upon the party consenting. I know that in some cases the obligation of a contract may be transferred by way of concomitancy; as to the husband, it is carried with the chattels and person of the wife; and it lies upon the heir and executor when they have assets; but for a man to be originally bound by a contract, it is necessary that there be his consent; and the consent of no other person will serve.

2. To consider what is in the verdict, and apply what has been said to it: I find in it no assent of the husband's found, nor any authority he gave his wife, but only matter of evidence. I confess, that when a wife, though not particularly appointed, contracts for necessaries for herself, her family, her husband, or her children, this is great evidence to a jury to make them find the assent of the husband; for it cannot be reasonably thought that any man would be so barbarous as to deny his assent to have the necessities of his family supplied; and so it may be believed and found he did assent; but this only in case of cohabitation; for it may be well imagined, that when a wife leaves her husband, that he may refuse to supply her; and so in the verdict, this matter of evidence is answered, by finding, that she departed from him: but then there is an answer on the other side, that she afterwards, and before this contract, desired to cohabit with him;

to

to this it is replied again, with a flat bar to any evidence that can be given of an assent, *viz.* that the husband did expressly prohibit those tradesmen to trust her: the judges, in their directions to a jury, direct them to be guided by such evidence of an assent when nothing appears to the contrary; because it would be very hard in point of proof to shew express evidence of assent to every particular; but when there is an express prohibition or denial of assent, this takes off all the circumstances of evidence on the other side.

3. I am to shew in what points we all agree, and where we differ.

1st, We all agree that it is not the contract of the wife's to bind her; for in our law she hath no will, nor power to bind herself; the civil law, as it allows her a property distinct from the husband's, so it gives her power to bind herself by contract.

2dly, It is agreed on all hands the wife ought to be maintained; the civil law, though it allows the wife a separate property, yet the husband ought to maintain her out of her dower: it is more necessary for the common law that takes away all property from her to make provision for her subsistence, else that which we pretend to be the most reasonable and provident law in the world, would be the most barbarous; but in this we differ. It is said by those who argue that the husband should be charged, that she may be maintained by a power the law gives her to charge her husband by way of contract, which is altogether denied by us.

3dly, We all agree that when the wife contracts for the necessaries of her husband, children, or family, that this shall not charge him by any inherent power in the wife, but by a reasonable and implicit assent, which must be found by a jury, but we differ in the charging him; when she contracts for the supply of her own necessities, we say it is not by a power she has, but there must be his consent, either express or implied. Secondly, We confess, that in case of cohabitation, there is great evidence of his assent, till the contrary appears; but it is not so binding as will amount to a presumption. Thirdly, Therefore we say it must be found by the jury. Fourthly, That it is countermandable by prohibition, where it is said on the other side, and must be maintained, else they can make nothing of the case, that there is in the wife, upon the intermarriage, an original, inherent, primogenial, and uncountermandable power to charge the husband for her necessities, which the husband can no ways repeal, though there be no cohabitation or consent, but an express prohibition, and this is the true state of the question betwixt us; if there be such a power in the wife or no, independent upon any consent of the husband's. I shall consider,

1st, If there be such a power during cohabitation? 2dly, If for necessaries? and here I shall make a second question, If there be such a finding of necessaries as is requisite in a verdict? 3dly, If the departure make nothing in the case? 4thly, Admitting all this, whether it be countermandable *quoad* one man?

1st. I

1st, I shall hold there is no such power in the wife; my reasons are,

1st, By the law of God, of nature, of reason, and by the common law, the will of the wife is subject to the will of the husband; and therefore an indictment for being a joint-receiver with her husband was holden ill; but if the law were with those who argue on the other side, this would be inverted, and the will of the husband would be subject to the will of the wife.

2dly, Because no man can be originally bound in a contract, but by his own consent.

3dly, To prove the law on their side lies upon them, which they have not, nor any ways can do, (there being but one semblance of an authority they can allege, which is 11 H. 6., which is the opinion of Judge *Martin*, and must be intended by way of evidence;) but they say, they prove it by reason and inconvenience.

1. I answer, *Argumentum ab inconvenienti* will not change or alter the law when it appears to be so; but it is only to prove and interpret the law when we are in doubt whether it be so or no.

2dly, I answer, The inconvenience of the other side outweighs, and is far greater, for it will bring into the law a manifold incertainty.

1. What things are necessary, what kind of necessity, and when and how often this necessity may happen; as if the husband should give the wife clothes, and she give them away the next day, she is in as much necessity the next day as she was before, and *quicquid necessitas cogit debetur*.

2dly, There would be great uncertainty which way she should supply her necessities; as this way, 1. Of taking up goods, and if she can find no credit with the mercer, but has the usurer for her friend, then the law sure that provides against her necessities will give her leave to take up money; and if that fails, it is reasonable that she should sell goods; for the two other ways failing, the law will not let her perish; if there were no goods, then it were as reasonable she might receive rents, which would be against Sir *Paul Tracey* and *Dutton*'s case, Cro. Jac. 621.; and if there were none such, she might raise money upon the demise of the land; if the law will give way to her necessities in the first case, it must yield in all the rest, for the case may else be so that the provision of law would be defective: but I hold, that in none of these cases the wife can provide for herself; but say, there must be a trust somewhere; as a father is bound by the law of nature to provide for his son, and the son is bound to provide for the father, but the law will not give the one leave to oblige the other by way of contract; because the law supposes that they will not be so unnatural, and intrusts them with it, *viz.* before the 43 Eliz. for the poor. If this trust must be somewhere, the husband knows best how to manage affairs, and so is fitter to be intrusted by the law than anybody else: I add, that although

although the law will not presume so much ill as that a husband should not provide for his wife's necessities, yet there is a severe obligation on him, not only to supply her in case of exigencies and extreme necessity but according to conveniency; but the law has not made her her own judge, but provided her a judicature sufficient to reform the close-handedness of her husband: where she is driven to an extreme necessity and want of subsistence, the law has appointed a judge to compel the husband to supply her, I mean the Chancellor; for, upon a *supplicavit* he may be bound to the peace, and *benè et honestè tractare*; which I hold not to be understood only that he must use her gently, and forbear beating her, but that he must supply her exigencies. Then, for her conveniences, the law has appointed the bishops' courts. And whereas it is said, that this is not the common law, I answer, that they are jurisdictions appointed by the common law; and though their coercion and proceedings are after another law, yet their derivation, as to their use here, was from the common law; and concerning the amplitude of their power, which is said not to be able to administer a remedy sufficient for this disease, I say, as it is aided by the *brachium seculare*, the power of it falls as severely upon them that disobey it as the common law can use when men will not pay their debts; for they may excommunicate, and upon that follows imprisonment, and a disability to sue any action.

The second objection made on the other side, by comparing the case of a feme covert with the case of an infant; but I answer, an infant is disabled only *quoad hoc*, and may oblige himself for necessaries; but here the wife would bind her husband also; in the case of an infant there is nobody intrusted by the law to provide for him (for guardian in socage is only where there is land) immediately, and therefore he must do it himself; whereas, the husband is intrusted for the wife; so the cases are not parallel.

3dly, It is objected that it comes to the use of the husband; I answer, it would then bind the husband in superfluities, which may so come to his use; which how inconvenient, I leave any man to judge.

4thly, It is objected, that the husband is bound by the wrongs of his wife, and may be charged in trover and conversion upon her act; I say, that in case of a wrong she binds herself, for she must be joined in the action, and so she will be more careful not to subject herself, than when the husband is charged alone; but I hold, that in this case no trover and conversion lies; for the delivery of the party, knowing the fact, and intending a sale and contract, translates the property at the peril of him that delivers them. If a man knows one to be an infant, and sells him goods, it is at his peril; for if they be not necessaries, he shall never charge the infant for the conversion: and so of a feme-covert, if there be no consent of the husband; for it has been holden, that what the wife eats or wears comes to the use of the husband, and will maintain a conversion; and if the law should not be taken thus, we should let in a flood of inconveniences, which would

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make all those disabilities the law has raised for the protection of infants and feme-coverts, mere words and of no effect.

2dly, I shall lay no stress upon the imperfect finding of the verdict, lest it might be said that that was the reason of the judgment; but only name some particulars wherein it seems to be imperfect. 1. They should have found what the stuffs were; for it hath been adjudged, that velvets were not necessary for an infant; they ought to have found the circumstances of the necessity; as where manslaughter is committed *se defendendo*, or in execution of an office; they should have set forth of what kind the necessity was, as there is a necessity of clothes, of meat, of medicine, and of habitation; they have found that these goods were necessary and convenient for his degree, they should have said also for his estate; for a high degree may have a low estate, and then the wife cannot expect to be maintained according to the height of her husband's degree; but I lay no hold on these defects in the verdict.

3dly, Upon her departure all evidence of any obligation of the husband to maintain her ceases; it would else be very unreasonable; for whilst they are both in one house, the same provision will serve for both. In case of a bailiff, if he goes away, no contract of his will bind the master, though he had no express discharge; and here we must presume some unreasonable cause of her departure; for a wife in no case ought to do it, and she might have had alimony without any separation. Moor, 874.

4thly, Admitting all this, I hold that the prohibition here takes away all presumption of any consent of the husband to the contract, either express or implied; and though the wife should be allowed such a power to charge her husband as is affirmed on the other side, yet it may be discharged as to one particular man, by the prohibition and countermand of the husband; it would be a very hard case else; for she may make him liable to the greatest enemy he had in the world. 12 E. 4. 18. The king may grant to *J. S.* to be exempt of juries; but if he grants it to a whole county, hundred, or township, the grant is void; and by this prohibition of the husband here is no discharge of the whole power, but only it is taken of those particular persons. If a man enters into an obligation not to use his trade, it is against law, and void; but if it be not to set up his trade in such a street or town, it is good.

Note: He added, that as to charging the husband by way of evidence, which he had restrained to cohabitation, he said, the law is the same where the husband departs from the wife; as upon going beyond sea, *&c.*

‖In the case of *Manby* v. *Scot*, *supra*, the wife departed without the husband's consent (*a*); but if the husband, without justifiable cause, turn her out of doors, he cannot avoid his liability for necessaries supplied to her, either by a general advertisement to tradesmen not to trust her, or by a particular notice to an individual; for when he turns her out, he sends her with credit for her reasonable expenses.

Harris v. Morris, 4 Esp. Ca. 41.

(*a*) If the husband does not assent to the wife leaving his house and living separate,

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it seems he cannot be made liable to her debts, although she may have left him in pursuance of a deed previously made, by which they had agreed to separate. Hindley v. Marquis of Westmeath, 6 Barn. & C. 200.; and see Westmeath v. Westmeath, 1 Dow. P. Ca. N. Ser.

3 Esp. Ca. 251. Boulton v. Prentice, 1 Sel. N. P. 264.

And if the wife's situation is rendered unsafe by his cruelty and ill treatment, it is equivalent to turning her out of doors. 1 Esp. Ca. 441.

Aldis v. Chapman, 1 Selw. N. P. 363.; and see 2 Stark. 87.

Lord *Ellenborough* decided in one case, that if a man, by bringing another woman under his roof, rendered it unfit for his wife's residence, he was liable for necessaries on her leaving him.

Horwood v. Heffer, 3 Taunt. 420.

But it was afterwards held by the Court of Common Pleas, that no ill treatment short of personal violence, or such conduct as to induce a fear of it, would entitle a stranger to sue the husband for necessaries furnished the wife on her leaving him.

Houleston v. Smith, 3 Bing. 27., where the case in 3 Taunt. 420. was disapproved by the court.

If the jury decide that the wife had reasonable ground to apprehend personal violence, the husband is liable. If the wife were justified in leaving him, he cannot determine his liability by merely requesting her to return. Emery v. Emery, 1 Young & J. 501. If the wife lives separate, it lies on the tradesman suing to shew that the separation was such as to justify her binding her husband for necessaries. Mainwaring v. Leskel, 1 Moo. & M. 18.

Liddlow v. Wilmot, 2 Stark. Ca. 86.; and see Clifford v. Laton, 1 Moo. & M. 101.

If the wife, living separate from her husband, without any fault of her own, has funds at her command, the question is, whether they are adequate to her support; if they are, (whether derived from the husband or not,) that circumstance repels all idea of an implied credit from the husband, and he is not responsible for her debts.

1 Stra. 647. 2 Stra. 707. Govier v. Hancock, 6 Term R. 603.

If the wife leave the husband and commit adultery, he is not liable to provide her necessaries; but if he voluntarily pardon her and take her back, he becomes again liable. Harris v. Morris, *supra*. See Rex v. Flintam, 1 Barn. & Adol. 287.

Norton v. Fazan, 1 Bos. & Pull. 226.

And though, in general, her adultery discharges the husband, yet if the husband leave her in possession of his house with her adulterer, with children bearing his name, he will be liable for necessaries furnished under such circumstances to the wife and children; for the suffering her to remain in the house, enables her to procure credit.

Robinson v. Nation, 1 Camp. R. 245.

If a man cohabits with a woman, holding her out as his wife, he is liable for her debts as if she were his wife. Munro v. De Chemant, 4 Camp. 215.

But if a woman takes up goods, and pawns them before they are made into clothes, the husband shall not pay for them, because they never came to his use; *secùs*, if made up and worn and then pawned. Salk. 118. pl. 10. If she pawns

Since the resolution in *Manby* v. *Scott*, there have been several cases in which tradesmen have recovered in actions brought against the husband for goods delivered the wife; and in all these cases the judges have laid down the distinction of an implied promise, and directed it as a sufficient foundation to charge the husband; and in their directions, have shewn as much favour as possible to such tradesmen as intrusted her on the credit of her husband, and were in no combination with the wife to charge him.

pawns her clothes, and borrows money to redeem them, husband not liable. 2 Show. 283. If husband and wife by agreement live separate, and she has a separate maintenance, it will be presumed that those who deal with her trust her on her own credit. Salk. 116. pl. 6. Ld. Raym. 444. Sid. 124. 12 Mod. 245. 6 Mod. 171. *Vide* Skin. 348. pl. 18. Warning a tradesman's servant not to trust her, sufficient warning to the master. Salk. 118. pl. 10. 2 Ld. Raym. 1006. A tradesman who sold lace and silver fringes for a petticoat and side-saddle, which amounted to 94*l.*, and all within four months, to the wife of a serjeant at law, afterwards a judge, recovered against him. Morton v. Withens, Skin. 348.

¶As the husband's liability is grounded on an implied authority to the wife to contract the debt, it is removed where the circumstances rebut the presumption of such an authority. Cohabitation raises a presumption of the husband's assent and authority to contract debts for necessaries. In considering the question of authority, the estate and degree of the parties is a fit subject for consideration; and so also is the nature of the articles. The question, what are and are not necessaries, according to the degree and estate of the parties, is a question for the jury. If there are any circumstances to shew an assent by the husband, it is a question for the jury, whether the debt was contracted under his assent, or not; but if there is no evidence of assent, the plaintiff will be nonsuited. If the goods are not necessaries, the burden of shewing an assent by the husband lies on the plaintiff.

The plaintiff, a jeweller, in the course of two years, delivered jewellery to the wife of defendant, to the value of 83*l.*, the defendant being a special pleader, living in a ready-furnished house at 200*l.* rent, and keeping no man servant, having received less than 4000*l.* fortune with his wife, and she having had jewellery on her marriage sufficient for her condition; it appeared that the wife had never worn any of the articles in the presence of the defendant, and that the plaintiff, on calling for payment, had always asked for the wife, and not for the defendant; the court held, that the articles could not be considered necessaries, and that there was no evidence in the circumstances, to go to a jury, of an assent by the husband to the contract; and consequently the plaintiff was nonsuited. Montague v. Benedict, 3 Barn. & C. 631.

If the husband and wife are not cohabiting, the husband, in general, is only liable for necessaries supplied her; but even where they are parted, if the husband sees the goods supplied to her, and does not have them returned, he adopts her act and renders himself answerable. Waithman v. Wakefield, 1 Camp. R. 119.

And if a husband permits his wife to assume a style and appearance in life above her real station, he is liable for necessaries suitable to such apparent condition; but if a tradesman, in such case, neglect to make proper enquiries, by which he might have ascertained the real situation of the parties, he cannot claim of the husband for any thing beyond necessaries suitable to their real condition. Hunt v. De Blaquiere, 5 Bing. 550.

And if a tradesman has notice of circumstances which rebut any assent to the wife's contracting the debt, he cannot come upon the husband even for necessaries. Thus, where the tradesman had notice of the husband making the wife an allowance for Holt v. Brien, 4 Barn. & A. 252.

the supply of herself and family with necessaries during his temporary absence; it was held, that he must be considered as trusting the wife alone.

Bentley v. Griffin, 5 Taunt. 356. Metcalfe v. Shaw, 3 Camp. R. 22.

And where the goods are not necessaries, and it appears from circumstances, such as debiting the wife in the tradesman's books, her acceptance of bills, or giving a note for the goods, &c., that the credit was given to the wife only, the husband will not be liable, although he may be living with his wife.

And whether the credit in such case be given to the wife or to the husband, is a question of fact for the jury.

Peters v. Anderson, 3 Bing. 170.

Where a wife carried on business on her own account during the imprisonment of her husband, and he returned to live with her after his discharge; it was held, that he was liable for articles furnished in this business with his knowledge after his return, though the invoices and receipts were in the name of the wife, and she was rated to and paid the poor's and paving rates.

Seaton v. Benedict, 6 Bing. 28.

And if the husband supply his wife with necessaries, he is not liable for debts contracted by her without his previous authority or subsequent assent.‖

Salk. 118. pl. 11. Ruled on evidence.

An ordinary working man married a woman of the like condition, and after cohabitation for some time, the husband left her, and during his absence the wife worked; and this action being brought for her diet, it was holden, that the money she earned should go to keep her.

Vern. 71. [At law a wife cannot make her husband liable for money *borrowed*, though lent and applied

If the wife, whilst she lives separate from her husband, and hath a separate maintenance, buys goods of tradesmen who know of the separation and maintenance, they cannot sue the executors of the husband in Chancery for these goods; neither will equity give the executors any relief, because they have a very good defence at law.

for the buying of necessaries. 1 Salk. 387. But in equity the creditor will be] allowed to stand in the place of the tradesman, and to have satisfaction as far as they could if they had been plaintiffs. Preced. in Chan. 502. 1 P. Wms. 482. Where equity will decree a wife a separate maintenance, *vide* Abr. Eq. 68. [There certainly are cases where equity has decreed alimony to the wife; but whether the decrees proceeded upon a previous divorce in the Ecclesiastical Court, or upon an agreement between the parties, in many cases doth not appear. Lasbrook v. Tyler, 1 Chan. R. 24. Ashton v. Ashton, *Id.* 87. Russell v. Bodwill, *Id.* 99. Whorewood v. Whorewood, *Id.* 118. 1 Chan. Ca. 250. But it is observable, that all these cases, except that of Lasbrook v. Tyler, were during the times of the troubles, when commissioners were appointed, to whom jurisdiction was expressly given, and whose decrees were holden to be confirmed by the act for the confirmation of judicial proceedings. 1 Chan. R. 118. In Nichols v. Danvers, 2 Vern. 761., proceedings had been had against the husband, as appears from the registrar's book (though not noticed in Mr. Vernon's report), in the Ecclesiastical Court, *propter sævitiam;* and in Oxenden v. Oxenden, it appears from Gilbert's report of it, that there had actually been a divorce *propter sævitiam;* and in Angier v. Angier, Gilb. Eq. R. 172. there was an agreement. But in Williams v. Callow, 2 Vern. 752., the court certainly does appear to have decreed the wife a separate maintenance out of a trust fund, on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or agreement that the fund in dispute should be so applied. And in Watkyns v. Watkyns, 2 Atk. 96., the husband having quitted the kingdom, Lord *Hardwicke* decreed the wife the interest of a trust-fund, till he should return and maintain her as he ought. Yet in Head v. Head, 3 Atk. 547., Lord *Hardwicke* observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even then unwillingly; and this opinion of Lord *Hardwicke* appears most reconcilable to principle; for the case of a divorce *propter sævitiam*, may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt but that courts of equity

equity may, concurrently with the Spiritual Court in proceeding upon it, decree a separate maintenance. Wood's Inst. 62. Sealing v. Crawley, 2 Vern. 386. Guth v. Guth, 3 Bro. Chan. R. 6. ‖But it seems the court will not enforce such agreement if made between the husband and wife alone. Legard v. Johnson, 3 Ves. 352. St. John v. St. John, 11 Ves. 532. Elworthy v. Bird, 2 Roper, 298.; though it is otherwise where the husband agrees with a trustee for the wife. *Id.*‖ The Spiritual Court, however, would be the more proper jurisdiction, if it acted *in rem*. Lit. R. 98. 2 Atk. 511. But if after an agreement between husband and wife to live separate they appear to have cohabited, equity will consider the agreement as thereby waived. Fletcher v. Fletcher, Mich. 1788. ‖Durant v .Titley, 7 Price, 577. Hindley v. Marquis of Westmeath, 6 Barn. & C. 200. Westmeath v. Westmeath, 1 Dow. P.C.N.S. 519. *acc.*‖ It is observable, that if courts of equity had an original and concurrent jurisdiction with the spiritual courts, it would have been unnecessary to have given the commissioners during the troubles such jurisdiction; and that the doubt in 1 Chan. R. 118. could not have been raised respecting the validity of their decrees after the act for confirming judicial proceedings. Besides, even in the spiritual courts they do not pretend to the right of decreeing alimony, but as incidental to a decree of divorce; and a decree of divorce or separation was never suggested to be within the jurisdiction of a court of equity. Fonbl. notes on Eq..Tri. 96, 97. And Lord Chancellor *Loughborough* is reported to have said, that he took it to be established law that no court, not even the Ecclesiastical Court, hath any *original* jurisdiction to give a wife separate maintenance. It is always as *incidental* to other matter that she becomes entitled to a separate provision. If she applies to the Chancery upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that the Chancellor will allow her a separate maintenance. So in the Ecclesiastical Court, if it is necessary for a divorce *à mensâ et thoro propter sævitiam*. 2 Ves. jun. 195.]

‖It is now settled, that if a husband, living separate from his wife, whether by a deed of separation or otherwise, allows her an adequate separate maintenance, and regularly pays it, he is not liable for her debts; and the adequacy is a question for the jury under all the circumstances. And it appears not necessary that the creditor should have notice of the separate maintenance in order to discharge the husband. Nurse v. Craig, 2 New R. 148. Houlgkinson v. Fletcher, 4 Camp. R. 70. Ozard v. Darnford, 1 Selw. N. P. 261. Turner v. Winter, *Ibid.* *Sed vide* 3 Esp. Ca. 250. that notice *is* necessary.

A pension enjoyed during pleasure from the crown, by the wife, has been held not to exempt the husband from such liability. Thompson v. Hervey, 4 Burr. R. 2177.; but see 2 Stark. Ca. 86. that the provision, if adequate, need not be derived from the husband.

Nor will an absolute transfer by the husband, to trustees for the wife, of personal property, unless the husband shews that the trustees have given effect to the deed by taking possession. Barrett v. Booty, 8 Taunt. 548.

Though the wife be living separately on a separate maintenance, if the husband promise to pay a debt contracted by her he is liable for it. Hornbuckle v. Hornbury, 2 Stark. 177.

The deed of separation, in order to be valid, must provide for an immediate, and not for a future separation at the will of either party. St. John v. St. John, 11 Ves. 526.; and see Durant v. Titley, 7 Price, 577. Hindley v. Westmeath, 6 Barn. & C. 200. Westmeath v. Westmeath, 1 Dow. P. Ca. N. S. 519.

Though where the deed made provision for any future separation, that should take place with the *approbation of the trustees*, the court held it legal on the ground of such approbation being required. Rodney v. Chambers, 2 East, 283.

If the maintenance is covenanted to be paid to the wife during her life, she is entitled to receive it although she may commit adultery, and although she may be divorced *à mensâ et thoro*. Durant v. Titley, 7 Price, 577. Jee v. Thurlow, 2 Barn. & C. 547. Hindley v. Westmeath, 6 Barn. & C. 200. Field v. Serre, 1 New R. 121.

Hunt v. De Blaquiere, 5 Bing. 550.

If the husband is separated by a divorce *à mensâ et thoro*, he is liable for necessaries supplied to his wife unless he pay the alimony decreed.‖

(I) What Acts done by the Husband or Wife alone, or jointly with the Wife, shall bind the Wife; and herein of her Agreement or Disagreement to such Acts after the Death of her Husband.

Roll. Abr. 346, 347. 2 Inst. 510. 10 Co. 42. Sid. 11. [In equity the wife's consent is necessary to the disposal of her personal estate; and she is personally examined in court as in the case of fines levied at law.]

THE husband, as head and governor of the family, hath an absolute power over the chattels real and personal which he is possessed of in right of his wife, to dispose of them as he thinks proper, and no act of concurrence of her's is of any avail, either in confirming or controlling such disposition: but the real estate is under a different regulation, and not under the power of the husband, longer than during the coverture; and therefore any disposition of it made by him alone may be defeated; also all charges laid on it by him, fall off with his death.

2 Inst. 681. (*a*) If she neglects to enter within five years after the death of her husband, and the fine was with proclamation, her entry is taken away, and her right for ever extinguished.

At common law, any alienation made by the husband of the wife's land, whether by feoffment, (*a*) fine, or recovery (*b*), was a discontinuance; and after his death she was put to her *cui in vita*, to reinstate herself; but now by the statute of 32 H. 8. c. 28. it is provided, *that no fine levied by the husband alone, of lands, being the freehold and inheritance of the wife, shall in any wise be or make a discontinuance, or be otherwise prejudicial to her or her heirs; but that the wife and her heirs shall and may lawfully enter into the said lands according to their rights and titles therein.*

For this *vide* Co. Lit. 326. Dyer, 72. 162. Plowd. 373. 8 Co. 72. 2 Inst. 681. 9 Co. 140. If lands be given to husband and wife, and the heirs of their bodies, and the husband alone levies a fine thereof, the wife may enter after his death by force of this statute. 9 Co. 138. 2 Inst. 681. Cro. Car. 477. (*b*) That a recovery suffered by the husband alone is void, *vide* F. N. B. 468. Booth, 185. 2 Inst. 543. Plowd. 57. [The husband alone may make a tenant to the præcipe. *Vide suprà* (C).]

Bro. tit. Fines, 33. 10 Co. 43. Hob. 225. 7 Co. 8. Co. Lit. 46. If a feme covert, as sole, levies a fine executory, and execution is sued against the husband and wife, he may stop the execution, because no act of her's can prejudice him; and if in this case the husband makes default, and she is received, she may for the benefit of her husband disturb the execution of her own fine; but after the death of her husband she cannot avoid it. Bro. tit. Fine, 79. Co. Reading, 9. [An entry by the husband into part only of the land, whereof the wife alone levied a fine, will avoid the whole fine. Mayo v. Combes, 1 Freem. 396. There is one instance of a married woman being allowed to levy a fine without her husband. The husband had sold lands,

If a feme covert levies a fine of her own inheritance, without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death to restore himself to his tenancy by the courtesy; because no act of a feme covert can transfer that interest which the intermarriage hath vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it.

lands, and covenanted that he and his wife (when of age) should levy a fine. When the wife came of age she refused to join in it; but it was levied by the husband alone, who afterwards went abroad. The wife afterwards consented to levy it, but the husband was absent. It was said, upon motion to levy it, that it had been usual in such cases for the cursitor to make out a *præcipe* to the wife as a *feme sole;* but no example of it was produced. The court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the lord chief justice, then in court. Moreau's case, 2 Black. R. 1205.]

If a husband and wife join in a fine to convey her own inheritance, it ought to be received, if, upon her (*a*) examination it appears to be voluntary and free from constraint; and if she be of full age, the fine shall bind her as if she had been sole. 18 E. 4. 12. Roll. Abr. 347. 2 Roll. Abr. 20. 2 Inst. 515. 3 Atk. 712.

(*a*) *Note:* The books which say, that a fine shall not bind a woman under coverture, unless she be examined, must not be construed as if it were in her power to reverse the fine for want of her examination; but they are to be understood in this sense, that the judge ought not to receive a fine without examining her. 2 Inst. 515.

The examination of a feme covert is not always necessary in levying fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife take an estate by the fine, and part with nothing, the feme need not be examined: but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore, if *A.* levies a fine *come ceo* to baron and feme, and they render to the conuzor, the feme shall be examined; so it is where she takes an estate by the fine, rendering rent. 2 Inst. 515. 2 Roll. Abr. 17.

If husband and wife levy a fine, and the wife is within age, they may join in a writ of error to reverse it during the minority of the wife, not by any privilege of coverture, but because, during her state of infancy, no act of her's can be so obligatory as not to be cancelled, if she thinks it prejudicial to her. F. N. B. 21. Leon. 15. 3 Lev. 36. But for this *vide* head of *Fines and Recoveries.*

If a man makes a jointure on his wife, either before or after marriage, and they both join in a fine, she is bound thereby; and if the jointure was made before marriage, she is barred to claim dower in any other lands of the husband's: but if the jointure was made during coverture, she may claim dower in the other lands. Co. Lit. 36. Dyer, 358. For this *vide* tit. *Jointure.*

If baron and feme by fine *sur concessit* grant land to *J. S.* for 99 years, and warrant the said land to *J. S.* during the said term, and the baron dies, and *J. S.* is evicted by one that hath a prior title, he may thereupon bring covenant against the feme, notwithstanding she was covert at the time when the fine was levied. 2 Sand. 177. Sid. 466. S. C. Mod. 290. 2 Keb. 684. 703. Wotton and Hale.

A recovery, as well as a fine by a feme-covert, is good to bar her, because the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law, that this is done by the coercion of her husband, for then it is to be presumed they would have refused her. 10 Co. 43. 2 Roll. Abr. 395.

But if a wife alone, or with her husband, bargain and sell her lands by deed indented and enrolled, yet it shall not bind her; 2 Inst. 673 Hob. 225.

for a wife cannot be examined by any court without writ, and there is no writ allowed in this case.

But where the money shall be paid out of the

If a feme covert join with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her. personal estate of the husband, *vide* Brend v. Brend, 1 Vern. 213. [If a wife charge her estate with payment of her husband's debts, or apply her separate estate to such purpose, and it do not appear to have been intended by her as a gift to her husband, equity will decree the husband's assets to be applied in exoneration of her estate, or in repayment of the money advanced. Earl of Huntingdon v. Countess of Huntingdon, 2 Vern. 147. 1 Bro. P. C. 1. S. C. Pocock v. Lee, 2 Vern. 604. Tate v. Austin, 2 Vern. 689. 1 P. Wms. 264. S. C. Bagot v. Oughton, 1 P. Wms. 347. Evelyn v. Evelyn, 2 P. Wms. 659. Lewis v. Nangle, Ambl. 150. Earl of Kinnoul v. Money, cited in 3 Bro. Ch. R. 206. Clinton v. Hooper, 3 Bro. Ch R. 201. Parteriche v. Powlet, 2 Atk. 384. Lecam v. Mertins, 1 Ves. 315. Astley v. Earl of Tankerville, 3 Bro. Ch. R. 545.] But for this *vide* head of *Mortgage*. Where she shall be bound to a specific performance of her agreements in equity, *vide* tit. *Agreements*, and 2 Vern. 61.

Roll. Abr. 660. Bro. Disseisin, 67.

If a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the disseisin, for the same reason: but her agreement after her husband's death will make her a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee.

Roll. Abr. 660. Bro. Disseisin, 67.

So if a man disseise another to the use of a feme covert, her agreement to it signifies nothing; for though the husband's agreement to it settles the estate in the wife, yet it makes her no sharer in the guilt of the disseisin.

Co. Lit. 357. Roll. Abr. 660. Bro. Disseisin, 15. 67. *Vide* 8 H. 6. 14. *cont.*

But if a feme covert actually enter and commit a disseisin, either solely or together with her husband, then she is a disseisoress, because she thereby gains a wrongful possession; but yet such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because though by such entry she gains an estate, yet she has no power of transferring it to another.

Bro. Acceptance, 10. Bro. Leases, 24. Cro. Jac. 332. 2 Andr. 48. Co. Lit. 45. Plow. 137. Cro. Jac. 563. Yelv. 1. Cro. Eliz. 769. [It hath been holden that a mortgage for years by husband and wife of the wife's inheritance, without any fine levied, may be confirmed by circumstances by

If the husband seised of lands in right of his wife, make a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable: the reason whereof is, that the wife after her intermarriage being by law disabled to contract for, or make any disposition of her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law thereupon transfers the power of dealing and contracting for her possessions to the husband, because no other can then intermeddle therewith; and without such power in the husband they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both: but to prevent the husband from abusing such power, and lest he should make leases to the prejudice of the wife's inheritance, the law has left her at liberty after his death, either to affirm and make good such

such lease, or to defeat and avoid it, as she finds it subservient to her own interest: and this she may do, though she joined in such lease, unless made pursuant to the statute 32 H. 8. c. 28. the wife when discovert, although there be no actual re-delivery of the deed. Goodright v. Straphan, Cowp. 201. But see Drybutter v. Bartholomew, 2 P. Wms. 126.] As to leases made by husband and wife, either at common law or by virtue of 32 H. 8., *vide* head of *Leases and Terms for Years.*

Husband and wife made a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters, the husband before any day of payment dies, the wife takes a second husband, and he at the day accepts the rent and dies: it was holden, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done, for he by the marriage succeeded into the power and place of the wife; and what she might have done, either as to affirming or avoiding such lease before marriage, the same may the husband do after the marriage. Dyer, 159. Roll. Abr. 475. Roll. Rep. 132.

The husband being seised of copyhold lands in right of his wife in fee, makes a lease thereof for years, not warranted by the custom, which is a forfeiture of her estate; yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture: and the diversity seemeth between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of nonpayment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case, the husband cannot forfeit by this lease more that he can grant, which is but for his own life. 2 Roll. R. 344. 361. 372. Cro. Car. 7. Cro. Eliz. 149. 4 Co. 29.

‖By the 9 G. 1. c. 29. it is provided that married women entitled by *descent* or *surrender* to use of a will, who have not been admitted, may be admitted tenants of their copyhold estates either personally or by their guardians or attorneys; and in case of neglect, that the lords of whom the lands are holden may appoint guardians or attorneys for the purpose, and impose and levy the *usual* fines, and receive the same out of the rents of the estate, accounting for the surplus to the persons entitled, and no neglect or refusal to be admitted or pay the fines shall be a forfeiture of the copyhold. 9 G. 1. c. 29.

This statute only applies to the cases of women entitled by descent or surrender to use of a will; and therefore, in other cases not within the statute, the lord may seize the estate until admittance, or enter for a forfeiture if the custom authorize it. Kensington v. Mansell, 13 Ves. 240. Doe v. Hellier, 5 Term R. 170.

If the husband of a copyholder obtain an enfranchisement, and take a feoffment in fee of the lord with livery of seisin, it seems (though it has not been decided) that the feoffment operates only as a release of the services, and leaves the estate descendible as before.‖ Doe v. Jackson, 1 Barn. & C. 448.

Plow. 293. Co. Lit. 351. Roll. Abr. 345.

A woman guardian in socage marries, and joins with her husband by indenture in making a lease for years of the ward's lands, yet after her husband's death she may avoid the same; for though the husband has absolute power to dispose of all chattels, either real or personal, whereof he is possessed in right of his wife, and the wardship of the body, and land in this case is but a chattel; yet the wife being possessed of it in right of the infant, and accountable to him for the profits when he comes of age, the husband's disposition shall not bind her after his death, but that she may avoid it in right of the infant, whose guardian she still continues to be; and her own joining in the lease was not material, because she was then under coverture.

Co. Lit. 3 a. [(a) A bond to her singly is good. Bro. tit. Obligation, p. 36. Testament et Volunt. p. 9. (b) And if he do, he may maintain trover for the recovery of the purchase-money. Garbrand v. Allan, 1 Ld. Raym. 224. The like remedy he may have for money lost by the feme at cards. Rex v. Stevens, cited in 1 Sid. 112. The receipt of money by the feme will be binding upon the husband, if it appear that she *usually* receives and pays money for him. Seaborne v. Blackston, 2 Freem. 178.]

A feme covert is capable of purchasing (a); for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being for his advantage; but the husband may disagree (b); and it shall avoid the purchase: but if he neither agrees nor disagrees, the purchase is good; for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage. But in this case, though the husband should agree to the purchase, yet after his death she may wave it; for having no will of her own at the time of the purchase, she is not indispensably bound by the contract: therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it.

Co. Lit. 112 a. note 6. Peacock v. Monk, 2 Ves. 191. ‖Downes v. Timperon, 4 Russ. 334.‖ Gibbons v. Moulto, Rep. temp. Finch, 346. Sir W. Jones, 137. *Vide* note 6. Co. Lit. 112 a. Fonbl. notes on Eq. Tr. 85. ‖Where husband and wife have a joint power to appoint the wife's estate by formal deed, and they agree to sell it, the agreement is not binding on the woman. Martin v. Mitchell, 2 Jac. & W. 425.‖

[A wife may, without her husband, execute a naked authority, whether given before or after marriage. So where both an interest and an authority pass to the wife, if the authority be collateral to, and do not flow from, the interest; because then the two are as unconnected as if they were vested in different persons. And as a feme covert may, without her husband, convey lands in mere execution of a power or authority, so may she, with equal effect, in performance of a condition, where land is vested in her on condition to convey to others. It seemeth doubtful, however, whether she can convey lands which she holds as trustee without her husband joining in the conveyance.

Connor v. Martin, 3 Wils. 5.

If a note be made payable to a feme sole or order, and she afterwards marry, she cannot, during the coverture, indorse it.]

M'Neilage v. Holloway, 1 Barn. & A. 218.; and see Phillskirk v. Pluckwell, 2 Maule & S. 393.

‖But the husband may sue alone on such bill without its being indorsed; for by the marriage it is absolutely vested in the husband.

Barlow v.

If a note is given to a married woman carrying on trade as a feme

feme sole with her husband's assent, in order to indorse it to the plaintiff one of her creditors, yet the property in the note vests in the husband by the delivery to the wife, and no interest passes to the plaintiff by her indorsement. If she indorsed it in her husband's name, *quære*, whether the jury might presume an authority from her husband for that purpose? Bishop, 1 East R. 432.

If after the indorsement, the maker promise the indorsee to pay it, the maker cannot resist payment on the ground of the wife's want of authority. Cotes v. Davis, 1 Camp. 484.

Where the husband had taken a bond conditioned to pay an annuity to the wife, it was held that the wife without the assent of the husband could not discharge the obligor from certain payments of the annuity, in consideration of his discharging certain debts due from the husband to the obligor. Brown v. Benson, 3 East R. 531.

If the wife without authority from her husband contract with a servant by deed, the servant cannot sue the husband on the covenant, since the wife made it without authority; but the servant may sue in *indebitatus assumpsit* for the work and labour done.‖ White v. Cuyler, 6 Term R. 176.; and see Clifford v. Burton, 1 Bing. R. 199.

[The bond of a feme-covert is void; and so is her appointment of an attorney; for she is incapable of executing a deed.] 2 Wils. 3. 2 Saund. 213.

‖Cutts v. Sansom, 3 Taunt. 261.‖ But if a woman seal a bond in the presence of her husband, and he stand by, and do not gainsay, it shall bind him. Cited *per* Master of the Rolls, as adjudged in the time of H. 8. 2 Freem. 218. ‖As to the will of a feme covert see tit. *Wills and Testament* (B).‖

(K) Where the Husband and Wife must join in bringing Actions.

IN those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in the action; as in recovering debts due to the wife before marriage, in actions relating to her freehold or inheritance, or injuries done to the person of the wife. Roll. Abr. 347. Moor, 432. That a feme covert can in no case sue without her husband, *vide* letter (M).

‖And as it is necessary for the wife to join her husband in an action for a debt due to her before marriage, so also the husband alone cannot be petitioning creditor under a commission of bankrupt in respect of a debt partly due to his wife *dum sola*, and partly to himself since the marriage. Rumsey v. George, 1 Maule & S. 176.; but see *Ex parte* Barber, 1 Glyn & J. 1. Where husband and wife sued for money lent by the wife before marriage, and she died pending the suit, it was held the suit abated. Checchi v. Powell, 6 Barn. & C. 255.

If the wife is joined, her interest must appear on the face of the declaration, or it will be bad. Serres v. Dodd, 2 New R. 409.

If in replevin a joint demise is stated by the husband seised in right of his wife, and his wife, it is disproved by evidence of a receipt for rent given by the husband alone.‖ Parry v. Hindle, 2 Taunt. R. 180.

If a feme sole hath a rent-charge, and rent is arrear, and she marries, and the baron distrains for this rent, and thereupon a rescous is made, this is a tort to the baron himself, and he may have an action alone. (*a*) Cro. Eliz. 459. Owen, 82. S.P. Moor, 584. S.C. (*a*) Or may join his wife therein, because it arises upon a duty due unto her before coverture. Cro. Eliz. 459. *per cur.*

So

2 Bulst. 14. adjudged. (b) The baron seised of a house for life; and, in the right of his feme, leased for years to the defendant, who burnt the house, and the baron alone brought an action for this; and whether it lay *dubitatur*; because the damage was done to the estate of the feme; and if she dies, the baron is not chargeable over in waste, in regard of which only an action lies; because it was the folly of the plaintiff that he made no special provision against waste. Cro. Eliz. 461. —— If *A.* demises a house to *B.* for years, and *B.* covenants to repair the said house during the term, and after *A.* grants the reversion to baron and feme, &c.; the baron may have an action alone upon this covenant; for therein damages only are to be recovered. Cro. Jac. 319. adjudged. 3 Bulstr. 163. Roll. Rep. 359. S.C. adjudged.

So if a feme sole hath right to have common for life, and she takes husband, and he is hindered in taking the common, he may have an action alone without his wife (b), it being only to recover damages.

Bulstr. 21. They must join in *detinue* for charters concerning the wife's inheritance. 38 H. 6. 4. Roll. Abr. 347. So in trover for a deed by which a rent-charge was granted to her *dum sola*, though it came to the hands of the defendant after coverture. Noy, 70. For rent due to her before coverture as tenant in *dower*. Roll. Abr. 318. 348. *Vide* Bulstr. 135, 136. Cro. Jac. 283. and *quære* if since 32 H. 8. c. 37. there is any difference where the avowry is made for rent due before, and where after marriage. —— Whether the husband alone may bring a *quare impedit*, *vide* Co. Lit. 351 a. Owen, 82. Lit. 13. 357. Winch. 73. 2 Bulstr. 14. Jenk. 2, 3. Bulstr. 110.

But if baron and feme are disseised of the land of the feme' they must join in an action for the recovery of this land.

Cro. Eliz. 608. 13 Co. 47. S.C. Moor, 912. S. C. 2 Inst. 650. S. C. cited. 2 Mod. 270. S. C. cited. Jenk. Rep. 273. S. C. said to be adjudged that the baron might have the action alone. *Vide* 1 Brownl. 9. 1 Jones, 325. —— If a stranger cuts trees upon the land of the feme, they may join. 15 E. 4. 9. b. Cro. Car. 437. —— So they may join in trespass *quare clausum fregit*. But Lit. Rep. 285. *cont.*

If the baron be possessed of a rectory for years, in right of his feme, he and his feme may join in an action upon the 2 & 3 E. 6. c. 13., for not setting forth tithes; for the possession of the baron is in the right of the feme, and the action is given by the statute to the proprietor.

Bulstr. 110. 2 Vent. 197. Cro. Car. 419, adjudged. 2 Mod. 217. S. C. cited, *arguendo*, as if adjudged that she must join. Jones, 367. S. C. but S. P. does not appear. (a) For enclosing twenty acres of waste, in which the feme had common, *ita quod* they could not, as before, take the profits with their cattle, &c.; and because a feme covert cannot have cattle, Lit. Rep. 284, 285., the court inclined for the defendant; but it does not appear what judgment was given. (b) So in an action for not grinding at the wife's mill. Hob. 189. —— So where the feme had right to all the lop of certain trees during life, and the owner cut them down. Cro. Car. 437. adjudged. Jones, 376. In which last book it is said the exception was, that the action was brought by the baron alone, and yet adjudged for him.

If a feme sole is possessed for years of a close, to which time out of mind there hath been a way through the close of *J. S.* next adjoining, and *J. S.* erects a building *ex transverso viæ prædict.*, so that she cannot use the said way, and after she marries, the baron and feme may join in an action for the stoppage during the coverture, declaring that after the said marriage they could not use the said way, *&c.* (a), because the wrong was done to the feme, and the baron had the close in her right. (b)

2 Mod. 269. Frosdick and Sterling adjudged; and that the cases Cro. Car. 419. Jones, 367. Lit. Rep. 284. Hob. 189. warrant no more than that the wife may be joined, not that of necessity she must.

If *A.* declares that he was seised, in right of his wife, of a messuage, bakehouse, *&c.*, and that the defendant erected two houses of office so near the said bakehouse that the walls thereof became foundrous, and the air so unwholesome that he lost his custom, *&c.*; the action lies for the husband alone.

If

If *A.* leases to *B.* for years, rendering rent, and after grants his reversion to baron and feme, and *B.* attorns, and then rent is arrear, and the term expires, the baron may bring an action alone for this rent, because this action is grounded upon the duty, and not upon the nature of their estate; and the money must come to the baron; and there is no difference where the baron and feme are joint-lessors (*a*), and where joint-purchasers. (*b*)

2 Bulstr. 233. Roll. R. 52. S. C. adjudged. (*a*) And then it was never questioned but the baron might bring the action alone; but when brought by both, it hath been doubted. Bulstr. 21. *per Yelv. J. et vide* Lit. Rep. 13. Palm. 207. [They may join, or not, at their election. Aleberry v. Walby, 1 Stra. 229. Beaver v. Lane, 2 Mod. 217.] (*b*) But in that case, 2 Bulstr. 234. *per Dod.* he must bring the action generally, and not shew himself to be assignee; but yet Roll. Rep. 52., it appears, the action was so brought; and yet held, *per cur.* to be only *surplusage*.

‖But if the husband and wife grant a lease of the wife's lands under seal, and the lessee covenant with the husband and wife, and the heirs and assigns of the wife, to pay the rent, the husband cannot, after the death of the wife, sue for the rent on the covenant; for, after the wife's death, the rent belongs to her heirs.‖

Hill v. Saunders, 2 Bing. R. 112.

But if *A.* conveys lands to *B.* in fee, and covenants with him, his heirs and assigns, to make further assurance, and these lands are assigned to *J. S.* and his wife, and the heirs of *J. S.*, they must both join in an action on the covenant for further assurance.

Roll. Abr. 348. Cro. Car. 503. 505. Jones, 406, 407. S C. adjudged, *vide* Cro. Jac. 319. 5 Bulstr. 164. Roll. R. 300.

But if a bond is made to a feme covert during coverture, conditioned to pay money to the feme, the baron alone may bring an action upon this bond. (*c*)

5 Lev. 403. adjudged upon a demurrer to the declaration; and a case was cited by Powel, where upon a judgment obtained by baron and feme, the baron only sued a *scire facias* for the damages and costs, and had judgment. (*c*) If a bond be entered into to baron and feme, the baron may sue it alone, and thereby he shews his dissent to his wife's taking any thing by it; 2 Mod. 217. [1 Stra. 229.; though it be entered into to the wife as administratrix. Ankerstein v. Clarke, 4 Term R. 616.]

If *A.*, in consideration that *B.*, a feme covert, will cure a certain wound, assumes and promises to *B.* to pay unto her 10*l.*; if *B.* does cure it accordingly, she may join with her husband in an *assumpsit* for this money (*d*), for this promise arising upon a matter of skill and performance of the wife, she is the cause of the action; and such an action will survive to the wife.

Cro. Jac. 77. 205. adjudged, and affirmed in *Cam. Scacc.* Sid. 25. S. C. cited to be adjudged that they ought to join. 2 Sid. 128., like point; and *per Glyn* C. J. it may be in the name of both, or of the husband alone. (*d*) But whatever the consideration be, where there is an express promise made to the wife, she may join. Cro. Eliz. 61. But without an express promise, the action does not lie; for the fruit and labour of the wife belongs to the husband, for which he only shall bring the action. Salk. 114. 4 Mod. 156. S. C. and S. P. Carth. 251. All. 3. 6. Stile, 9. 298.

‖And the wife may join with the husband in an action on a promissory note made to her during the coverture.

Phillipskirk v. Pluckwell, 2 Maule & S. 393.; and see 1 H. Black. 108.

Where a wife sued jointly with her husband for a debt due to them as partners trading together in *Spain*, no evidence being given, that by the law of *Spain* the wife could be a partner with her husband, they were nonsuited. *Quære*, if such evidence had been given, whether they could have sued jointly in *England*?‖

Cosio v. De Bernales, Ry. & Moo. C. 102.; and see 1 Stra. 612.

If

If *A.*, in consideration that baron and feme had intermarried at his request, assumes and promises to them to pay unto the feme 8*l. per annum* during the coverture, *&c.*; notwithstanding the whole benefit redounds to the husband, yet in an action thereupon they may join (*a*), *à fortiori*, because it is an executory promise, and hath continuance, and is not to be done *unicâ vice* only.

(*a*) Or the baron may bring the action alone. All. 36. [*Qu.* If this be not the proper mode? Stile, 297.]

It seems clearly agreed, that for debts due to the wife (*b*), and all causes of action before coverture, the husband must join in the action.

Roll. Abr. 347. Mo. 422. S. P. laid down as a rule. Owen, 82. Lit. Rep. 13. Keb. 440. 3 Term R. 631. The husband alone cannot bring an *indebitat assumpsit*, or an *insimul computasset*, for a debt due to the wife herself before coverture, much less when it is due to her as executrix or administratrix. Sid. 299. 2 Keb. 89. (*b*) In consideration that *A.* will marry his daughter *B.*, assumes to give her as much as he gives any other of his daughters, &c.; and because this promise was made before marriage, whether the baron and feme must not join in an action thereupon, *dubitatur*. Sid. 25.

‖But the husband may sue alone on a bill payable to the wife before marriage, and not indorsed by her; for the marriage absolutely vests the bill in the husband.‖

M'Neilage v. Holloway, 1 Barn. & A. 218.

In an action upon a *trover* before marriage and a *conversion* after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron alone ought to bring a *replevin*, *detinue*, &c. (*c*); for these actions admit and affirm a property in the feme at the time of the marriage, which by consequence must have vested in the baron.

Sid. 172. Keb. 641. S.C. Vent. 261. 2 Le. 107. S. P. and that he may join the wife at his election. [But see 3 Term R. 631., in confirmation of the position in the text. (*c*) *Vide* Ca. temp. Hardw. 119.]

But if *A.* declares that the defendant, being indebted to him and his wife as executrix to one *J. S.*, in consideration that *A.* would forbear to sue him for three months, assumed, *&c.*, and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger.

Carth. 462. Ward and Ellard adjudged. Salk. 117. pl. 8. Ld. Raym. 368. S.C. adjudged. Yelv. 84. Cro. Jac. 110. S. P. adjudged. Whether such a recovery will be direct assets, or a *devastavit* for so much, *vide* head of *Executors and Administrators*.

For a battery or other personal *tort* done to the wife, they must join (*d*); and if the wife dies, the action dies with her.

Roll. R. 369. Lit. R. 285. Brownl. 205. Noy, 18. ‖Hopper v. Reeve, 1 Moo. R. 407.‖ Not for personal or other wrongs done to them both, unless where they have a joint interest, and they have wrong in respect thereof. March, 47. Cro. Car. 553. Jones, 440. Cro. Jac. 555. Roll. Rep. 108. 2 Mod. 66. 8 Mod. 200. 341. Vent. 328. 2 Vent. 29. Hardw. 166. Stile, 128. Cro. Car. 175. Lev. 3. 2 Lev. 20. [1 Wils. 224. 2 Stra. 726. In equity, the husband cannot file a bill for a *chose in action* in right of the wife, without making her a party: if he do, and it be dismissed, it will not conclude the wife; and if he die before judgment or decree, she cannot revive the suit. Clearke v. Lord Angier, 2 Freem. 160.] (*d*) And the judgment must be, that the baron and feme shall recover, notwithstanding the baron only is to have the damages. Godb. 369.

But the baron may bring an action alone for the battery (*e*), carrying away and detaining of his wife, *per quod solamen et consortium* of his said wife *amisit*, because the action is founded upon the special damage done to himself, and will be no bar to another action

Cro. Car. 89, 90. adjudged, and affirmed in *Cam. Scacc.* Cro. Jac. 558.

action brought by baron and feme, or by the feme after the death of the baron, for the same battery. S. P. adjudged. 2 Roll. Abr. 556. Jones, 440. Lit. Rep. 339. 2 Roll. R. 51. S. P. adjudged. (e) Where an action is brought for words spoken of, or other tort done to the wife, and founded upon the special damage of the husband, she must not join. Sid. 346. Lev. 140. Keb. Rep. 791. pl. 47. 2 Keb. R. 587. pl. 65.

In trespass by baron and feme, they declared for a battery of the feme, *et quod* the defendant *alia enormia eis intulit;* and though objected, the feme cannot join for a wrong done to the baron, yet because the *alia enormia*, &c. was but form, and only in aggravation of damages, and altered not the substance of the declaration, it was adjudged for the plaintiffs. Cro. Jac. 664. Adjudged after verdict, and affirmed in *error*. *Vide* Stile, 236. Sid. 225. Stile, 202.

So in trespass and false imprisonment by baron and feme, *per quod negotia domestica* of the husband *remanserunt infecta ad grave damnum ipsorum;* and it was objected, that this being laid as a special damage to the husband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages. Salk. 119. pl. 12. Russel and Corne. [6 Mod. 127. S.C. 2 Ld. Raym. 1031. Andr. 245. and 2 Stra. 1094. S.C. cited. 11 Mod. 264.]

(a) In trespass (b) by baron and feme for beating the feme (c), they may declare that it was *ad damnum ipsorum*, notwithstanding a feme covert can have no damages, for this action will survive. (a) Sid. 387. adjudged; and said *per cur.* it could not be otherwise. 2 Keb. 434. S. C. Palm. 339. 3 Mod. 120. So in debt upon a bond made to the feme *dum sola;* for the nonpayment to her *dum sola* was to her damage, as the nonpayment since is to the damage of the baron. Stile, 134. adjudged; and said it is the usual way of declaring in such case. (c) So for words spoken of the feme. March, 212. (b) *Vide* Cro. Jac. 473. 644. Stile, 155. 2 Keb. 387.

But if in *trover* by baron and feme, they declare *quod cum possessionat. fuerunt, &c.* and that the defendant converted, *ad damnum ipsorum*, this is naught after verdict; for the possession of the wife is the possession of her husband, and so is the property; so that the conversion cannot be to the damage of the wife, but of the husband only. Salk. 114. pl. 1.

[Although an action cannot, regularly, be brought by or against a feme covert, yet the objection to it by the parties to the suit, it hath in some cases been laid down, can be taken only in abatement (d): therefore the feme (e), after she has been trented by a plaintiff as a feme sole, may have process of execution for the costs in her own name, as sole, for the plaintiff is concluded from denying it. And husband and wife (g), who have improperly joined in an action, are not at liberty after verdict for the defendant, to object to such impropriety, in order to discharge themselves of costs.] Milner v Milner, 3 Term R. 627. (d) But see Candell v. Shaw, 4 Term R. 361. and Read v. Jewson, there cited, where the objection was made by the defendant after verdict, and allowed. And to an action on a bond acknowledged by a feme covert, coverture may be given in evidence on *non est factum*, for the instrument is merely void. 1 Ld. Raym. 313. 3 Burr. 1805. (e) Wortley v. Rayner, Dougl. 637. But the husband cannot have execution without a *scire facias*. *Ibid.* (g) —— v. Helyers, Cro. Car. 175.

‖In an action on a bond conditioned for payment by defendant of an annuity to defendant's wife, if the breach is stated in nonpayment to the plaintiff, it is ill, and judgment will be arrested.‖ Lunn v. Payne, 6 Taunt. 140.

(L) Where

(L) Where they must be jointly sued.

Co. Lit. 133. Dr. Plit. 3. 2 H. 6. 4. *Vide infrà* Letter (M). 308.

THE husband is by law answerable for all actions for which his wife stood attached at the time of the coverture; and also for all her torts and trespasses during coverture, in which cases the action must be joint against them both (*d*); for if she alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defending himself.

(*d*) And therefore if a man recovers against a feme covert as sole, the husband may avoid it by writ of *error*, and may come in at any time and plead it; but for this *vide* 17 Ass. pl. 17. Stile, 254. 280. 2 Roll. R. 53. 22 H. 6. 31. 3 Term R. 631. and tit. *Error and Abatement.*

For this *vide* Co. Lit. 351. Roll. Abr. 6. pl. 7. Yelv. 166. Noy, 79. Leon. 312. Cro. Car. 494. 254. Roll. Abr. 348., where it was laid *quod ad usum proprium*, or *ad usum suum converterunt*; for this must be intended to the use of both, and not of the husband only. Vent. 33. ‖*Vide* 2 Saund. 47 e. (5th edit.)‖ [This point is settled as laid down in the text. 1 Salk. 114. Andr. 245.] In debt upon a *devastavit* against baron and feme executrix, it shall not be laid *quod devastaverunt*; for a feme covert cannot waste. 2 Lev. 145.

If goods come to a feme covert by *trover*, the action may be brought against the husband and wife, but the conversion must be laid only in the husband, because the wife cannot convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them.

Keyworth v. Hill, 3 Barn. & A. 684.

‖However, it is now determined that a declaration against husband and wife, charging that they converted to their own use, is good *after verdict*; for the verdict does not proceed upon the acquisition of property by the defendants, but the deprivation of property in the plaintiff, and the conversion may have been by destruction.

Morris v. Norfolk, 1 Taunt. R. 212.

In an action against husband and wife for a debt due from the wife before marriage, if the declaration allege a promise by the wife during the coverture to pay it, this is error, for she is incapable of making a promise.

Stone v. M'Nair, 1 Moo. 126. 7 Taunt. 432.

And a declaration stating, that the husband was indebted to the plaintiff for money lent to the wife at *her* request, is bad; since, without a request by the husband, there can be no debt due from him.‖

2 Lev. 63. and note by the reporter, no notice was taken

An action on the case was brought against baron and feme, for retaining and keeping the servant of the plaintiff, and judgment accordingly.

that a feme covert may not make a retainer or contract; but perhaps the receiving and keeping the servant without any contract is a trespass of which a feme covert may be guilty. *Qu.*

17 E. 4. 7. 2 H. 4. 19 b. 3 H. 4. 1. Roll. Abr. 348.

If a lease for life or years be made to baron and feme, reserving rent (*a*), an action of debt for rent arrear may be brought against both, for this is for the advantage of the wife.

(*a*) But an *assumpsit* lies not against baron and feme on a promise made by the wife during coverture; for *quoad* the wife it is void. Palm. 313. ‖See 1 Taunt. 212.‖ But if a feme covert takes up goods from a tradesman, affirming herself to be a feme sole, *quære*, if this be not such an injurious taking as will subject the husband and wife to an action, though neither can be charged on the contract? ‖If a feme sole trader is sued in the courts of the city of *London*, the husband must be joined for conformity. Beard v. Webb, 2 Bos. & Pull. 95‖

[It

[It would be error to join the wife in a declaration for words spoken by the husband *only*, and such declaration would be bad either upon demurrer, or in arrest of judgment: two declarations therefore for words, the one against husband and wife, the other against husband only, cannot be consolidated.] Swithen v. Vincent, 2 Wils. 227.

If an action be brought against the husband and wife, and the wife be arrested, she shall be discharged upon common bail; for nobody can be supposed to undertake for a wife who hath no property of her own. For this *vide* tit. *Bail in Civil Causes*, (B) 5. How she may reverse an outlawry, see tit. *Outlawry*.

‖And this, although the debt is contracted before marriage; the courts however, will not relieve her if she has *wilfully* and *malâ fide* represented herself to the plaintiff as a feme sole; but they will if the plaintiff when he gave the credit knew she was a feme covert. Pritchett v. Cross, 2 H. Black. 17. Waters v. Smith, 6 Term R. 451. Pitt v. Thompson, 1 East, 16. Crookes v. Fry, 1 Barn. & A. 165. Collins v. Rowed, 1 New R. 54. Pritchard v. Cowlam, 2 Marsh. 40. Pannell v. Taylor, 1 Turn. & R. 100. Harvey v. Cooke, 5 Barn. & A. 747. Holloway v. Lee, 2 Moo. 211. Carlisle v. Starr, 9 Price, 161. Though separated by divorce *à mensâ et thoro*, she cannot be held to bail, or sued as a feme sole. 5 Bro. & B. 92. 5 Barn. & C. 291.

The wife of an attorney is not entitled to be discharged if arrested on mesne process jointly with her husband, for the plaintiff was compelled to sue them jointly by common process, and then the arrest follows of course; and the Court of Common Pleas have refused to discharge wives of foreigners living abroad, though without a separate maintenance.‖ Roberts v. Mason, 1 Taunt. 254. De Gaillon v. L'Aigle, 1 Bos. & Pull. 8. Burfield v. Duchess de Pienne, 2 New R. 580.

[The court will not discharge a wife taken in execution upon a judgment obtained against her and her husband.] (*a*) Pitts v. Meller, 2 Stra. 1167. Finch v. Duddin, *Id.* 1237. Langstaff v. Rain, 1 Wils. 149. Anon. 5 Wils. 124. ‖(*a*) Unless it appears that she has no separate property to discharge the debt, and this although her husband has been discharged under the insolvent act. Sparkes v. Bell, 8 Barn. & C. 1. 2 Man. & Ry. 124.‖

‖The court could not discharge under the insolvent act 1 G. 4. c. 119. a married woman in execution with her husband for a debt contracted before marriage, since she was not capable of complying with the conditions of the act, by executing a warrant of attorney and having a judgment entered up against her. *Ex parte* Deacon, 5 Barn. & A. 759.; and see 6 Moo. 128.

But by the 7 G. 4. c. 157. § 72. provision is made for discharging married women, and for their assigning all their property real and personal, and for their executing a warrant of attorney to confess judgment. 7 G. 4. c. 57. § 72.

If a plaintiff sues a feme sole on a contract, and obtains interlocutory judgment against her before her marriage, he may proceed after her marriage without joining her husband by *scire facias*; and a *capias ad satisfaciendum* following the judgment against her alone is regular. Cooper v. Hunchin, 4 East, 521.; and see 3 Maule & S. 557.

It seems that if a married woman be taken in execution for a debt contracted by her before her marriage, she cannot be discharged, although the husband be in custody on mesne process for the same suit; at all events, the granting or refusing such discharge is in the discretion of the court.‖ Chalk v. Deacon, 6 Moo. 128.; and see 3 Bos. & Pull. 220.

[On

Gordon v. Halpen, Ca. temp. Hardw. 101.

[On a motion that the wife may have leave to plead separately from her husband, it appeared that her estate was settled upon her, and that the settlement had been confirmed in the House of Lords to be for her separate maintenance, but the estate was made liable to answer all actions brought against the husband on her account: it was suggested, in support of the motion, that this was a fictitious demand in the plaintiff set up by connivance of the husband, and that he would let judgment go by default, and so share with the plaintiff in what should be recovered. But *per Cur.* We cannot allow you to sever in pleading: your best way will be to plead in the name of husband and wife; and if the husband should disavow, and that be contrary to the order of the House of Lords, you will know how to enforce that order; but we can do nothing in it.

Clark v. Norris, 1 H. Black. 235.

If the husband enter an appearance for himself only, where he is sued with his wife, this is not such an irregularity as will authorize the plaintiff to sign judgment without demanding a plea.]

Russell v. Buchanan, 6 Price R. 139.

‖But where the attorney for the defendant who was sued jointly with his wife for a debt due from her *dum sola*, appeared on his undertaking, and pleaded for the husband only; it was held that the plaintiff might appear for the wife according to the statute, and treat the husband's plea as a nullity, and sign judgment.‖

(M) Where a Wife shall be considered as a Feme Sole; [and herein of her separate Estate.]

Br. Baronet Feme, p. 66. Co. Lit. 133 a. 1 Roll. R. 400. Moor, 85. 1 Bulstr. 140. 3 Bulstr. 188. 2 Vern. 104.

A HUSBAND who hath abjured the realm, or is banished (*a*), is thereby *civiliter mortuus*; and being disabled to sue or be sued in right of his wife, she must be considered as a feme sole; for it would be unreasonable that she should be remediless on her part, and equally hard upon those who had any demand on her (*b*), that not being able to have any redress from the husband, they should not have any against her.

[(*a*) Though the banishment be only for a limited time. Sparrow v. Carruthers, cited in 1 Term R. 7.] ‖Carroll v. Blencow, 4 Espin. Ca. 27.; and see *antè*.‖ (*b*) In *assumpsit*, the defendant proved that she was married, and her husband alive in *France:* the plaintiff had judgment; upon which, as a verdict against evidence, she moved for a new trial; but it was denied; for it shall be intended, that she was divorced: besides, the husband is an alien enemy; and in that case, why is not his wife chargeable as a feme sole? Comb. 402. Salk. 116. 646. Ld. Raym. 147. ‖See Kay v. Duchess de Pienne, 3 Camp. 123. De Gaillon v. L'Aigle, 1 Bos. & Pull. 35.‖ [In equity, if the husband is out of the jurisdiction of the court, though not an exile, Dubois v. Hole, 2 Vern. 613.; or if he cannot be found, Bell v. Commissary Hyde, Pr. Ch. 328., the wife may be compelled to answer separately.]‖ Her joining as co-plaintiff or co-defendant with her husband, will not prejudice a future claim by her as to her separate estate. 1 Sim. & Stu. 185. 1 Jac. & W. 665.‖

10 Mod. 6. But for this see tit. *Customs of London* and

By the custom in *London*, if a feme covert trades by herself in a trade with which her husband does not intermeddle, she may sue and be sued as a feme sole.

Leon. 131. Lit. Rep. 51. Hetl. 9. 2 Brownl. 128. Mod. 26. 1 Show. 185. [But the custom is confined to suits in the city courts: she cannot sue alone in the superior courts, upon a cause of action accruing during the coverture, even though she be discovert at the time of commencing the suit. Candell v. Shaw, 4 Term R. 361.; ‖and when sued in the city

city courts, the husband must be joined for conformity. Beard v. Webb, 2 Bos. & Pull. 93.‖ That she may be a bankrupt, see tit. *Bankrupt* (A). By a settlement *before* marriage, the husband may put his wife in a situation to carry on a separate trade; and if he do not intermeddle therewith, the stock in trade will be exempt from his debts; and the wife will be solely entitled to the increase and produce. Jarman v. Woolloton, 3 Term R. 628., and Haselinton v. Gill, there cited.]

[In the case of a divorce *à mensâ et thoro*, of which alimony is a consequent, the wife, it seems, becomes solely responsible to creditors (*a*): and so in the case of a voluntary parting, and a separate maintenance allowed her by the husband; for as soon as she acquireth a will, and an interest distinct from, and independent on her husband, the disability of coverture is supposed to cease. It hath therefore been determined by the Court of K. B., though it by no means appears to be settled (*b*), that a woman so separated and with such maintenance, may contract and be sued alone for any personal demand. And the liability of her being sued alone must necessarily infer her capacity of being sole plaintiff against those with whom she may contract. Her power too, in such circumstances, over her real property at law, hath lately been asserted to a very considerable extent (*c*): for it hath been holden, that a wife who had a copyhold estate to her separate use, and lived separate from her husband, could surrender the same without her husband, he having, upon the separation, covenanted to join in all necessary conveyance of such estates, and to such uses as she should appoint.

Ringstead v. Lady Lanesborough, Co. Bankrupt Laws, 52. Barwell v. Brookes, *Id.* 36. Corbet v. Poelnitz, 1 Term R. 5. See *cont.* Hatchett v. Baddely, 2 Black. R. 1079. Lean v. Schutz, *Id.* 1195. [(*a*) But not where alimony is allowed only *pendente lite:* the fund must be permanent. Ellah v. Leigh, 5 Term R. 679.

See too the observations of the court in that case. (*b*) *Vide* 6 Term R. 604. ‖But it is now settled, that a woman living separate from her husband with a separate maintenance cannot be sued alone. Marshall v. Rutton, 8 Term R. 547., nor though she be divorced *à mensâ et thoro.* Lewis v. Lee, 3 Barn. & C. 291. Hookham v. Chambers, 3 Bro. & B. 92. Fairthorne v. Blaquiere, 6 Maule & S. 73.‖ (*c*) Compton v. Collinson, 1 H. Black. 334. The adequacy of the settlement, or the circumstances of the husband at the time of making it, are points which have not yet been discussed. Such a settlement, indeed, *with a covenant by the trustees to indemnify the husband against the wife's debts*, hath been holden to be good against creditors prior to the time of making it, for the covenant is a valuable consideration. Stephens v. Olive, 2 Bro. Ch. R. 90.; and King v. Brewer, there cited, as decided by Lord *Loughborough* at *Chelmsford* assizes 1776. ‖Worrall v. Jacob, 3 Meriv. 256.‖ But without such covenant the husband is discharged from the wife's debts; for, as to him, the reason of introducing it, is, that he may be protected against the costs he may incur by being sued for those debts. Angier v. Angier, Gilb Eq. Rep. 152. But if the operation of the covenant be, as stated in the case of Stephens v. Olive, it would follow, that any agreement between husband and wife, securing her a separate maintenance, without such covenant, may be set aside by creditors; unless it could be shewn that the conduct of the husband had been so harsh and cruel, as to afford the wife a sufficient ground for a sentence of alimony in the spiritual court, if the wife had sued him in such court; under which circumstance, it seems, a court of equity will sustain a conveyance by the husband of part of his estate, as a separate maintenance for his wife, even against the claims of creditors. Hobbs v. Hall, *July* 1786, Fonbl. Notes on Eq. Tr. 102. ‖Nunn v. Ladbrooke, 8 Term R. 521. Where the husband secures an annuity to the wife as a separate maintenance, if it is in arrear the court will decree payment of the arrears, but they will not decree an appropriation of a sum to secure future payments. Cooke v. Wiggins, 10 Ves. 191.‖

But it is in a court of equity, where a feme covert is usually, and where perhaps only she can properly be, considered as a feme sole; it being competent to that court to act upon her property in the hands of her trustees, and therefore to treat her as having interests and obligations distinct from those of her husband. If, therefore, she claims any rights in opposition to

those claimed by her husband, or if she lives separate from him (*a*), or disapproves the defence he wishes her to make (*b*), she may, in equity, obtain an order to defend a suit separately (*c*). If a husband is plaintiff in a suit (*d*), and makes his wife a defendant, he is considered as thereby renouncing his marital right over her, and she is allowed to answer separately without an order of the court for the purpose. And as she may defend a suit instituted against her by her husband, so she may institute a suit against him: but the bill must be exhibited in her name by her next friend (*e*), though she may defend without such protection. And the court will not permit a bill to be filed by any one without her consent. (*g*)

(*a*) Pr. Ch. 329. (*b*) 2 Atk. 50. 2 Eq. Ca. Abr. 66. (*c*) But a separate answer put in without such order may be suppressed as irregularly filed. 1 Ch. R. 68. But see 2 P. Wms. 371, where allowed. (*d*) 3 Atk. 478. (*e*) 2 Ves. 452.

(*g*) Pre. Ch. 326. If a married woman obstinately refuseth to join with her husband, she may be compelled to make a separate defence; and for that purpose an order may be obtained that process may issue against her separately. 1 Ch. Ca. 296. It should be observed, however, that though a woman may be proceeded against without her husband, yet the court cannot make a personal decree against her for the payment of a debt; all they can do is, to call forth her personal property in the hands of trustees, and to direct the application of it. 1 Bro. Ch. R. 16. 2 Atk. 68.

‖With respect to the mode of constituting a separate provision for a married woman, whenever it appears from the nature of the transaction, as in the instance of a settlement in contemplation of marriage where the husband is a party, or from the context of the instrument limiting the property to the wife, that she was intended to have it to her sole use, a court of equity will carry this intention into effect; and if no trustees are named the husband will be considered a trustee for her.

Tyrrell v. Hope, 2 Atk. 558.

Thus where the husband signed a paper by which he agreed that the wife should enjoy and receive the profits of a certain property, those words were held to imply a separate use to the wife, and to create a trust in the husband for her.

Darley v. Darley, 3 Atk. 399.

So also Lord *Hardwicke* said that technical words were not necessary, and held that the word "livelihood," was sufficient to show the intention of the donor, to give property to the wife's sole and separate use.

Lee v. Prieaux, 3 Bro. C. C. 382. Hartley v. Hurle, 5 Ves. 540.; and see 18 Ves. 434.

So a direction that the trustee should not be troubled to see to the application of the sum payable, but that the receipt of the married woman should be a sufficient discharge to him, was held by Lord *Alvanley* sufficient to entitle the wife to the dividends as her separate property; and a direction that the money was to be paid "into her proper hands," has been held to have the same effect.

Dixon v. Olmius, 2 Cox R. 414.

And so also a bequest of bond and mortgage debts to be delivered up to the married woman, "whenever she should "demand or require the same."

Prichard v. Ames, 1 Turn. & R. 222.

So also a legacy for her own use and at her own disposal. See Beable v. Dodd, 1 Term R. 193. Horseman v. Abbey, 1 Jac. & Walk. 381.

Dakins v. Beresford, 1 Ch. Ca. 194.

But the intention to deprive the husband of any benefit from the property must be clear. Thus a devise in trust to sell, and out of the produce "to purchase in the trustee's "name an annuity of 80*l.* for the life of the wife of *D.*, and

"to

" to pay the same to her and her assigns," was not held to exclude the husband's right though living apart from his wife.

Nor will a direction " to pay to her to and for her use," have that effect; nor a legacy to the woman to her *own* use and benefit. 3 Bro. Ch. Ca. 383.; and see 4 Madd. 409. 5 Madd. 491. 3 Ves. 166. 5 Ves. 617.

Jacobs v. Amyatt, 1 Madd. 376.

But a legacy to a married woman " for her own use and at " her own disposal," vests in her as separate estate.

Prichard v. Ames, 1 Turn. & R. 222.

And so a bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use.‖

Adamson v. Armytage, 19 Ves. 416. Coop. 283.

The general grounds upon which equity allows a wife to institute a suit against her husband, are, where any thing is given to her separate use (*a*); or the husband refuseth to perform marriage-articles (*b*); or articles for a separate maintenance (*c*); or where the wife (*d*), having been deserted by her husband, hath, during his absence, acquired by her labour a separate property, of which he hath plundered her. And it will decree a specific performance of articles of separation (*e*) at the suit of the wife, ‖as far as regards payment of the maintenance,‖ though the husband offer to take her back again, if it appears that a *perpetual* separation was intended by the parties: but not so, where the separation is merely temporary (*g*), or there hath been a subsequent cohabitation. (*h*) Nor is it any answer to such a suit, that the wife hath been guilty even of adultery. (*i*) However, in most cases, where a wife comes into equity to support her possession independent on her husband, it is her merit which entitles her to relief; and therefore the court will not decree maintenance (*k*) where there is full proof of elopement and adultery.

(*a*) 2 Ves. 452. For if no trustees are interposed, the husband is considered as a trustee for the wife. 2 P. Wms. 316. And where a legacy was given to a feme covert, with a direction " that her " receipt " should be a " sufficient discharge to the " executors," it was holden to be equivalent to the testator's saying, " that " it should be to her separate use." Lee v. Prieaux, 3 Bro. Chan. R. 381. (*b*) 2 Vern. 493. (*c*) Gilb. Eq. R. 152. (*d*) 1 Atk. 278. (*e*) 3 Bro. Chan. R. 614. (*g*) 1 Ves. 17., and 3 Atk. 547. ‖*Vide* 3 Ves. 352. 11 Ves 532. 2 Roper, 295.‖ (*h*) Fletcher v. Fletcher, cited in 3 Bro. Chan. R. 619. (*i*) 3 P. Wms. 269., and Blount v. Winter, reported in 3 P. Wms. 276. Cox's edition. (*k*) 2 Atk. 96. ‖*Sed vide* Seagrave v. Seagrave, 13 Ves. 439. Jee v. Thurlow, 2 Barn. & C. 547.‖

‖Whether the wife can dispose absolutely of her provision settled on her as a *separate maintenance*, does not appear finally settled. Where a sum of stock was settled in trust to permit the wife to receive the dividends for her maintenance and support, during the joint lives of herself and her husband, and she joined with her husband in granting an annuity for a valuable consideration out of the stock, Lord *Alvanley* held that the annuity could not be sustained against the wife, since she had only a special trust on tne dividends of the stock, and no dominion over them.

Hyde v. Price, 3 Ves. 437. See Greatly v. Noble, 3 Madd. R. 79.

As the wife may dispose by will of savings from her separate estate limited to her sole use by a stranger, so also she may dispose of *savings* from her separate maintenance; but if she make no disposition, and her husband be the survivor, he will be entitled to them as her administrator, subject to her separate debts;

Gage v. Lyster, 2 Bro. P. C. 4. 2 New R. 159. 1 Roper, 205. Stephens v.

Olive, 2 Bro. C. C. 90. Worrall v. Jacob, 3 Meriv. 256.

debts; and during the wife's life her savings will not be liable to her husband's engagements, if the settlement were made for a valuable consideration.‖

Finch's R. 145. 2 P. Wms. 639. 3 P. Wms. 12. 205. 1 Stra. 238. Ves. 538. But this equity is personal to the wife; for if she die in her husband's lifetime, though she leave children, her husband is entitled to her personal property, without making any provision for them. Scriven v. Tapley, Ambl. 599. Phipps v. Earl of Anglesea, Fonbl. Notes on Eq. Tr. 89. ‖Murray v. Lord Elibank, 10 Ves. 84. Lloyd v. Williams, 1 Madd. R. 450.; *sed vide* 13 Ves. 7. If the wife dies after a decree for carrying in proposals for a settlement to the Master's office, the right of the children attaches. Rowe v. Jackson, 2 Dick. 604. And it has lately been decided that the wife's equity attaches on her filing a bill for a settlement, and that the children are entitled if she afterwards die. Steinmetz v. Halthin, 1 Glyn & Ja. 68. But the wife may in her lifetime waive the settlement and defeat the children. 10 Ves. 88. 1 Madd. 450.; *sed vide* 2 Ves. 672. If she insist on her equity against her husband's assignees, she cannot afterwards waive it in favour of her husband. Barker v. Lea, 6 Madd. 330. If the wife is subject of a state by the law of which the husband is entitled to the whole fund, the court will not require a settlement on her. Sawyer v. Shute, 1 Anst. 63. Campbell v. French, 3 Ves. 321. Dues v. Smith, 1 Roper, 265.‖

Where the property of a wife is in the power of a court of equity, it will not part with it, unless the husband make a proper settlement, or the wife in court consent to his receiving it. And it hath gone so far (*a*) as to restrain him from proceeding in the spiritual court for the wife's portion arising out of personal estate, because that court cannot oblige him to make an adequate provision on her. ‖But the court will not restrain his recovering the property in a court of law.(*b*)‖

(*a*) Pr. Ch. 548. 2 Atk. 420. Toth. 111. ‖(*b*) 1 Ves. sen. 539. 2 Atk. 420. 10 Ves. 90.‖

2 Atk. 420. 2 Ves. jun. 608. 682. 9 Ves. 87. 2 Madd. 16.

‖The assignees of the husband under the bankrupt law, and under the insolvent acts, and also his general assignees for payment of debts, stand in the same situation with respect to the wife as the husband himself; consequently if the wife's property is a legal interest, which can be obtained without resorting to a Court of Equity, they are entitled to it absolutely, but if the property is equitable, they are bound to make a settlement on the wife, in the same manner as the husband himself.

Salisbury v. Newton, 1 Eden's R. 370. Wenman v. Mason, 1 P. Wms. 549. Jewson v. Moulson, 2 Atk. 417. Like v. Beresford, 3 Ves. 511. Pryor v. Hill, 4 Brown C. C. 139. Macaulay v. Phillips, 4 Ves. 19. Franco v. Franco, 4 Ves. 530. Elliott v. Cordell, 5 Madd. 149.

And though it has been disputed, whether the assignee of the husband, claiming by purchase from him, was compellable in equity to make a similar settlement, it seems now to be settled that he cannot be in a better situation than the husband, and must make a settlement. However where the wife's equitable property was only a life interest, the Vice Chancellor considered this a new case, and refused to order a settlement against a purchaser, for valuable consideration, of the husband.

1 Roper B. & F. 271.

It seems doubtful whether the wife is entitled to a provision out of a trust term belonging to her as against a purchaser.

3 P. Wms. 11. 8 Ves. 206. Murray v. Elibank, 10 Ves. 90.

The wife's equity for a settlement will be defeated by payment or transfer of the funds to the husband, by the trustee or party in whose controul they are, before any proceedings are instituted respecting the property, and such payment or transfer may be lawfully made before proceedings had, but not afterwards.

Carr v. Eastabrooke, 4 Ves.

If the wife be an adulteress living apart from her husband, a court of equity will not interfere upon her application for a settlement

settlement out of her own *choses in action*, neither will it order them to be paid to the husband; not to the wife because she is unworthy of the court's notice, nor to the husband because he does not maintain her, in respect of which duty only the law gives to him her fortune.‖

146. Ball v. Montgomery, 2 Ves. jun. 191.

The wife's consent to the payment of money to her husband (*a*), though she be not personally present, being resident abroad, may be given, and acted upon; but it cannot, by the rules of the court in such case, be dispensed with (*b*), if the sum exceed one hundred guineas; nor will the court part with the property, even with such consent, unless there be an affidavit both by husband and wife that it is not settled. (*c*)

(*a*) 2 Bro. Chan. Ca. 663.
(*b*) 3 Bro. Chan. Ca. 237.
(*c*) 2 Bro. Chan. Ca. 663. 2 Ves. jun. 38. ‖2 Cox. 157.‖ In *Ex parte* Higham, 2 Ves. 579., Lord *Hardwicke* appears to have refused to order the whole of the wife's fortune to be paid to the husband though the wife was in court, and desired it might. See also Blackwood v. Morris, cited in Ca. temp. Talb. 43. to the same effect. But in Willetts v. Cay, 2 Atk. 67., the Master of the Rolls is reported to have ordered the wife's whole fortune to be paid to the husband, though insolvent, the wife being in court, and giving her consent. As to part of her fortune, if she will persist in requiring it to be paid to her husband, the court must comply with her request. Dimmock v. Atkinson, 5 Bro. Chan. Ca. 197. With the consent of the wife money left in trust for the wife and her heirs to be laid out in land, ordered so be paid to the husband without being invested in land. Pearson v. Brereton, 3 Atk. 71. Stock standing in the names of trustees under a settlement, the dividends to be paid to the wife, or to such uses as she should from time to time during coverture appoint, the principal to be transferred after her death to the husband; ordered, upon her consent, to be paid, though no appointment to the husband. Clarke v. Pister, 26th *March* 1778, cited in 3 Bro. Chan. R. 568. So a legacy given to a wife for her sole use, with a power of appointment by will, and in default of appointment to her executors; ordered, upon her consent, to be paid to her husband. Newman v. Cartony, 24th *April* 1771. *Ibid.* So of money settled in like manner. Ellis v. Atkinson, 3 Bro. Chan. R. 565. ‖As to examination of the wife where she is abroad, see 1 Ves. & B. 507. 2 Ves. sen. 60. 2 Bro. C. C. 633. 3 Ves. 321. When the fund is under 200*l.* it will be paid out to the husband on the joint petition of husband and wife. Elworthy v. Wickstead, 1 Jac. & W. 69.‖

‖The court will not allow the wife to waive her equity by giving her consent in court to a payment to her husband, where the sum is unascertained at the time, the Vice-Chancellor observing in one case, that although she might not think 500*l.* the proper subject of a settlement, she might think differently of 600*l.*

Edmonds v. Townsend, 1 Anst. 93. Sperling v. Rochfort, 8 Ves. 178. Woollands v. Croucher, 12 Ves. 174. Jernegan v. Baxter, 6 Madd. 32. Godber v. Laurie, 10 Price R. 152.

And where the fund is reversionary, whether it be vested or contingent, it seems now settled that the consent of the wife cannot be taken to give it up to the husband. Sir *W. Grant* observed, in *Woollands* v. *Croucher*, "The ordinary occasion "for taking the consent is where the husband applies to have "paid to him money that belongs presently and immediately to "the wife. Her equity is not to prevent his receipt of it (for "it belongs to him), but to have a settlement; and the court "requires her consent to the payment to him without a settle- "ment; but in this instance the object is not to bar her equity "to have a settlement, but to bar her right to survivorship, "for upon his death it belongs to her entirely: she is giving "up not her equity only but her entire right by survivorship; "that is not the case in which the court takes her consent."

Woollands v. Croucher, *supra*. Pickard v. Roberts, 3 Madd. 384. Wade v. Saunders, 1 Turn. & R. 306. *Sed vide* Butler v. Duncombe, 2 Vern. 762. Howard v. Damiani, 2 Jac. & W. 458.; and see Roper, c. 6. § 2.

And if the fund has been settled and vested in trustees for the benefit of the wife, the court will not authorize her departure with

Richard v. Chambers and

with it to any person, though she should consent on examination in nature of a fine at law.‖

Seaman v. v. Druill, 10 Ves. 580.

Lee v. Muggeridge, 10 Ves. 580.; and see 1 Sim. & Stu. 365. 2 Jac. & W. 456.

And a woman, having a separate estate, may pass it without an examination in court; and she will be bound to a specific performance, unless there be any proof of fraud or undue influence on the part of the husband. Lord *Hardwicke* (*a*) indeed seems to have thought, that the power of a feme covert to dispose of her separate estate must be confined to such part of it as was personal; for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had, before marriage, reserved to herself such right by way of trust, or of a power over an use; and doubted whether a court of equity would carry into execution a bare agreement to the prejudice of the heir at law. But this doubt is now done away (*b*); for it hath been since determined, that a court of equity will compel the heir to make a conveyance to the party in whose favour such an agreement was made. And in all those cases where a feme covert hath such power (*c*), she may exercise it without joining her trustees, unless their joining is made necessary.

Allen v. Papworth, 1 Ves. 163. Pybus v. Smith, 3 Bro. Chan. R. 340.

(*a*) Peacock v. Monk, 2 Ves. 191.

(*b*) Wright v. Cadogan, 6 Bro. P. C. 156 Rippon v. Dawding, Ambl. 565.

(*c*) Grigby v. Cox, 1 Ves. 517. ‖Essex v. Atkins, 14 Ves. 547. Glyn v Baster, 1 Young & J. 329. Acton v. White, 1 Sim. & Stu. 429.‖

‖And with respect to personal estate it is now settled, that where it is actually given or settled, or agreed to be given or settled, to the separate use of a married woman, she may dispose of it as a feme sole, to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose; and the wife's power is the same, whether the property settled to her separate use is in possession or in reversion.‖

Fettiplace v. Gorges, 1 Ves. jun. 46. 3 Bro. C. C. 8. Rich v. Cockell, 9 Ves. 369. Sturges v. Corp, 13 Ves. 190.; but see Whistler v. Newman, 4 Ves. 129. As to what is a good execution of the power where it is confined to appointments of the wife by *deed or will*, see Sugd. on Powers.

If a feme covert, having separate property, borrows money, and executes a bond, or enters into a bond conjointly with her husband, as a security for his debts, this will give a foundation to demand the money out of her separate estate; and her declarations may in such case be read in evidence against her.

Peacock v. Monk, 2 Ves. 190. Norton v. Turvill, 2 P. Wms. 144. Hulme v. Tenant, 1 Bro. Chan. R. 16. It hath been holden, too, that the separate property may be applied to the discharge of a bond given by her *before* marriage. In this case it must be observed, that two bills were filed; the first against the wife only, in respect of her separate property, which was dismissed; the plaintiff then sued out writs against husband and wife but the husband absconding, so that he could not be served, the plaintiff proceeded to outlawry, and then filed a second bill against the wife only. Briscoe v. Kennedy, at the Rolls, 21st July 1762; cited in 1 Bro. Chan. R. 18.

‖And so also where she accepted a bill for a milliner's debt, this was held to be a charge on her separate estate; and it is clear that where she either expressly or impliedly charges her separate estate for necessaries, it will entitle her creditors to satisfaction out of that fund.

Heatley v. Thomas, 15 Ves. 596. Bulkin v. Clarke, 17 Ves. 505.

Stuart v. Lord Kirkwall, 3 Madd. 387.

Whether without such a charge her general creditors can come upon such separate estate, does not appear to be quite settled. Lord *Thurlow*, in *Hulme* v. *Tenant*, seems to have been of opinion

1 Ves. jun. 277. 2 Ves. jun. 150. 8 Ves. 175.

opinion they could, considering the liability to general engagements as a necessary incident to separate estate, arising from the capacity to contract, which a separate estate confers; but subsequent authorities appear to limit the liability to cases where the contract is entered into with the intention of charging her separate estate, in which cases the court treats the charge as an appointment by the wife of her separate estate.‖ 9 Ves. 493. 497. 11 Ves. 225. 3 Madd. 389. *Qu.* Whether there is any distinction as to the liability of the separate estate

whether the feme is living with her husband, or enjoying a separate maintenance. 2 Roper, 306.; and see *Id.* 242., and *Qu.* whether the husband can throw the expense of her funeral on her separate estate? Gregory v. Lockyer, 6 Madd. 90.

If a wife charge her estate with the payment of her husband's debts, or apply her separate estate to such purpose, and it do not appear to be intended by her as a gift to him, equity will decree the husband's assets to be applied in exoneration of her estate, or in repayment of the money advanced. Huntingdon v. Huntingdon, 2 Vern. 437. 1 Bro. P. C. 1. Pocock v. Lee, 2 Vern. 604. Tate v. Austin, 1 P. Wms. 264. 2 Vern. 689. Parteriche v. Pawlet, 2 Atk. 384. Clinton v. Hooper, 3 Bro. Chan. R. 201. ‖Kinnoul v. Money, 3 Swanst. 217. n. Aguilar v. Aguilar, 5 Madd. R. 414. Pitt v. Pitt, 1 Turner R. 180.‖

‖With respect to the wife's right to redeem her mortgaged estate, where the equity of redemption is not reserved to her by the mortgage, it seems established that where the mortgage-deed of the wife's property contains no limitations of the estate beyond the security, and reserves the equity of redemption to the husband alone, in that case the wife's original sole interest will be preserved to her, the *mere form* of the reservation of the equity of redemption being held insufficient of itself to alter the prior title to the property; and the circumstance of the reservation having been made otherwise than to the owner of the estate (the wife), being presumed in law to have originated either in the inaccuracy of the language of the clause, or in the mistake of the person who prepared or engrossed the deed, neither of which circumstances is allowed to prejudice the person having the prior title. Broad v. Broad, 2 Chan. Ca. 98. 161. Ruscombe v. Hare, 6 Dow's Parl. Ca. 1.

But where the mortgage-deed contains a settlement of the wife's estate, and the mortgage, or the form of reservation of the equity of redemption, has nothing to do with the subsequent limitations of the property, but is perfectly distinct from them; as where the mortgage is for a term of years, and the limitations apply to the inheritance, in that case these limitations, through the medium of the wife's fine, will take effect, and the persons entitled to redeem will be not the wife under the prior title, but the persons interested in the estate under the uses or limitations contained in the mortgage-deed.‖ Rowell v. Walley, 1 Chan. R. 116. Jackson v. Innes, 16 Ves. 356. 1 Bligh R. 104. 1 Roper, 156.

In equity gifts may be supported between husband and wife, though the law doth not allow the property to pass. Such gifts, however, must not be prejudicial to creditors; nor must they be of the whole of the husband's estate. Slanning v. Style, 3 P. Wms. 334. and Calmady v. Calmady,

there cited. Bletsow v. Sawyer, 1 Vern. 245. Moor v. Freeman, Bunb. 205. Mitchell v. Mitchell, there cited. Beard v. Beard, 3 Atk. 72.] ‖As to what words constitute a provision to the wife's separate use, see *ante*, p. 738.‖

BARRATRY.

(A) Who shall be said to be a Barrator.
(B) Of the Form of the Proceedings against such an Offender.
(C) How punished.

‖As to Barratry by the master of a ship or the sailors, See MERCHANT AND MERCHANDIZE, (I). MARINE INSURANCE, Vol. V. p. 462.‖

(A) Who shall be said to be a Barrator.

A BARRATOR is described a person who is a common mover exciter, or maintainer of suits or quarrels, either in courts or in the country; and this offence consisting in all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow among neighbours, it is not material whether the suits commenced be in a court of record or not; or whether those quarrels relate to a disputed title of possessions or not.

[Barrator, according to Junius, is *vitilitigator*, and is a forensic term, taken from the *Normans*. The Icelandic and Scandinavian, *baratta*; the Anglo-Norman, *baret*; and the Italian, *baratta*, are all words signifying a quarrel, or contention. Skene saith that barrators were simonists, so called from the Italian, *barrataria*, which signifieth corruption in a judge who giveth an unjust sentence for money. And with us it may be observed, by stat. 3 E. 1. c. 33., barrators are forbidden to give judgments.] Co. Lit. 368. a. b. 8 Co. 36. b. Hawk. P. C. bk. 1. c. 21. Dan. 725. 3 Inst. 175.

But if a man prosecutes an infinite number of suits, which are his own suits, against others, yet he shall not be a barrator by this; for if they are false and groundless, the defendants shall have costs against him.

Roll. Abr. 335. But by Hawk. P.C. bk. 1. c. 21., if such suits are merely groundless, and brought only with a design to oppress the defendants, such a man may as properly be called a barrator, as if he had stirred up others to bring them. *Vide* 3 Mod. 98. 8 Co. 36 b. 2 Atk. 340.

An attorney cannot be deemed a barrator in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy.

Hawk. P. C. bk. 1. c. 21.

Also it seems clear, that no man can be a barrator in respect to one act only (*a*); for every indictment for such crime must charge the defendant with being *communis barractator*.

Hawk. P. C. bk. 1. c. 21.

(*a*) In respect to one or two acts only. 2 Roll. Abr. 89.

A feme covert cannot be indicted as a common barrator. (*b*)

(*b*) But this opinion, Serjeant Hawkins says, is justly questionable; for since a feme covert is as capable of exciting quarrels, in frequent repetition whereof the notion of barratry seems to consist, as if she were sole, why should she not as properly be indictable for it? 1 Hawk. P.C. bk. 2. c. 21.

(B) *Of*

(B) Of the Form of the Proceedings against such an Offender.

NO general indictment, charging the defendant with being a common oppressor and disturber of the peace, and stirrer up of strife among neighbours, is good, without adding the words *communis barractator*, which is a term of art appropriated by the law to this purpose. Mod. 288. Sid. 282. Cro. Jac. 526.

An indictment of barratry concluding *cont. formam statuti* is good, though no statute be made directly against it, but only for the punishment of it, supposing it an offence at common law. 2 Roll. Abr. 79. Cro. Jac. 527. Cro. Car. 340. 2 Keb. 409, 410. Cro. Eliz. 148. Hawk. P C. bk. 1. c. 21.

Also it hath been holden, that an indictment of this kind may be good, without alleging the offence at any certain place: because, from the nature of the thing, consisting in the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, that a trial ought to be by a jury from the body of the county. 2 Keb. 410. Cro. Eliz. 195. Latch, 194. Palm. 450., and Roll. R. 295. *cont.*

It hath been resolved, that such an indictment is not good, without concluding *cont. pacem, &c.*, for this is an essential part of it. Cro. Jac. 527.

It seemeth to be the settled practice at this day, not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 Mod. 18. 1 Hawk. P. C. bk. 1. c. 21. 2 Atk. 340.

(C) How punished.

IF they are common persons, the usual punishment is by fine and imprisonment, and also by binding them to their good behaviour; but if they are of any profession relating to the law, they may be further punished by being disabled to practise for the future. Hut. 104. 1 Hawk. P. C. bk. 1. c. 21. Whether justices of the peace as such have cognizance of barratry without any other commission, by virtue of the 34 Ed. 3. 1. *Quære*, and *vide* Hawk. P. C. bk. 1. c. 21. Yelv. 46. 2 Roll. R. 151., and 2 Hawk. P. C. bk. 2. c. 8. § 39.

BASTARDY.

ALL well regulated governments have laid down and settled certain rules of propagation, as necessary to the very being of human society. Hence the solemnity of marriage was established, not only as it prevents lewdness, but as a regulation, without which there could be no distinction of families, and consequently no encouragement for industry, or foundation for acquiring riches; the children therefore that are born in these societies, and are to enjoy any privileges by the laws, must be such as are born according to their rules of copulation; for it is absurd that the laws should give sanction and privilege to things done contrary to the law, since that would take away the distinction of right and wrong, lawful and unlawful; and therefore bastards by our law lie under several disabilities. (*a*)

[According to Ld. *Coke*, "*bastardus* "*dicitur à* "*Græco verbo* "βασσαρις; "viz. *meretrix*, "*seu concubina*, "*quia procrea-* "*tur ex mere-* "*trice seu con-* "*cubinâ.*". But Sir Henry Spelman, *verbo bastard*, rejects this derivation, and holds it to be a pure *Saxon* word, "*bastart;*" viz. *impurè natus, ut apud nos, upstart dicitur homo novus.* It is compounded of *base*, vile, or ignoble; and *peopse*, original. Others, among whom is Dr. Johnson, derive it from the *British*, "bastaerd," or "bastardd," a word compounded of bâs, *minimè profundus*, et tardd, *germinatio*, tarddu, *germinare, pullulare, salire, oriri ut fontes, q. d. qui non à profundâ et antiquâ nobilitate ortum deducit, sed qui nuper ortus est et germinavit.* The word *bas*, or *base*, it may be observed, is from the *Persic*, *bast, bay.* Hickes deduceth it from the Islandic, *busta;* and *er, or*, and *ord;* viz. *principium*, whence *busta-ord*, or *bustard, origine vel ortu non legitimus. Vide* Davies, Cambro. Brit. Lexi., Du Fresne's Gloss. Jun. Etymol., and Hickes's Thes.] In ancient days bastardy was so disgraceful, that to retain a bastard in a man's house was a reflection; and the stain and reproach of the parent's crime dwelt always upon the issue, so that he could not be admitted to a feudal service; and, therefore, when the bishops requested that our law should be changed in the particular of Bastard Eignes, the statute says that all the barons and earls answered, *una voce, nolumus leges Angliæ mutare.* Merton, 9. 2 Inst. 93. [See notes, Co. Lit 244 b. 245 a. (15th edit.) In *Germany*, and with us (who derive many of our customs and political opinions from the *Germans*), bastardy was always a circumstance of ignominy. But in *Spain, Italy*, and *France*, bastards were, in many respects, on an equal footing with legitimate children. Butler's Co. Lit. 243 b. note 2. But Sir H. Spelman tells us (he doth not, indeed, refer to any authority), that among the northern nations bastardy was no bar to succession; and to shew that it was not considered by them as ignominious, he cites the letter of the Conqueror to *Alan* Count of *Brittany*, beginning with these words, "*Ego Willelmus Rex, cognomento* bastardus." Eustathius asserts, that bastards were as honourable as legitimate children about the time of the *Trojan* war; but the passage in the Iliad, Θ 281., which he refers to as establishing this equality, evidently shews the contrary. Perhaps there was no time among any civilised people when illegitimacy was not reputed a disgrace.] (*a*) He is *quasi nullius filius*, and can be heir to no man. Doct. & Stud. Dial. 1. c. 7. Inst. 123.

Under this head we shall consider,

(A) Who are Bastards.

‖(B) Of their Capacities and Incapacities.‖

(C) Where Bastardy is to be tried, and the Rules concerning such Trial: And herein of general and special Bastardy.

(D) Of Bastard *Eigne* and *Mulier Puisne.*

(E) How

(E) How Bastards are to be provided for: And herein of the Duty and Power of Justices of the Peace.

(F) Murdering Bastards, ‖and concealing their Birth.‖

(A) Who are Bastards.

ALL persons born out of lawful matrimony are bastards by the common law; but, by the civil law, those that are born before marriage are legitimated by a subsequent marriage; for, by the civil law, all persons adopted into a man's family were inheritable; and the canonists have allowed of this notion, because the subsequent marriage, they say, takes away the preceding guilt, and shews a consent from the beginning. This difference between the civil law may likewise be ascribed to the power which the father, by the *Roman* law, had over his children, because he was the author of their being, and had the care of their education; if therefore a child should not be legitimated by a subsequent marriage, the parent would not have had him under his power; for no man had a power over the *vulgo quæsiti*; and consequently the father would not have commanded that to which he gave being; nor would the child have had the benefit of the parent's education; which would have cut a member from the commonwealth.

47 E. 3. 14. b. 11 H. 4. 81. Bract. lib. 5. fol. 416. Roll. Abr. 624. [1 Black. Com. 454, 455. By the *Roman* law, it should be observed, the father could legitimate only his "*natural* "*children*," or the offspring of his concubine, who, by this epithet of "*natural*," were distinguished from the spurious brood of adultery, prostitution, and incest, to whom *Justinian* reluctantly grants the necessary aliments of life. *Vide* Inst. l. 1. 10. Pandect. l. 1. tit. 7. Cod. l. 1. tit. 27. Noy, 74. 89. Heinec. Elem. Jur. de Legitimatione.] ‖And the French law, which admits the legitimation by subsequent marriage, makes the above distinction. Code Civ. Art. 331. The legitimation is a privilege inseparably annexed to the marriage, so that though both the parents and the children should waive or refuse it, the children nevertheless would be legitimate. But it holds in those cases only where at the time of the birth of the children it was lawful for the parents to marry; for if the father were married to another woman at the time of the birth of the children, and afterwards his wife died, and he married the mother of the child, the child would not be legitimated by the subsequent marriage. Children thus legitimated are on an equal footing with the legitimate children; and if they die before the marriage of the parents still they are considered as legitimate, and transmit their legitimacy to their issue. But whether they are considered legitimate only from the time of the marriage of their parents, or whether their legitimacy by their parents' marriage has a relation back to the time of the birth, is a point warmly disputed by the civilians and canonists. The prevailing opinion seems to be that they are to be considered as legitimate to all purposes, but those in which to consider them as such would operate to the detriment of a third person. Thus, if there be a natural-born child, and the father afterwards marries and has sons, his wife dies, and he marries the woman by whom he had the natural child, it seems to be the better opinion, that the child legitimated by the subsequent marriage does not acquire the right of primogeniture over the sons of the first marriage. Co. Litt. 245 a. note 1.; and see Pothier Traité du Contrât de Mariage, part 5. c. 2. § 5. Vinnius Inst. lib. 1. tit. 10. § 13. De Legitimatione. Heinecc. Elem. Jur. Civ. p. 50.; and tit. *Marriage and Divorce* (D), Vol. V. p. 314.‖

‖The law of *England* not only does not allow children born before marriage in *England*, to be rendered legitimate by the subsequent marriage of the parents; but the Court of King's Bench has lately decided, that a *Scotch* child born before marriage,

Doe dem. Birtwhistle v. Vardill, 5 Barn. & C. 438.

riage, and rendered legitimate in *Scotland* by the subsequent marriage of its parents there, is not inheritable to lands in *England*. The case was an ejectment brought on the demise of *John Birtwhistle* for recovery of lands in *Yorkshire*, and the jury found a special verdict, from which it appeared that the lessor of the plaintiff was undoubted heir as nephew of the person last seised, if he could be held legitimate and capable of inheriting lands in *England*. His father went to *Scotland* in 1790, and cohabited with his mother; and in 1799, during such cohabitation, and the father and mother being both domiciled in *Scotland*, the lessor was born, and in 1805 the parents married in *Scotland*. The father died in 1810 in *Scotland*, seised of lands there, to which the lessor was duly served heir according to the *Scotch* law. The court held, after argument, that the lessor of the plaintiff was not by such marriage of his parents after his birth, rendered capable of inheriting lands in *England*. *Abbott* C. J., saying, "We adopt the laws of all christian countries as to marriage, but, it by no means follows, that we are to adopt all the consequences of such marriages which are recognized in foreign countries; it is sufficient if we admit all such consequences as follow from a lawful marriage solemnized in this country;" and *Holroyd* J. says, "the *lex loci* is alone applicable to the inheritance of real property; and I take it, that legitimacy alone is not sufficient to make a person inherit socage lands, it must be legitimacy *sub modo*; the heir must be a child born after marriage."

Two cases had been previously decided in the House of Lords, which were cited in support of the principle contended for in the above case, that legitimacy is a personal *status* accompanying the party wherever he goes, that it must be settled by the law of the country where the marriage takes place, and that a person cannot be legitimate in one country and illegitimate in another: but these cases do not appear inconsistent with the peculiar grounds on which the decision in *Doe* v. *Vardill* proceeded.

The first case was decided in the Court of Session in *Scotland*, and the judgment was affirmed in the House of Lords in 1808.

5 Barn. & C. 444. *W. Sheddon* of *New York*, married, according to the law of *America*, a woman who had previously borne him two children, *William* and *Jane*, and he died a few days afterwards, leaving an estate in *Ayrshire* not disposed of by will or settlement; such marriage, according to the law of *America*, had not the effect of rendering the children legitimate. It was held that the son *William* could not inherit the *Ayrshire* estate, because his legitimacy or illegitimacy must be determined according to the laws of *America* where his parents were domiciled, and where himself was born, and by the law of that country he was illegitimate.

Ibid. So also in the case of the *Strathmore* peerage, the son of Lord *Strathmore* born in *England* before the marriage of his parents, who were domiciled in *England*, was held not entitled to inherit the *Scotch* peerage and estates, though his parents had subsequently

quently solemnized a valid marriage in *England.* Lord *Eldon* said he could discern no material difference between the case of the then claimant and that of *Sheddon* v. *Patrick*; and Lord *Redesdale* says, "the law that attached to the claimant from his "birth, was the law of *England.* I apprehend this child was "born illegitimate according to the law of the country in which "he was born, according to the condition of the mother of whom "he was born, and according to the state of his father, who was "at the time a person unquestionably domiciled in *England.*" ‖

All persons born within marriage are legitimate, unless there is an apparent impossibility that they should be generated by the husband; for there is the strongest presumption that can be, that they are legitimate, because the husband hath the power and dominion over his wife, and therefore may by the law keep her by force within the bounds of duty; to which the canonists have added a fanciful reason, to wit, the husband, having the ownership of his wife, hath the property of the fruit of her body, though planted by another; *quicumque semen apposuit, marito acquiritur, quia est dominus ventris.* Now the presumption thus being that it is the husband's child, it must be destroyed by contrary proof; and this negative, that it is not the husband's child, is capable of no other proof than this only, that it must be shewn impossible it should be the husband's child; if therefore the husband be proved castrate, the issue are bastards.

If the husband be under the age of fourteen, the issue are bastards; for, before the age of puberty, generation is naturally impossible. [1 H. 6. 3. b. Bro. Bastardy, 26. Roll. Abr. Bastard (B), 13.] 18 H. 6. 31. 34. 29 Ass. 54. Bro. Bastardy, 36. Co. Lit. 244. [The age of puberty is fixed by us, after the *Roman* law, at the age of fourteen. Before the time of *Justinian*, puberty in males was judged of *ex habitu corporis:* but that emperor thinking *inspectionem habitudinis corporis* an indecent practice, fixed its commencement immediately upon the completion of the fourteenth year. Inst. lib. 1. tit. 22. But it is absurd to suppose that generation is physically impossible before the age of fourteen; nor is it so concluded in the authority to which the passage in the text refers. 1 H. 6. 3. b. What is there said (and it is, by the way, merely the speech of counsel,) is, that in such case the issue shall be bastard, "*pur ceo que ne poit estre* entendus par nul ley *que l'enfant deins cel age poit engend.*"]

If the husband be not within the four seas during the time that passeth between the conception and birth of the child, it is a bastard. This was settled when the king's dominions extended to the four seas only; for to pass and re-pass in the king's dominions was possible, without any knowledge or proof; but to pass out of another's dominions into the king's, without some knowledge or proof of the matter, was supposed by the law not possible; for there is no such passage in a realm well governed without examination. Roll. Abr. 355. Co. Lit. 244. Bract. 239. If the husband be in *Ireland* during the time the wife goes with child, the issue is no bastard, because the husband was within the king's dominions. Roll. Abr. 328. *Quære.* ‖It is now settled that the presumption of access or non-access at such a period as according to nature might render the husband the father of the child, or otherwise, is to be established by evidence like any other fact. See The King v. Luffe, 8 East, 206. Opinions in Banbury Peerage Case, *post*, 751.‖

An order of two justices, which was affirmed on appeal, adjudged *J. S.* the reputed father of a bastard child; the order recited specially, that *Mary*, the wife of *Jonathan Spence*, mariner, was delivered of a male bastard child, and that it appeared to them Carth. 469. Salk. 122. pl. 5. [But it hath been settled ever since

Pendrel's case, in 5 G. 2., that not only proof of being out of the kingdom, but also every other kind of evidence tend-

them upon oath of, &c. that *Jonathan Spence*, her husband, was in the king's service at *Cadiz* in *Spain*, and not within the king of *England*'s dominions, at the time when the said child was begotten or born; and because it did not appear that the husband was absent all the time, as well as at the time of conception and the child's being born, the order was quashed.

to prove the impossibility, or even improbability, of the husband's being the father, is admissible. 2 Stra. 925. ‖Bull. N. P. 113 a.‖ 3 P. Wms. 365. 1 Black. Com. 457. Lomax v. Holden, 2 Stra. 940. Rex v. Inhabitants of Bedall, *Id.* 1076. Ca. temp. Hardw. 379.; and Andr. 8. S. C. Goodright v. Saul, 4 Term R. 356. Rex v. Inhabitants of Lubbenham, *Id.* 251.] ‖See the resolutions in the Banbury Peerage Case, and the report of the Gardner Peerage Case, *post*.‖

‖But it is not necessary that the husband should be absent during the whole time of gestation, in order to render the child illegitimate, if he be absent so long that, according to the course of nature, he could not be the father.

The King v. Luffe, 8 East, 193.; and see 11 East, 132. 12 East, 550. Head v. Head, 1 Sim. & Stu. 150. 1 Turner R. 138. Smyth v. Chamberlayne, decided in the Prerogative Court of *Canterbury* by Sir *W. Wynne* 1792. Appendix to Le Marchant's Gardner Peerage Case.

An order of bastardy removed into the King's Bench by *certiorari*, stated, that it appeared to the justices, on the oath of *Mary Taylor* as otherwise, that her husband had been beyond seas, and that she had not seen him or had access to him from the 9th of *April* 1804, till the 29th of *June* 1806; and that it appeared that the said *Mary Taylor*, on the 13th of *July* 1806, was delivered of a male bastard child likely to become chargeable to the parish of *B.*, and that *H. Luffe* did beget the said child on the said *Mary Taylor*; and the justices upon examination of the cause and circumstances of the premises, as well as upon oath of the said *Mary Taylor* as otherwise, did thereby adjudge the said *H. Luffe* to be the reputed father, *&c. &c.* Three objections were taken to the order: 1st, that the wife was admitted to prove the nonaccess of her husband; 2dly, that the child, being of a married woman, the justices had no jurisdiction to make an order of filiation, unless the child appeared to have been actually chargeable; 3dly, that the nonaccess of the husband was not proved during the whole time of the wife's pregnancy, which was necessary to bastardize the issue. Lord *Ellenborough* C. J., after over-ruling the first objection, and observing that the second resolved itself into the third, proceeded, in an elaborate judgment, to show that there was no novelty (as had been urged) in the doctrine of admitting the proof of nonaccess of the husband, living within the kingdom, in order to rebut the presumption of legitimacy; and his lordship cited cases from the Year Books, 1 H. 6. and 10 and 18 Edw. 1., where this evidence had been admitted. "The rule of law," says his lordship, "which has prevailed in these "cases, is *stabitur huic presumptioni donec probetur in contrarium.* "*Ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore,* "*infirmitate vel aliâ causâ impeditus, vel erat in ea invalitudine* "*ut generare non possit.* Bracton, p. 6. a. From all these authorities I think this conclusion may be drawn, that circumstances which shew a natural impossibility that the husband should be the father of the child of which the wife is de-

See the opinions of the judges on the Banbury claim of Peerage,

"livered,

" livered, whether arising from his being under the age of " puberty, or from his labouring under disability occasioned " by natural infirmity, or from the length of time elapsed " since his death, are grounds on which the illegitimacy of the " child may be founded." The order was confirmed.

post, Shelley v. ———, 13 Ves. 58.

It was held in one case not absolutely necessary to prove the nonaccess of the husband, where the circumstances of the case raised a strong presumption against the legitimacy of the child; as, for instance, where it was born during the notorious cohabitation of the mother with another man, and was considered by all the family as his child.

Goodright v. Saul, 4 Term R. 356. But Lord *Erskine*, who was counsel in this case, has stated that it was decided on the ground of nonaccess being proved. See Gardner Peerage Case, Appendix, p. 468.; and see the case of Boughton v. Boughton. *Id.* 469.

In the celebrated case of the *Banbury* peerage, the judges, in answer to questions put to them by the House, gave the following unanimous answers: —

" The presumption of legitimacy, arising from the birth of a " child during wedlock, the husband and wife not being proved " to be impotent, and having opportunity of access to each " other during the period in which a child could be begotten " and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.

See Selw. Ni. Pri. 708. Gardner Peerage Case, by Mr. Le Marchant, Appendix, note E., where a concise and clear account is given from authentic sources of the various proceedings in this case, and 1 Sim. & Stu. 153.

" The fact of the birth of a child from a woman united to a " man by lawful wedlock, is generally, by the law of *England*, " *primâ facie* evidence that such child is legitimate. Such " *primâ facie* evidence of legitimacy may always be lawfully " rebutted by satisfactory evidence that such access did not take " place between the husband and wife, as by the laws of nature " is necessary, in order for the man in fact to be the father of " the child. The physical fact of impotency, or of nonaccess, " or of nongenerating access, as the case may be, may always " be lawfully proved by means of such legal evidence as is " strictly admissible in every other case in which it is necessary, " by the law of *England*, that a physical fact be proved.

" After proof given of such access of the husband and wife, " by which, according to the laws of nature, he might be the " father of a child, (by which is to be understood proof of " sexual intercourse between them,) no evidence can be received, except it tend to falsify the proof that such intercourse had taken place. (*a*) Such proof must be regulated by " the same principles as are applicable to the establishment of " any other fact.

(*a*) But see the Gardner Peerage Case, *post*.

" In every case where a child is born in lawful wedlock, the " husband not being separated from his wife by a sentence of " divorce, sexual intercourse is presumed to have taken place " between the husband and wife; until that presumption is " encountered by such evidence as proves, to the satisfaction of " those who are to decide the question, that such sexual intercourse did not take place at any time, when by such inter-

" course

" course the husband could, according to the laws of nature, be " the father of such child.

" The presumption of legitimacy of a child born in lawful " wedlock, the husband not being separated from his wife by a " sentence of divorce, can be legally resisted only by evidence " of such facts or circumstances as are sufficient to prove, to the " satisfaction of those who are to decide the question, that no " sexual intercourse did take place between the husband and " wife at any time, when by such intercourse the husband could, " by the laws of nature, be the father of such child.

" Where the legitimacy of a child in such case is disputed, " on the ground that the husband was not the father of such " child, the question to be left to the jury is, whether the " husband was the father of such child; and the evidence to " prove that he was not the father, must be of such facts and " circumstances as are sufficient to prove, to the satisfaction of " a jury, that no sexual intercourse took place between the " husband and wife at any time, when by such intercourse the " husband could, by the laws of nature, be the father of such " child."‖

Roll. Abr. 358, 359, 360. If the marriage is made null by divorce, the issue is illegitimate; as if the parties be divorced for pre-contract, consanguinity, affinity, or frigidity; for where the marriage is nullified, it is a copulation without marriage, and consequently the issue are bastards; and it is the same by our law, whether they have notice or not of the consanguinity, because we look no further than the dissolution.

Roll. Abr. 357. If a man marry his cousin within the degrees, or his sister, the issue got between them is not a bastard till there be a divorce; for though such a marriage be unlawful, yet it remains good till sentence of divorce be pronounced, and consequently the issue must be esteemed legitimate till such a dissolution.

5 Co. 98 b. Burie's case, 2 Leon. 169. S. C. Jenk. R. 268. Noy, 72. Moor, 225. pl. 366. S. C. by the name of Morris and Webber. If a man be divorced from one woman *propter perpetuam generandi impotentiam*, and then marry another, and have issue by the second marriage, which continues without divorce, the issue are lawful; for a man may be *habilis et inhabilis diversis temporibus*, and the second marriage is not avoided by any divorce, and therefore stands good in law.

2 Roll. Abr. 355. Foxcroft's case. ‖See 8 East, 193. 12 East, 550.‖ A bed-rid person marries a woman that is pregnant in his chamber, the woman is delivered twelve weeks after; the child adjudged a bastard, for the apparent impossibility of his being the father of it.

Roll. Abr. 358. If a woman marry *grossment ensient* it is the child of the husband; for, when they testify their consent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his; for at that time the child is one with the mother, and therefore in taking the mother he takes the child with her.

7 Co. 41. If a man is married within the age of consent, and when he comes

comes to that age he is divorced by reason of his dissent from the marriage, and then he marries again, and hath issue, and dies; it cannot be averred that he cohabited with his first wife to avoid the divorce and disannul the second marriage, and bastardize the issue, for the ecclesiastical courts are proper judges in this case; and when by sentence they have declared the marriage void, it cannot belong to the temporal courts to enquire into and set aside their sentence, for that is to take away their jurisdiction; the same law if the first wife had been divorced *causâ præcontractus.*

Kenn's case, Roll. Abr. 360. Cro. Jac. 186. 4 Co. 29. Godolph. 484.

If there be a separation for adultery *à mensâ et thoro*, the issue born afterwards are presumed *primâ facie* not to be the husband's, unless it appear upon proof that the husband after such separation did cohabit with his wife.

11 H. 7. 27 a. Roll. Abr. 359. 7 Co. 42. Salk. 123. pl. 7. 3 P. Wms. 275.

[Where parliament dissolves a marriage for a cause subsequent thereto, there is no necessary or general occasion for reputing the children illegitimate.]

1 Wooddes. 594. In the case of adultery, a clause is occasionally inserted for illegitimating children born after a particular time. See Martin's Divorce Bill, 1793.

If *A.* takes *B.* to wife, and has issue by her, and they are afterwards divorced, because they were within the age of consent at the time of marriage, and afterwards disagreed; and then *A.* takes *D.* to wife, by whom he hath issue, and dies; upon the suit of the issue of *B.* the ecclesiastical commissioners, upon a commission directed to them, cannot enquire into the marriage between *A.* and *D.* because they are dead; for though a sentence of divorce may be repealed, after the death of the parties, by suit in the spiritual courts, yet no sentence of divorce can pass there after the death of the parties; for a divorce in the ecclesiastical courts, after the death of the parties, can be only made to bastardize the issue of that marriage, which being a thing that concerns the inheritance, is properly cognizable in the temporal courts; therefore a prohibition shall be granted to stop their proceeding upon it.

Roll. Abr. 360. 7 Co. 43 b.

As to the legitimation of children born after the death of the husband, it is agreed, that the usual time of birth is nine solar months and ten days; but it may be hastened or prolonged by accident; as by hard usage, want of sustenance, *&c.*; because the nourishment of the child in the womb, depends on that of the mother; so that a child hath been allowed legitimate nine months and twenty days after the death of the father; but when the child was born eleven months after the death of the husband, and it was proved the husband could not enjoy his wife within a month before his death, it was adjudged a bastard.

‖Alsop v. Stacey,‖ Palm. 9. Roll. Abr. 356. Godbolt, 281. Stile, 277. ‖Cro. Jac. 541.‖ See Mr. Hargrave's note, 1 Co. Lit. 123 b. ‖where he contends that Lord *Coke's* rule, that nine months, or forty weeks, is the furthest *legitimum tempus* allowed by law for a child to be born, is too strict; and that it seems to be the practice of the courts to consider forty weeks merely as the more *usual* time, and not to decline exercising a discretion of allowing a longer space where the opinions of physicians, or the circumstances of the case, have so required. See the arguments in the Gardner Peerage Case, reported by Mr. Le Marchant 1828, where Mr. Hargrave's note is considered, and Dr. Hunter's opinion as to the period of gestation stated by Mr. Hargrave is much questioned.‖

Palm. 9. Co. Lit. 8 a.

A lewd woman after her husband's death married her adulterer, and within six months and a day after her first husband's death had a child; it was adjudged the first husband's, because he had the dominion of the woman at the time of her conception.

21 E. 3. 39. Co. Lit. 8 a. Bro. 97. Roll. Abr. 357. ‖See the case of Forster v. Cook, 3 Bro. C. R. 347. But see Lord *Eldon*'s observations on this case in the Gardner Peerage case, p. 286.‖

A wife marries immediately after her husband's death, and hath a child nine months and eleven days after the death of her first husband; it was adjudged the second husband's, because it was born one day after the usual time, and the usual time is the only measure to discern between them; but if it be born at the end of nine months and ten days, the father is doubtful, and some have said, that the child may choose his father.

But to prevent this doubtfulness in heirs, and to hinder the wife from putting false children upon her deceased husband, the law hath provided the writ *de ventre inspiciendo* for the husband's heir; and if the wife be found with child, or suspected to be so, she must be removed to a castle, and there safely kept till her delivery; and by this writ the heir may take her away from her second husband; but it lies not for the heir apparent, who hath no interest in the estate in the life of the ancestor. Co. Lit. 8. Roll. Abr. 357. This power of removing the relict of the ancestor to a castle, in case she really is, or is suspected to be with child, seems only to be used where the woman continues unmarried; for if she takes another husband, and the sheriff returns that he caused her to be searched by such women, and found her to be *enseint*, the course seems to be this, *viz.* for the husband to enter into recognizance that she shall not remove from the house where they then inhabit; after which a writ is to be awarded to the sheriff to cause her to be viewed every day till her delivery by two at least of the said women returned by him, and that three or more of them shall be present with her at her delivery. Cro. Jac. 685. Moo. 523. Co. Lit. 8. Cro. Eliz. 566. Reg. 227. [This writ is grantable to tenant in tail. *Ex parte* Aiscough, 2 P. Wms. 591. Mosel. 391. It is now granted to a devisee, whether for life, or in tail, or in fee. *Ex parte* Bateman, at the Rolls, 10th *Dec.* 1784. *Ex parte* Bellett, at the Rolls, 20th *Dec.* 1786. *Ex parte* Wallop, 4 Bro. Chan. R. 90. In Mosely a case of *personal estate* is cited, in which the then Master of the Rolls, in conformity to the reason of the common law, directed that the Master should appoint two matrons to inspect a woman. Mos. 391.]

Gardner Peerage Case, reported by Denis Le Marchant, Esq. See the Preface for some learned remarks on the law respecting adulterine bastardy, and the Appendix for several cases as to the law of *Scotland* and *France* on this subject, and for a clear and authentic report of the proceedings in the Banbury Peerage Case.

‖Captain *Alan Hide Gardner* and *M. E.* his wife, cohabited as man and wife from their marriage till the month of *January* 1802. On the 10th of that month, Captain *G.* being on board the ship which he commanded at *Portsmouth*, Mrs. *G.* joined him, and remained till the 30th of *January*, when she quitted the ship at *St. Helen's*. On the 7th of *February* following, Captain *Gardner* sailed for the *West Indies*, (having never been on shore since Mrs. *G.*'s departure,) and did not return to *England* till the 11th of *July* following. Mrs. *G.* returned to *London* on quitting the ship, and immediately commenced or resumed an adulterous intercourse with Mr. *H. Jadis*, who, in about a week from her return, was seen by her servant with her in her bed-room, and on another occasion, in bed with her. She kept up a constant intercourse with him during her husband's absence. Before Captain *G.*'s return in *July*, Mrs. *G.* declared herself with child, and expressed an expectation of being delivered on Captain *G.*'s return in the summer. In the autumn she appeared advanced in pregnancy, Captain *G.* treated her like a woman in that condition, and expressed anxiety as to her health and as to the child likely to be born. Having been overturned in a carriage, the family apothecary was called in and attended her. Mrs. *G.* tried to advance her delivery by driving over the stones in her carriage, telling

telling her servant that her medical attendant advised it; and she also told her that the child would not be born in time to be Captain *G.*'s child, and that Mr. *Jadis* must be its father. She was delivered of a son on the 8th of *December* 1802, when Captain *G.*, by her contrivance, was not in the house, and did not sleep there that night. Mrs. *G.* told her husband's brother she had had a dropsy, and sent her servant to the family apothecary to say she was put to bed, but he must keep it a secret. The child was conveyed by the midwife, by Mrs. *G.*'s orders, to a woman to nurse; Mrs. *G.* visited it, and ordered it to be christened *Henry Fenton*, after Mr. *J.* her paramour. In *June* 1803, Captain *G.* having discovered his wife's intercourse with Mr. *J.*, ceased to cohabit with her, and she went to live with Mr. *J.* They resided together, at *Bayswater*, and in *Hertfordshire*, and had a child with them called *Henry Jadis*. In 1814 the boy was placed at *Westminster* school by the name of *Henry Fenton Jadis*, and Mr. *J.* visited him, paid his bills, and treated him as his son. Captain *Gardner*, in 1804, recovered damages against Mr. *J.* in an action for adultery, and obtained a divorce *à mensâ et thoro*; and in 1805 the marriage was dissolved by act of parliament. In 1808, Captain *G.*'s father dying, he became Lord *Gardner*. In 1809 he married again, and in 1810 had a son, *Alan Legge Gardner*, on whom, by the death of his father in 1815, the barony of *Gardner* descended, supposing *Henry Fenton Gardner* (the son of which Mrs. *G.* was delivered in *December* 1802) to be illegitimate. *Alan Legge Gardner*, during his minority (in 1824), petitioned the king to declare his right to the barony by letters patent, or to order his name to be entered on the parliament roll as a minor peer, or to recognize his right in such other way as to his majesty should seem proper. On the report of the attorney-general, the petition was referred to the House of Lords; and in 1825 it came on to be heard before a committee of privileges. The above facts were proved in evidence; and various physicians and accoucheurs were also examined on the part of the petitioner, and on the part of *Henry Fenton Gardner*, (who put in his claim to the barony,) as to the possibility of *H. F. Gardner* being the son of Captain, afterwards Lord *Gardner*. On the part of the petitioner, five eminent medical practitioners stated they considered it impossible that *Henry Fenton G.*, born on the 8th of *December*, could be the fruit of intercourse between Captain *G.* and his wife on the 30th of *January*, or even on the 7th of *February*, the former period being forty-four weeks and three days, and the latter forty-three weeks and four days. They were also clearly of opinion, that he could not have been begotten by Captain *Gardner* after the 11th of *July*, when he returned to *England*. These witnesses agreed that forty weeks after conception was the latest time for the labour of a woman to commence, so that the woman and child could live; though the time was sometimes less. On the part of *Henry Fenton Gardner* a number of medical witnesses were called, who agreed that forty weeks or 280 days was the ordinary period

of gestation; but most of them professed to have known instances of that period being exceeded, and in some instances protracted to 306 and 311 days; and they conceived that a child born on the 8th of *December* might be begotten on the 30th of *January*; and some midwives and other women were called, who spoke to children being born (who lived), according to their calculations, at ten and even eleven months from their conception. (*a*) The Committee resolved, that *Alan Legge Gardner* had made good his claim to the barony, thereby establishing the illegitimacy of *Henry Fenton Gardner* or *Jadis*.‖

(*a*) It is to be observed that the witnesses for the petitioner professed to found their judgment as to the period of gestation on cases in their own knowledge, where the time of conception was ascertained with tolerable accuracy; and they agreed that in those instances they never knew the forty weeks or 280 days exceeded. None of the medical witnesses for *Henry Fenton Gardner* professed to state a case of that period being exceeded where the date of conception was *exactly known*; they only adduced instances of married women cohabiting with their husbands, where the computation was made either from the woman's last menstruation, or from the time when the expected menstruation was first missed, or from the sensations experienced on the quickening of the child. Any of these criteria, according to the admissions of the witnesses themselves must be fallible; the conception may take place either the day after the last menstruation, or not till twenty seven days after, or at any time in the interval. The return of the menses is often obstructed by cold and other causes, and is almost invariably suspended while the woman is suckling; and conception sometimes takes place during the suspension; and the period of quickening varies in different women to the extent of several weeks, besides that the sensations indicating it are liable to be mistaken. The only female witness who, in speaking to a gestation exceeding nine calendar months (ten months and five days) professed to date her conception from a definite day, *viz.* the departure of her husband to sea, was proved to be mistaken as to the date. See the Evidence in Mr. Le Marchant's Report. Notwithstanding, however, the clear and strong testimony of the medical witnesses for the petitioner, and the unsatisfactory nature of the evidence opposed to it, the decision is perhaps hardly to be deemed a recognition of the doctrine of the King v. Luffe, strongly supported by Lord *Erskine* in the Banbury Peerage Case, and which would *seem* the result of the Judges' opinions in that case, *viz.*, that in order to bastardize a child born in wedlock, the evidence must shew a *natural impossibility* of the husband being the father. Taking the evidence of the physicians, together with that as to Lady G's. adultery, and the circumstances attending the birth and education of the child, the case seems to proceed upon the broader rule, that a strong *moral improbability* may be sufficient to rebut the presumption of legitimacy arising from birth in wedlock. Had Lady G's. life been unimpeached, could the committee, on the evidence of the physicians alone, have pronounced the child illegitimate? And yet, according to the opinions in the Banbury Case, they were to be satisfied, "that no sexual intercourse did take place between the husband and wife at any time when by such intercourse the husband could by the laws of nature be the father of the child." Lord *Redesdale*, Lord *Eldon*, and Lord *Ellenborough* appear in this case to have considered strong *moral improbability* sufficient; and Lord C. *Lyndhurst* in Morris v. Davis (MS. Rep.; and see 5 Russell, S. C.) was of the same opinion, and impugned Lord *Erskine's* contrary doctrine — and considered moral improbability as the rule of the Banbury Peerage Case.

‖(B) Of the Capacities and Incapacities of Bastards.‖

Doct. & Stud. Dial. 1. c. 7. Inst. 123.

HE is *quasi nullus filius*, and can be heir to no man.

Co. Lit. 3 b. 6 Co. 65. ‖River's case, 1 Atk. 410. Wilkinson v. Adam, 1 Ves. & Bea. 422. 452.‖

But though he cannot inherit any ancestor, yet when he hath gotten a name of reputation, he may purchase by it; for all surnames were originally acquired by reputation. *George Shelly* conveyed lands to the use of himself, the remainder to *George Shelly* his son; whereas in truth *George* was born of one *B.* in matrimony of one *C.*, yet was reputed the son of *George*, and educated by him; though the boy was but six years old, it was ruled that he should take the remainder; for having got by reputation

reputation the name of *George Shelly*, these words are a certain designation of the person to make the remainder. But if a remainder be limited to the eldest issue of *J. S.*, whether legitimate or illegitimate, *J. S.* hath issue a bastard, he shall not take this remainder; for it is not vested in *J. S.* as it was in the other case, but is in contingency, and the certain time is not defined when this contingency shall happen: for the bastard, at his birth, does not acquire the reputation of being the issue of *J. S.*; and since the bastard, when first in being, cannot take by virtue of this limitation, he can never take it; for he cannot be understood to be the person designed and marked out by these words, if, after his birth, it depends on the uncertainty of popular reputation, whether he should take the remainder or not; and such a designation of the person as contains no certainty in itself, or no relation to any other certain matter that may reduce it to certainty, is a void limitation.

But where a remainder is limited to the eldest son of *Jane S.*, whether legitimate or illegitimate, and she hath issue a bastard, he shall take this remainder, because he acquires the denomination of her issue, by being born of her body; and so it was never uncertain who was designed by this remainder. Noy, 53. [See Metham. v. Duke of Devon, 1 P. Wms. 529., where Ld. *Macclesfield* inclined against such a remainder; and see Mr. Hargrave's observations upon this case. Co. Lit. 3 b. note 1.]

‖But an illegitimate child cannot claim a share under a devise to children generally, though the will was strong in his favour by implication. Cartwright v. Vawdry, 5 Ves. 530.; and see 1 Turn. & R. 510. 6 Madd. 292.

Nor although the testator knew that there were no legitimate children. Godfrey v. Davis, 6 Ves. 43.; and see 17 Ves. 531. 18 Ves. 147. 288.

Unless it appear by extrinsic evidence that he had acquired the reputation of a child at the time of the will.‖ Swaine v. Kinnersley, 1 Ves. & B. 469.; see 2 Meriv. 419. 1 Madd. 430. 12 Price 470.

If parents are married, and afterwards divorced, this gives the issue the reputation of children; and so doth a subsequent marriage of the parents. 6 Co. 65. Hughes's Abr. 363.

If the mother dispose of all her lands holden in chivalry, to her bastard son, she is not within the 32 H. 8. c. 1. which forbids the owners to dispose of above two thirds of such land for preferment of children; for children in any law must be intended such as are lawfully begotten. Dyer, 54b. Co. Lit. 123 b. 2 Roll. Abr. 785.

If a man, in consideration of natural affection and love, covenants to stand seised to the use of a bastard, this is not good; for he is not *de sanguine patris*; but it is said, that a woman may give lands in frank marriage with her bastard, because he is of the blood of the mother; but he hath no father, but from reputation only. Dyer, 57a. Andr. 79. 6 Co. 77. Noy, 55.

A court of equity will not supply the want of a surrender of a copyhold estate in favour of a bastard, as it will for a legitimate child. Preced. Chan. 475.

3 P. Wms. 33. 1 Wooddes. 397, 398.

[If a bastard, possessed of personal estate dies intestate, and without wife or children, the crown is entitled to such property, including leases or terms of years. The king, or other immediate lord of the fee, is also entitled to a real estate of inheritance, of which a bastard dies seised, without having devised it, and without leaving issue. This is the result of a bastard's being supposed to have no other relations, no heirs, or next of kin, except those arising from his own contract of marriage, namely, his wife and progeny. But the rigorous exertion of this prerogative would, in many obvious cases, carry the appearance of great hardship. It is usual, therefore, to make over the royal prerogative to some one; not indeed quite unconditionally and gratuitously, but with the reservation of a tenth, or other small proportion of the value, both of real and personal estate.

1 Term R. 96.

Bastards are within the stat. 26 G. 3. c. 33., which requireth the consent of parents or guardians to the marriage of persons under age; for the rule of *nullius filius* applies only to cases of inheritance.]

Priestley v. Hughes, 11 East R. 1.; The 26 G. 2.

‖And the consent of the natural mother is not sufficient to satisfy the statute; therefore the only legal consent in such a case must be by a guardian duly appointed.

c. 33. is now repealed by 4 G. 4. c. 75., the existing marriage act, and under this act a marriage of a minor without consent is not void. Rex v. Birmingham, 8 Barn. & C. 35.

Ex parte Anne Knee, 1 New R. 148. *Sed vide* 5 East, 224. n.

The mother of a bastard child, within the age of nurture, has a right to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it; and the court ordered it to be restored to the mother on *habeas corpus*, though it was not alleged that the custody was obtained unfairly.

Rex v. Sope, 5 Term R. 278. Rex v. Hopkins, 7 East R. 579.

And if the custody is obtained by the father by fraud or force, it is clear that the court will order it to be restored to the mother, without prejudice to the question of guardianship, which belongs to the Court of Chancery.‖

(C) Where Bastardy is to be tried, and the Rules concerning such Trial: And herein of general and special Bastardy.

Roll. Abr. 361. Bro. tit. Bastardy, 97. That where general bastardy is pleaded, the court, though

BASTARDY, in relation to the several manners of its trial, is distinguished into general and special bastardy. General bastardy is the bastardy tried by the bishop, which in its notion contains two things. 1stly, It should not be a bastard made legitimate by a subsequent marriage. 2dly, That it should be a point collateral to the original cause of action.

the parties conclude to the country, must direct a writ to the bishop. Rast. Ent. 105. The issue on general bastardy runs in this mauner: *Prædict.* J. R. *dicit quod* J. S. *est bastardus, et natus fuit apud* C. *in com. præd. in dioces. de* W., *et hoc paratus est verificare viis et modis quibus convenit, ac prout curia regis hic consideraverit; et prædict.* J. S. *dicit quod ipse objectione prædict. præcludi non debet, quia dicit quod ipse est legitimus et non bastardus; et hoc paratus est verificare ubi, et quomodo, et prout curia regis hic considerabit, et prædict.* J. R. *similiter.* Rast. Ent. 29. 279. 289.

Formerly

Formerly bastards had a way in such issues to trick themselves into legitimation, for they used to bring feigned actions, and get suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record, and after that their legitimation could never be contested; for being returned of record, as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it: but this created great inconvenience, as is taken notice of in the preamble of the 9 H. 6. c. 11., in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded: to remedy this inconvenience, without altering the rule of law, it was enacted, that before any writ to the bishop, there should be a proclamation made in the same court, and after that the issue should be certified into Chancery, where proclamation should be made once in every month for three months, and then the Chancellor should certify it to the court where the plea depends, and afterwards it should be again proclaimed in the same court, that all that are concerned may go to the ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. Roll Abr. 361.

If the ordinary certify or try bastardy without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the king, and therefore it must be exercised in the manner the king hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without an apparent necessity. Roll. Abr. 361.

The certificate must be under the seal of the ordinary, and not under the seal of the commissary only; for the command is to the bishop himself to certify; and therefore the execution of the command must appear to be by the bishop in proper person. Roll.Abr. 362.

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory (*a*); because the act of the public judicatory under which any person lives, is his own act; and were they not thus bound, there might be contradiction in certificates. *Ibid.*

(*a*) But in the trial of special bastardy, no person is bound by a verdict, unless he was party to the original suit; for no man can be bound by a judicatory from whence there lies an appeal, unless he be capable of that appeal; for it would be a contradiction, where there is an appeal supposed, to conclude a person that is incapable of bringing his appeal; as all persons who are not parties to the suit are; and therefore on a certificate, which is the highest act of that sort of judgment, every stranger is concluded, but not by verdict, because an attaint lies for him that is party to the original action. Roll. Abr. 362.

If a man be certified bastard, that doth not bind a stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions; nor doth it bind the party to the action till judgment thereon; because if he avoid the action, he avoids all the consequences of the action; and therefore if the defendant be certified bastard by the ordinary, Roll. Abr. 362. If the tenant be certified bastard, and die, though the writ abate, yet the certi-

fication stands in full force.

dinary, yet if the plaintiff be nonsuit, and they cannot go on to trial, the bishop's certificate never appears of record, and therefore is not binding.

Roll. Abr. 362.

If a man be certified *mulier*, no man is estopped to bastardize him, for though he may be a *mulier* by the spiritual law, yet he may be a bastard by our law; and therefore any man, notwithstanding the certificate, may plead the issue of special bastardy.

Bro. 76. 4 E. 3. 39. Rast. 289.

When a writ is awarded to the bishop to certify bastardy, day is given in court to attend such certification, otherwise the parties would be without day in court, in waiting for the bishop's certificate, and this would create a discontinuance, and therefore the parties must attend the day, and not expect that the proceedings should be revived by resummons; though some have holden the contrary, because the bishop is judge, and so not bound to a certain day.

11 H. 4. 78. Bro. Bastardy, 97 a.

Ne unques accouples in loyal matrimony is no plea but in dower; and in appeal to bastardize any person, bastardy general or special must be pleaded; for the matrimony is there to be questioned, where there is a claim under the relation of wife, but there is more than marriage in question in the point of legitimation.

Roll. Abr. 361.

The plea of bastardy may be tried by the bishop in actions personal, as well as real.

Bro. 97. Bro. 98.

If there be no bishop, the certificate must be made by the guardian of the spiritualities, for he is to sustain the office in the mean time.

28 E. 3. 27. Bro. 97. In *mortdancestor* the tenant pleads bastardy in the demandant; this shall be certified by the bishop of the diocese where the writ is brought, though the demandant says he is a *mulier*, born in another diocese; for he may bring his proofs and evidence to the diocese where the writ is brought. Bro. Bastardy, 97.

In an assize the tenant makes bar as heir; the plaintiff says the tenant is a bastard; the tenant says, he is a *mulier*, born at *London*; and prays a writ to the bishop of *London*; the plaintiff says, that he was born at *L.* in *Surry*, (the county also wherein the lands lie,) and prays that it may be tried by assize; but this could not be granted, because here bastardy was particularly pleaded, and not left at large upon the issue; but the certificate in this case was directed to the bishop of *Winchester*, within whose jurisdiction *Surry* is, because where the place of birth is in dispute, the trial must be in the place where the land lies; for where the place of birth is controverted, it is uncertain, and so is the same as if not alleged.

Bro. Bastardy, 98.

In an assize the bishop certified directly, that the defendant was a bastard, and it was indorsed on the certificate, that *A.*, the mother of the defendant, left her husband for seven years, in which time the defendant was begotten by one *B.*, a priest, and so a bastard; but because the defendant was made a bastard in the certificate, they gave no heed to the indorsement, as a thing foreign and immaterial.

(a) The issue is in this manner: *Et prædict.* P.

Special bastardy, which is always tried by a jury in the temporal courts, is twofold: 1st, Where the bastardy is the gist of the action, and the material part of the issue. (a) 2dly, Where those

those are bastards by the common law that are *muliers* by the spiritual law, and such are those that are born before marriage, whose parents afterwards intermarry.

dicit quod prædict. W. *actionem versus eum habere non debet quia dicit quod ubi prædict.* W. *per breve suum prædict. præsupponit et asserit se fuisse filium et hæredem præd.* T. *idem* W. *natus fuit extra omnia sponsalia et hoc paratus est verificare unde petit judicium si præd.* W. *ut filius et hæres prædict.* T. *seu alterius cujuscunque, &c. versus eum habere debeat. Et prædict.* W. *dicit quod prædict.* T. *patet suus habuit quandam uxorem sibi desponsatam* A. *nomine de qua ipse natus fuit infrà sponsalia inter ipsum* T. *et* A. *celebrat. et verificat. unde petit judicium.* So that when the party avers the birth within espousals by way of reply, he doth not offer an issue, because that were to take an issue too much at large; but it is necessary to set forth the manner of the birth, *viz.* of whom he was born, that they may go to issue upon a particular matter; otherwise, he that takes this plea would be put on the proof of an universal negative, which cannot be proved; and then the party that objected the defect, must offer an issue in this manner: *Et prædict.* P. *dicit ut prius quod prædict.* W. *natus fuit extra omnia sponsalia et non infrà sponsalia ut prædict* W. *superius allegavit et de hoc ponit se super patriam et prædict.* W. *similiter ideo, &c.* Rast. Ent. 387. Dyer, 97. pl. 51.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. Brownl. 1. Hob. 179. Godolph, Eccl. Law, 479. Co. Ent. 29.

If it be found by an assize taken at large that a man is a bastard, the temporal courts are judges of it, for the jury cannot be estopped to speak truth, which may fall within their own knowledge; and what they find becomes the record of the temporal courts, and so within their conusance. Bro. Bastardy, 97.

In an assize of *mortdancestor*, one of the three points enquirable is, Whether the demandant be heir to *J. S.*, the ancestor? in which case, if the tenant pleads he is ready to hear the recognizance of the assize (*et hoc paratus est per assisam inquirere*), he cannot give in evidence that the demandant is a bastard, but he ought to have pleaded the same; for if this were given in evidence, and not pleaded, the spiritual court would be ousted of their jurisdiction. Fitz. Abr. 12. 2 Inst. 400.

(D) Of *Bastard Eigne*, and *Mulier Puisne.*

A MAN who hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue a second son born after marriage; the first of these is termed in law a *bastard eigne*, and the second a *mulier*. By the common law, as hath been said, such *bastard eigne* is as incapable of inheriting, as if the father and mother had never married; but yet there is one case in which his issue was let into the succession, and that was by the consent of the lord and person legitimate; as if upon the death of the father the *bastard eigne* enters, and the *mulier* during his whole life never disturbs him, he cannot upon the death of the *bastard eigne* enter upon his issue. Lit. sect. 399. Co. Lit. 245.

No man can bastardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by 7 Co. 44. Jenk. Rep. 268. Brownl. 42. Co. Lit. 33 a.

Lit. sect. 399. Co. Lit. 245. (a) Though this seems to be the doctrine of the old books, yet there is this modern case: An ejectment was brought by one Pride against the Earls of Bath and Montague; Pride made title as heir to George Duke of Albemarle,

by the rules of the civil or common law: by the rules of the civil law, this person is by supposition legitimate; and if the common law be made the judge, he cannot be bastardized; for it is a rule of common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that represents him (*a*); and this rule of law was taken from the humanity of the ancients, who would not allow the calumny of the dead; as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an easy matter to throw on them the aspersion of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit to limit a time in which all proofs of bastardy are to be disallowed.

proving himself the son of one who was brother to the duke, and that the duke died without issue; the defendant gave evidence, that Duke George had issue Duke Christopher, who conveyed to him; plaintiff gave evidence, that Duke Christopher was a bastard, begotten of such a woman, who, at the time of her marriage with the said George Duke of Albemarle, was married to another man, who was then, and is yet living: Upon which it was objected, That since Duke George and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to bastardize the issue, who was dead also; and who, during his whole life, was reputed and taken to be the legitimate son of the duke, and so styled by the duke himself in his deed of settlement, and in his will, his son and heir; *et quod justum non est aliquem post mortem facere bastardum.* The court held this true of such a bastard as is meant by Littleton, in his case of *bastard eigne* and *mulier puisne; i. e.* such a bastard as is born before the espousals of a father and mother, who may afterwards marry; and said, the rule extended only to that case. Salk. 120. Pride v. Earls of Bath, &c. 7 W. & M. 3 Lev. 410. S. C., who tells us, that though the evidence was admitted by *Holt*, and *Gil. Eyre*, the only judges in court, the jury were not satisfied with it, and gave a verdict for the Earl of Bath.

Co. Lit. 244. Roll. Abr. 624.

To exclude the *mulier* from the inheritance, there must not only be an uninterrupted possession of the *bastard eigne* during his life, but a descent to his issue.

Co. Lit. 244. Hughes, 365.

If he, *bastard eigne*, dies, leaving issue *in ventre sa mere*, and the *mulier* enters, and then the son is born, the son of the *bastard eigne* is for ever excluded, because there was no descent; and so our law in this disagrees with the civil law, which, for the benefit of the infant, reputes a child in its mother's womb in the same condition as if it were born.

Co. Lit. 244.

If the *bastard eigne* enter, and die without issue, yet the lord by escheat cannot claim it against the *mulier*; for there is no descent cast to extinguish his right.

Co. Lit. 244.

If the *mulier* enters into the land after the decease of the bastard, before the heir of the *bastard eigne*, yet he is barred; for the land is cast upon the issue of the bastard immediately after his death, and the descent to him is made without any entry, and consequently he is within the benefit of the rule.

Co. Lit. 244. 8 Co. 101. Sir Richard Pexhall's case. Plowd. 372.

If the *mulier* be an infant during the possession of the *bastard eigne*, yet he is barred by the descent; for though no laches can be imputed to an infant, because, not being of the age of consent, his permission cannot be taken for a consent, yet in such cases where time is limited by the law for pleas and actions, infants are included, unless specially excepted; for here their permission

mission is taken for a consent, because they are supposed to consent to the established law, to which they are obliged for protection during minority; and the law hath not thought fit to except, because it is a public mischief in a very tender point, for it might be any man's case, to suffer by the bastard of an ancestor, and the law hath given the infants guardians to plead by; but it cannot revive the evidence of legitimation, which so easily perishes with the life of the party.

If a man hath issue a son *bastard eigne*, and a daughter, being *mulier puisne*, and the daughter is married, the father dies, and the son enters, and dies seised; this shall bar the *mulier*, for she might have claimed by her husband; the same law if the *bastard eigne* enters, and enjoys peaceably during his life, while the *mulier* is imprisoned, or beyond sea, or of nonsane memory; for the constant and quiet possession of the *bastard eigne*, together with the character he had, during life, of being legitimate, shall, in a case of such nice consequence, outweigh, at a trial, any evidence that can be brought to the contrary. Co. Lit. 244. 8 Co. 101.

The descent of services, rents, or reversions expectant upon estates-tail, or for life, whereon rents are reserved, shall bind the *mulier*; for the enjoyment of these equally suppose the character of legitimate, as the possession of any corporal rights: but such a descent would not drive the party that hath right to an action; for it is a contradiction in terms, that a man should be dispossessed of a mere right. Co. Lit. 244. 8 Co. 101.

If the *bastard eigne* die seised, and the son endow the wife, yet the descent takes away the right of the *mulier*; the *bastard eigne*'s entering into religion is such a descent as takes away the right of the *mulier*. Co. Lit. 244. 8 Co. 101.

Tenant in tail, the remainder in tail, the remainder in fee; tenant in tail hath issue *bastard eigne* and *mulier puisne*, and dies; the bastard entereth, and continueth his possession, and hath issue, and dies; the issue enters; the *mulier* dies: he in remainder shall have a *formedon* against the issue of the bastard, and the continuance of the possession of the bastard shall not prejudice him; for the statute of *Westm.* 2. says, that the will of the donor manifestly expressed in his gift must be observed: now the bastard cannot bring himself within the intention of the donor; for he is neither the heir, nor a person begotten by a tenant in tail, since, in law, he is the son of no man; and consequently the express words of the statute exclude him from the inheritance, which set aside the rules of common law in this case. 29 E. 3. 38 b. Hughes, 366. Roll. Abr. 625.

If a man hath issue *bastard eigne* and *mulier puisne*, the bastard in the life of the father dies, leaving issue, and then the father dies, and the son of the bastard enters and dies seised, and it descends to his issue, the descent shall bind the *mulier*; for if otherwise, it would be bastardizing the ancestor after one descent, which is contrary to the rule. Co. Lit. 244.

If *bastard eigne* and *mulier puisne* daughters enter and occupy in coparcenary, the law will not suppose the whole in the *mulier*, but by a more easy construction presume, that the *mulier* admits the Co. Lit. 244.

the other into the inheritance: so if there be *bastard eigne* and *mulier puisne*, and the *mulier* enter to hunt or hawk, this doth not disturb the bastard's possession; for a man's intention doth always govern and denominate his actions; and in this case he did not enter to claim.

Co. Lit. 245. If the *bastard eigne* enter after the decease of his father, and the king seize the land for a contempt (whereby the profits only are taken) without cause, and the bastard die, and the issue petition, and be restored, he shall hold it against the *mulier*; for when the king seiseth land without cause, he shall only hold it as a substitute to the possessor.

Co. Lit. 244. 20 E. 3. Voucher, 129. Hughes, 565. The bastard being empleaded shall have his age, for the dilatory plea must be determined before the pleas in chief can come on; so that the plea of infancy will stay the suit before it can be enquired whether he is or is not a bastard: also he shall be vouched as heir to the father, for *qui sentit commodum sentire debet et onus.*

(E) How Bastards are to be provided for: And herein of the Duty and Power of Justices of the Peace.

18 Eliz. c. 3. BY the 18 Eliz. c. 3. it is enacted, "that two justices of the peace (*a*), whereof one to be of the *quorum* (*b*), in or next "unto the limits where the parish church is, within which "parish the bastard shall be born (*c*), upon examination of the "cause and circumstances (*d*), shall and may by their discretion "take order, as well for the punishment of the mother, and "reputed father of such bastard child (*e*), as also for the better "relief of every such parish, in part or in all; and shall and "may likewise by like discretion take order (*g*) for the keeping "of every such bastard child (*h*), by charging such mother or "reputed father with the payment of the money weekly (*i*), or "other sustentation for the relief of such child, in such wise as "they shall think meet and convenient; and if, after the same "order by them subscribed under their hands, any the said "persons, *viz.* mother, or reputed father, upon notice thereof, "shall not for their part observe and perform the said order, "that then every such party so making default, in not perform-"ing the said order, to be committed to ward to the common "gaol (*k*), there to remain without bail or mainprize, except he, "she, or they shall put in sufficient surety to perform the said "order, or else personally to appear at the next (*l*) general "sessions of the peace to be held in that county where such "order shall be taken (*m*), and also to abide such order as the "said justices of the peace (*n*), or the major part of them, then "and there shall take in that behalf, if they then and there shall "take any; and that if at the said sessions the said justices shall "take no other order, then to abide and perform the order "before made, as is abovesaid."

(*a*) A single justice may bind to the good behaviour him that is charged or suspected to have begotten a bastard child. Lam. 129. Crom. 196. Dalt. 44.

But the two justices cannot make any order pursuant to this statute, unless the child has been a charge to the parish. Comb. 39. Vent. 57.

If the two justices disagree, so that they make no order, the two justices of the next division, being of the same county, may make the order.

Dalt. 44. If five justices make the order, it is good; for the statute is not restrictive but requires two at least. 2 Salk. 477. pl. 18. If *J. S.* is adjudged the father of a bastard child,

child, and by the order it appears that the examination of the woman was by one justice only, though the ordering part thereof is said to be made by two, the court will quash it. Rex v. Beard, 2 Salk. 478. pl. 22. [Both justices must be present at the same time and place when the woman is examined; and if she refuse to filiate, the warrant of commitment must be signed by them together. 2 Black. R. 1017. An order of removal, however, by two justices, separately, and in different counties, hath been adjudged not *void*, but *voidable* only by appeal to the next sessions. 4 Term R. 596. The order must bear, upon the face of it, that it was made on the complaint of the parish where the child was born. 1 Bott. (3d edit.) p. 561. But the complaint may be made by others as well as the parish. 1 Barnard. K. B. 261. If a child be born in an extra-parochial place, no order can be made. 1 Bott. 421. pl. 555.] We the said justices *doth*, instead of *do*; an order was quashed for this fault. Salk. 128. pl. 6. 2 Ld. Raym. 1197. (*b*) One of the justices must be of the *quorum*. Dalt. 47. An order quashed, because it did not appear that one of the justices was of the *quorum*. 2 Salk. 477. pl. 18. Sid. 222. S. P. but Comb. 63 *cont.*, and there said, that this exception had been over-ruled several times; and see now 26 G. 2. c. 27., whereby orders of justices are not to be vacated for not expressing one of them to be of the *quorum*. (*c*) The place of birth must be set forth in the order, because it may be born in a parish where the two justices who made the order had no jurisdiction; and that it may appear that it was born in that parish to which the relief is ordered. Stile, 368. Dalt. 47. ‖6 Term R. 148. And an order not appearing to be made on complaint of the parish where the child is born, but stating it to be casual poor there, is bad. 13 East R. 57. n.‖ (*d*) And therefore, not only the mother, but likewise the putative father, should be summoned to appear, and both parties examined before any order is made; but this, however agreeable it seems to natural justice, is not always practised, the justices being apprehensive that such warning would tend to no other use, but to make the father keep out of the way: however, it has been resolved that such summons is necessary. Dalt. 52. [The summons may be by a third justice. Ca. temp. Hardw. 112.; the order need not state it. Cas. Sett. 127. The presence of the putative father not necessary. Cald. 308.] An order made by two justices of the peace was quashed, because it was made on an affidavit brought to them without examination of any witnesses. Comb. 103. (*e*) They must adjudge him the father of the child. Sid. 363. Stile, 154. Dalt. 52. Dougl. 662. [(*g*) It must appear by the order, that the child was born in the parish to which the money is ordered to be paid. Stile, 368.; and it must be so adjudged. Cald. 172. An order, describing the child as chargeable to an hamlet, is bad. Cas. Sett. 164. It must mention the sex, and name of the child. 1 Stra. 503.] An order, that the reputed father should pay so much till further order, was quashed; for that further order might be forty years hence. 2 Show. 129. An order, that the reputed father should give such security, as overseers or churchwardens shall think fit, is naught; for by such order the justices delegate their authority to others. 2 Salk. 477. pl. 20. Dalt. 47. An order to pay so much money a week till the child is fourteen years of age, is naught; for the justices have no power but to indemnify the parish; and that is done by obliging the father to maintain the child as long as it may be chargeable to the parish. Salk. 121. pl. 2. Comb. 232. S. P. But an order for payment, till nine years old, hath been adjudged good. 2 Stra. 788. Barnard, K. B. 31. Set. & Rem. 126. pl. 171. fol. 410. An order, that the father should pay so much money a week to the parish till the child was twelve years old, quashed; for the father may take it away and maintain it himself. Vent. 48. 59. Sid. 222. S. P. Mod. 20. [The father hath no such power, nor any right to the custody of it; for, till seven years of age *, the child shall stay with the mother for nurture. 2 Saund. 182. 1 Ventr. 210. Cas. of S. 64. Newland v. Osman, Tr. 27 G. 2. 1 Burn. Just. 199. 15th ed. 2 Wils. 126. 5 Term R. 278.] An order, that the father should pay so much weekly, without saying for how long, is naught; for it should be so long as it is chargeable to the parish. Stile, 154. S. P. 2 Keb. 575. 2 Salk. 480. pl. 31. The justices may order the payment of a sum in gross, for the charges the parish has been already at to midwife, nurse, *&c.* Dalt. 47. Vent. 336. Salk. 124. pl. 1. But an order, that the father should pay 4*s.* to the midwife, and 7*s.* a week until the child was able to get its living by working, was quashed: 1st, Because it did not appear that the parish procured the midwife, or were at any charge with respect to her; and they have no power to order any money but for the indemnity of the parish. 2dly, 7*s.* a week is excessive, and uncertain as to the time; for the father may, if he pleases, maintain it cheaper; and the order should have been for so long time as it shall be chargeable to the parish. Vent. 210. ‖If the order state that

[* The same law prevailed in *France*; for, in the case of separation between husband and wife, the children under seven years old were to remain with their mother, according to the custom of *Beauvoisis*, in 1283, c. 57. p. 294. And this law goes as far back as the time of the Emperor *Julian:* for that prince informs us, in his *Misopogon*, that he was placed, at that age, under the care of a governor.]

the

the child is likely to *become chargeable*, without stating that it is so, it is sufficient. 8 East. 193. 4 M. & S. 559.‖ An order, that the father should pay 2*d.* a week, is too little, and unreasonable. Sid. 365. When they order a sum in gross, they must shew for what, and the charges the parish hath been at. Comb. 103. ‖If the order direct a sum to be paid towards lying in and maintenance it is enough, without stating that the sum was expended by the overseers. 4 Maule & S. 559.‖ They cannot order a sum in gross for putting out the child apprentice. Comb. 448. An order to pay so much weekly to the overseers of the poor for, &c. is good; for, before the institution of these, it might have been ordered to be paid to two or three of the inhabitants. Salk. 122. pl. 6. 2 Ld. Raym. 1197. The order directed, that security should be given for the performance of it; and, because the statute directs, that the security should be either to perform order, or appear at the next sessions; for this the order was quashed. 2 Show. 258. 2 Bulst. 242. S. P. (*h*) If the child is no bastard, and yet they judge him such, an action lies against them. When the husband was seven years absent beyond sea, and they adjudged the child, which the wife had in that time, a bastard. 5 Mod. 419. Salk. 122. pl. 5. 123. pl. 7. *vide suprà.* ‖(*i*) Costs of obtaining the order cannot be directed. 9 East, 25. But now the costs of securing the father, and of the order of filiation, not exceeding 10*l.* may be charged on the father. 49 G. 3. c. 68. § 1.‖ [(*k*) A feme covert, and a soldier, may be committed for disobedience to an order of bastardy; and the commitment may be, either to the common gaol, or house of correction. 3 Bur. 1679. 2 Term R. 270. 5 Term R. 156. But a person cannot be committed for refusing to discover the father of a bastard child. 1 Bott, 422. pl. 554. An order cannot be made for security till after contempt. 2 Ld. Raym. 858.] (*l*) Must be intended that the order made by the two justices must be confirmed, or discharged, at the next quarter sessions of that part of the county where it was made, and not at the sessions in the county; for that would be mischievous in many counties where there are several sessions in distinct parts of the county. Dalt. 48. Sid. 149. Must be the next after notice of the order. Sid. 325. [If an order of bastardy be quashed by the court of general quarter sessions next after such order, the Court of K. B. will not intend that a court of general sessions intervened. 3 Term R. 496.] (*m*) Exception was taken to an order, that it was made *ad sessionem pacis in com. præd.* and did not say *pro com.* but overruled. Vent. 37. (*n*) It seems, by the better opinions, that the justices in their sessions have no power to make an original order, and are only to reverse, or affirm, the order made by the two justices; but for this, *vide* 2 Bulst. 342. 355. Dalt. 48, 49. Cro. Car. 337. 341. 2 Show. 132. pl. 110. Vent. 48. 59. [It is settled, that the justices at sessions have such power. Dougl. 610.] But, upon the removal of the cause by *certiorari*, the Court of King's Bench may either reverse the order in whole or in part; and though they reverse the order for irregularity, yet will they oblige the father to give security to appear at the next sessions, to abide such further order as shall then be made. Comb. 264. 2 Salk. 477. pl. 20. [It is for this reason, that the personal appearance of the defendant is required on a motion to quash an order. 1 Black. R. 198. The sessions, in the case of an appeal, cannot commit for nonpayment, but must proceed on the original order. 2 Ld. Raym. 1157. After the defendant is discharged by the sessions, on the merits, a new order cannot be made. 2 Ld. Raym. 1423.]

Carth. 397. Boerham and Waltham, Salk. 121. pl. 4. 5 Mod. 204. Comb. 360. *Vide* 2 Bulst. 349, 350. Dalt. 94. [So,

Bastard children gain a settlement in the parish where they are born; but if a woman big with child of a bastard, is by order of two justices removed from the parish of *A.* to *B.*, as her last place of settlement, from which order *B.* appeals, but before the next session she is delivered of a bastard child in *B.*, and afterwards the order of the two justices is vacated, the child must follow the mother, and gains a settlement in *A.*

if a woman comes to beg as a vagrant in a parish which she does not belong to, and drops her bastard there, it shall be settled in the mother's own parish, if she is apprehended for her vagrancy. Stat. 17 G. 2. c. 5. So a bastard born in gaol. Sess. Ca. V. 1. 94.; or in a licensed lying-in hospital, 13 G. 3. c. 82. § 5.; or in any house of industry, 20 G. 3. c. 36. § 2.; or under a certificate, 1 Stra. 186. 2 Stra. 1168. Burr. Sett. Ca. 187. 264. 650.; shall follow the mother's settlement.] ‖But see Rex v. Martlesham, 10 Barn. & C. 77.‖

Dougl. 7. 9. n. 2.

[When a bastard, having a different settlement from its mother, lives with her for nurture, the parish where the bastard's settlement is must maintain it.

1 H. Black. R. 253. See Dougl. 9.

If the parents neglect to provide for the sustenance of a bastard child, the parish where it is born must do it, though the justices make no order for that purpose.]

By

By the 7 Jac. 1. c. 4. it is enacted, "that every lewd woman "which shall have any bastard (*a*) which may be chargeable to "the parish (*b*), the justices of the peace (*c*) shall commit such "lewd woman to the house of correction, there to be punished "and set to hard work during the term of one whole year, and "if she shall eftsoons offend again (*d*), then to be committed to "the said house of correction as aforesaid, and there to remain "till she can put in good sureties for her good behaviour not "to offend again." 7 Jac. 1. c. 4.

(*a*) The woman must be delivered of such bastard child before she can be sent to the house of correction; and the child is not to be sent with her. Dalt. 48. (*b*) The child must be chargeable to the parish; therefore, if the father, or any other, maintains it, it seems, she is not to be punished by this statute. *Vide* Dalt. 46. (*c*) Must be by two justices at least. Dalt. 46. (*d*) But she shall not be punished upon this part of the statute, unless she were before convicted and punished on the first. *Qu.* If she were before proceeded against pursuant to the stat. 18 Eliz. c. 3. 2 Bulst. 348, 349.

‖By the 50 G. 3. c. 51. the above clause is repealed, and it is enacted that when a woman shall have a bastard child which shall be chargeable to the parish, it shall be lawful for any two justices before whom she shall be brought, to commit such woman to the house of correction for the district or place, and there to be set on work, for any time not exceeding twelve months nor less than six weeks. 50 G. 3. c. 51.

And by §. 3. the justices at a petty session for the division wherein the parish is situate, may, on a certificate from the keeper of the house of correction of the woman's good behaviour during a confinement of six weeks, order the woman to be immediately discharged from confinement; provided always, that nothing therein shall authorize the committal of the woman until she shall have been delivered for one calendar month.‖ § 3.

By the 13 & 14 Car. 2. c. 12. par. 19., "Whereas the putative "fathers and lewd mothers of bastard children run away out of "the parish, and sometimes out of the county, and leave the "said bastard children upon the charge of the parish where they "are born, although such putative father and mother have estates "sufficient to discharge such parish; it is therefore enacted, that "it shall and may be lawful for the churchwardens and overseers "for the poor of such parish where any bastard child shall be "born, to take and seize so much of the goods and chattels, "and to receive so much of the annual rents or profits of the "lands of such putative fathers or lewd mothers, as shall be "ordered by any two justices of the peace (*a*), for or towards the "discharge of the parish, to be confirmed at the sessions, for the "bringing up and providing for such bastard child, and there-"upon it shall be lawful for the sessions to make an order for "the churchwardens or overseers of the poor of such parish, to "dispose of the goods by sale or otherwise, or so much of them "for the purposes aforesaid, as the court shall think fit, and to "receive the rents and profits, or so much of them as shall be "ordered by the sessions as aforesaid, of his or her lands." 13 & 14 Car. 2. c. 12. par. 19.

[(*a*) An order, giving the churchwardens power to seize such of the putative father's goods as they may think proper, is bad. 2 Ld. Raym. 858.]

By the 6 G. 2. c. 31. it is enacted, "that if any single woman "shall be delivered of a bastard child, which shall be charge-"able, or likely to become chargeable to any parish or extra-"parochial 6 G. 2. c. 31. [An examination taken under this act,

is admissible evidence on an application to the court of sessions to make an order of filiation, though the woman die before such application can be made. Rex v. Ravenstone, 5 Term R. 373.]; [and see 3 East, 58. The order need only state that the child is *likely to become chargeable*, 4 M. & S. 559. One justice has not power under this act to compel a single woman to be examined, and his commitment of her for refusing to answer enquiries is bad. *Ex parte* Martin 6 Barn. & C. 80.

" parochial place, or shall declare herself to be with child, and " that such child is likely to be born a bastard, and to be " chargeable to any parish or extra-parochial place, and shall in " either of such cases, on an examination to be taken in writing " upon oath, before any one or more justice or justices of the " peace of any county, riding, division, city, liberty, or town " corporate, wherein such parish or place shall lie, charge any " person with having gotten her with child, it shall and may be " lawful to and for such justice or justices, upon application " made to him or them by the overseers of the poor of such " parish (*a*), or by any one of them, or by any substantial house- " holder of such extra-parochial place, to issue out of his or their " warrant or warrants, for the immediate apprehending of such " person so charged as aforesaid, and for bringing him before " such justice or justices, or before any other of his majesty's " justices of the peace of such county, *&c.*; and the justice and " justices before whom such person shall be brought, is and are " hereby authorized and required to commit the person so " charged as aforesaid (*b*), to the common gaol or house of cor- " rection of such county, *&c.*, unless he shall give security to " indemnify such parish or place, or shall enter into a recog- " nizance with sufficient surety, upon condition to appear at the " next general quarter sessions, or general sessions of the peace, " to be held for such county, *&c.*, and to abide and perform such " order or orders, as shall be made in pursuance of an act passed " in the 18th year of Queen *Elizabeth*, concerning bastards be- " gotten and born out of lawful matrimony.

(*a*) A *de facto* overseer of the poor under 22 G. 3. c. 83. though not legally appointed, is competent to apply under this statute, 13 East. 55. (*b*) This clause authorizing the committal of the reputed father in cases where the woman has not been delivered, is repealed by 49 G. 3. c. 68. § 6. *post*, p. 767.]

" Provided, that if the woman so charging any person as " aforesaid shall happen to die, or be married, before she shall be " delivered, or if she shall miscarry of such child, or shall appear " not to have been with child at the time of her examination, " then and in any of the said cases such person shall be dis- " charged from his recognizance at the next general quarter " sessions, or general sessions of the peace to be holden for such " county, *&c.*, or immediately released out of custody, by warrant " under the hand and seal, or hands and seals, of any one or " more justice or justices of the peace residing in or near the " limits where such parish or place shall lie.

" Provided also, that upon application made by any person " who shall be committed to any gaol or house of correction by " virtue of this act, or by any person on his behalf, to any jus- " tice or justices residing in or near the limits where such parish " or place shall lie; such justice or justices is and are hereby " authorized and required to summon the overseer or overseers " of the poor of such parish, or one or more of the substantial " householders of such extra-parochial place, to appear before " him or them at a time and place to be mentioned in such

" summons,

" summons, to shew cause why such person should not be dis-
" charged; and if no order shall appear to have been made in
" pursuance of the said act of the 18th of *Elizabeth*, or within
" six weeks after such woman shall have been delivered, such
" justice or justices shall and may discharge him from his im-
" prisonment in such gaol or house of correction to which he
" shall have been committed.

" Provided always, that it shall not be lawful for any justice
" or justices of the peace to send for any woman whatsoever
" before she shall be delivered, and one month after, in order to
" her being examined concerning her pregnancy, or supposed
" pregnancy, or to compel any woman before she shall be de-
" livered to answer to any questions relating to her pregnancy."

[This provision shews the humanity of our laws; but it proves very frequently an hardship upon parishes, by suffering the parents to escape. 1 Black. Com. 458. To an indictment before the passing of this act for secreting a woman big with an illegitimate child, so that she could not be had to give evidence against the father, the defendant demurred: *Et per cur.* judgment for the defendant, for it cannot be illegitimate before born, there being always a possibility that it may be born in lawful wedlock. 1 Stra. 612. 2 Ld. Raym. 1368.]

‖The statute 6 G. 2. c. 31. only authorizes parish officers to take securities for the *indemnity* of the parish; and therefore where the defendant gave a promissory note to the churchwardens, *&c.* for an absolute sum, and tendered a lesser sum for the actual amount of expense incurred, and on a trial pleaded such tender, which was found for the defendant, it was held that the plaintiff could not recover further on the note, it being contrary to the statute and to public justice to allow the parish officers to take an absolute sum in lieu of indemnity.

Cole v. Gower, 6 East, 110.

And no action lies on the note if the parish has not been damnified.

Wilde v. Griffin, 5 Esp. Ca. 141.

Such a bond being payable on a contingency, is not capable of valuation so as to be proved under a commission of bankrupt against the obligor, and consequently it is not barred by his certificate; but the parish officers may recover expenses incurred subsequent to the bankruptcy.

Overseers of St. Martin v. Warren, 1 Barn. & A. 491.; *sed vide* 6 G. 4. c. 16. § 56. *ante* tit. *Bankrupt*, which now provides for the proof of contingent debts; and see Davies v. Arnott, 3 Bing. 154.

A bond given voluntarily by the father of a bastard child, and not under the compulsion of the 6 G. 2. c. 31. is good, though not expressly conditioned to indemnify the parish, but to pay a sum certain every three months until the child should be deemed capable of providing for herself; for such a bond is not contrary to public policy like the bond in *Cole* v. *Gower*, and the words " deemed capable" must be taken to mean so deemed by a jury.

Middleham v. Bellerby, 1 Maule & S. 310.; and see 4 Taunt. R. 498. 7 Bing. 477.

But where the mother of a bastard child, upon its birth, deposited with the overseers a sum of money to meet any charges which might accrue in respect of the child, it was held by the Court of Common Pleas, that the mother might recover back the sum from them in an action for money had and received, since the deposit was not authorized by the statutes respecting bastards, and was illegal.

Clark v. Johnson, 3 Bing. R. 424.

Strangeways v. Robinson, 4 Taunt. 498.

It is not a good plea to an action upon such a bond that, after the child attained seven years, the father offered to keep and maintain it, and requested the overseers to deliver it to him, without shewing that the child was in the custody of the overseers (*a*), for it might be with the mother, and then they could not take it; and it seems that the putative father has no right to the custody of the child.

(*a*) Where the plea showed this it was equally held bad. Pope v. Sale, 7 Bing. 477.

Watkins v. Hewlett, 1 Bro. & B. 1. 1 Camp. 398. 564.; see 7 Dowl. & Ry. 612.

If the putative father pay a sum to the parish officers to indemnify them against the expenses of the child, and the child dies, he may recover the sum unexpended in their hands as money had and received to his use.

54 G. 3. c. 170. § 7.

By the 54 G. 3. c. 170. § 7. it is provided, that all securities given or received, or thereafter to be given, for indemnifying any district, parish, township, or hamlet for the maintenance of any bastard child, or for any expenses occasioned by the birth of the child, within such district, *&c.* shall be vested in the overseers of the poor of such district, *&c.* for the time being, and that it shall be lawful for such overseers, *&c.* to sue for the same by their description of overseers of such district, parish, township, or hamlet, and such action shall not abate by any change of overseers, *&c.*

Addey v. Woolley, 8 Taunt. 691.

The action must be in the name of the overseers for the time being, and not of those to whom the bond was given, if they have gone out of office.

49 G. 3. c. 68.

By the 49 G. 3. c. 68. intituled *An Act to explain and amend the law of bastardy, so far as relates to indemnifying parishes in respect thereof*, it is enacted, that every person who shall hereafter be adjudged to be the reputed father of any bastard child, shall be chargeable with the payment of all reasonable expenses incident to the birth of such bastard child, and also to the reasonable costs of apprehending such reputed father, and of the order of filiation, such costs of apprehending the reputed father and of the order of filiation not to exceed the sum of ten pounds; and all such expenses and costs shall be duly ascertained, on oath, before the justices of the peace or the court of quarter sessions making such order of filiation, which oath such justices, *&c.* are empowered to administer.

§ 2.

§ 2. And if any single woman shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, township, or extra-parochial place, and shall, in an examination to be taken in writing upon oath before any justice of any county, riding, *&c.* wherein such parish, township, or place shall be, charge any person with having gotten her with child, it shall be lawful for such justice, upon application by the overseers of the poor of such parish, *&c.*, or by any substantial householder of such extra-parochial place, to issue out his warrant for the immediate apprehending of such person so charged as aforesaid, and for bringing him before such justice,

justice, or before any other justice of such county, riding, *&c.*; and the justice before whom such person shall be brought, having authority in this behalf, is hereby authorized and required to commit the person so charged to the common gaol or house of correction of such county, riding, *&c.*, unless he shall give security to indemnify such parish or place, or shall enter into recognizance with sufficient sureties to appear at the next general quarter sessions, or general sessions of the peace for such county, riding, *&c.* to perform such order as shall then be made in pursuance of the act of the eighteenth year of the reign of Queen *Elizabeth*, unless one such justice as aforesaid shall have certified in writing under his hand to such general quarter sessions, or general sessions of the peace, that it had been proved before him, upon the oath of one credible witness, that such single woman had not been then delivered, or had been delivered within one month only previous to the day on which such general quarter sessions or general sessions of the peace shall be holden, or unless two justices of the peace of such county, riding, *&c.* shall have certified in writing under their hands, to the next, or, where such woman shall not have been delivered as aforesaid, then to the immediately subsequent general quarter sessions or general sessions of the peace, that an order of filiation had been already made on the person so charged, or that such order was not then requisite to be made on account of the death of the child, or for other like sufficient reasons, in each of which cases firstly before mentioned it shall be lawful for the justices at such general quarter sessions or general sessions of the peace to respite such recognisance to the then next general quarter sessions, or general sessions of the peace to be holden for such county, riding, *&c.*, without requiring the personal attendance of the putative father, or of his sureties; and in either of the said two last-mentioned cases it shall be lawful for the justices wholly to discharge such recognizance.

§ 3. If any reputed father, or any mother of such bastard on whom any order of filiation or maintenance of such child shall have been made by the court of quarter sessions, or which shall have been made by two justices of the peace and confirmed by the court of quarter sessions, or against which no appeal shall have been made to the court of quarter sessions (*a*), shall neglect or refuse to pay any sum or sums of money which he or she shall have been ordered to pay towards the maintenance or other sustentation for the relief of any such bastard child by any such order, it shall be lawful for any justice of the peace of the county, riding, *&c.* in which such reputed father or such mother shall happen to be; and the said justice is hereby required, upon complaint being made to him by any one of the overseers of the poor of any parish (*b*), township, or place liable to the support and maintenance of such child, or where such bastard child shall then be, and upon proof on oath of such order for the payment of such sum or sums of money, and of such sum or sums of money being unpaid, and of a demand having been made and a refusal

§ 3.

(*a*) Where an order of bastardy has been made, and the time for appeal past, it cannot be enforced under the 18 Eliz. c. 3.; but the magistrate must proceed under the 49 G. 3. c. 68. § 3. by commitment for three

months. *Ex parte* Addis, 1 Barn. & C. 87.

refusal to pay the same, or that such reputed father or such mother hath left his or her usual place of abode, and hath avoided a demand thereof being made by such overseers, to issue his warrant to apprehend such reputed father or such mother, and to bring him or her before such justices, or any other justice of the peace of the same county, riding, *&c.* to answer such complaint; and if such reputed father or such mother shall not pay such sum as shall appear to the said justice before whom such reputed father or such mother shall be brought, to be due and unpaid, or shall not shew to such justice some reasonable and sufficient cause for not so doing, it shall be lawful for such justice, and he is hereby required to commit such reputed father or such mother to the public house of correction or common gaol of the said county, to be there kept to hard labour for the space of three months, unless such reputed father or such mother shall, before the expiration of the said three months, pay or cause to be paid to one of the overseers of the poor of the parish, township, or place on whose behalf such complaint as aforesaid is made, the said sum of money so unpaid as aforesaid, and so from time to time, and as often as such reputed father or such mother shall, in manner aforesaid, neglect or refuse to pay any other sum or sums of money that shall afterwards become due by virtue of and under such order, after the expiration of or discharge from any such former imprisonment as aforesaid.

(*b*) A *de facto* guardian of the poor of a parish united under the 22 G. 3. c. 83. though not duly appointed, is competent to make the complaint. Rex v. St. Martyr, 13 East R. 55.

§ 4.

§ 4. Provides that all such expenses and costs shall be wholly subject to the discretion of the justices or court of quarter sessions who shall make such order of filiation; and the justices or court of quarter sessions are hereby authorized, if they shall see fit, to allow and order payment of the whole or any part thereof; provided always, that the costs of apprehending the reputed father, and of the order of filiation, shall not in any case exceed the sum of ten pounds; and for securing the due payment of the same, after such allowance and order as aforesaid, all and every the powers, authorities, provisions, clauses, matters, and things contained in the said act passed in the eighteenth year of the reign of Queen *Elizabeth*, concerning bastards born and begotten out of lawful matrimony, shall be observed in the execution of this act, and shall be construed to apply as fully and effectually to all intents and purposes as if the said powers, authorities, *&c.* were specially recited and re-enacted in this act.

§ 5.

§ 5. Provided also, that any person who shall think himself aggrieved by any order made by such justices as aforesaid, under the provisions of this act, and not originating in the quarter sessions, may appeal to the next general quarter sessions of the peace to be holden for the county where such order shall be made, on giving notice to such justices or to one of them, and also to the churchwardens and overseers of the poor of the parish on whose behalf such order shall have been made, or to one of them, ten clear days before such general quarter sessions of the peace

peace at which such appeal shall be made, of his, her, or their intention of bringing such appeal, and of the cause and matter thereof, and entering into a recognizance, within three days after such notice, before some justice of the peace for such county, with sufficient surety, conditioned to try such appeal, and abide the judgment and order of, and pay such costs as shall be awarded by, the justices at such quarter sessions; which said justices at their quarter sessions, upon proof of such notice being given, and of entering into such recognizance as aforesaid, shall and they are hereby required to proceed in, hear and determine the causes and matters of all such appeals, and shall give such relief and costs to the parties appealing or appealed against as they in their discretion shall judge proper; and such judgments and orders therein made shall be final, binding, and conclusive to all parties concerned to all intents and purposes whatsoever.

§ 6. And be it further enacted, that so much of an act passed in the sixth year of the reign of his late majesty King *George* the Second, intituled *An Act for the relief of parishes and other places from such charges as may arise from bastard children born within the same*, as authorizes the justice or justices before whom the reputed father of a bastard child shall be brought, in cases where the woman has not been delivered, to commit the reputed father to the common gaol or house of correction, unless he shall give security to indemnify the parish or place, or shall enter into a recognizance with sufficient security, upon condition to appear at the next general quarter sessions, or general sessions of the peace, shall be and is hereby repealed. § 6.

§ 7. And be it further enacted, that from and after the passing of this act no appeal, in any case relating to bastardy, shall be brought, received, or heard at the said quarter sessions, unless such notice shall have been given, and such recognizance entered into in manner aforesaid, according to the provision of this act. § 7.

(F) Murdering Bastards, and concealing their Birth.

BY the statute 21 Jac. 1. c. 27., if a woman delivered of issue, which being born alive would be a bastard, endeavour by burying, drowning, *&c.*, by herself or others, so to conceal its death, that it may not appear whether born alive or not, it is *murder*, unless she prove, by one witness at least, that it was born dead. 21 Jac. 1. c. 27. (Upon this statute, it hath been adjudged, that it is not necessary that the indictment be drawn specially, or conclude *contrà formam statuti*; for the statute doth not create a new offence but, only makes the concealment undeniable evidence of murder. It hath been agreed, too, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive; but it shall be undeniably taken that the child was born alive and murdered by the mother. 2 Hawk. P. C. c. 46. § 43. But of late years, as this law seemeth to be somewhat severe, it hath been usual, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive before the other constrained presumption is admitted. 4 Black. Com. 198. It hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute because she knocked for help. Kelynge, 32. Also it hath been agreed, that

that if a woman confess herself with child before-hand, and afterwards be surprised and delivered, nobody being with her, she is not within the statute, because there was no intent of concealment. Kelynge, 33. So, if it appear that she hath made any the slightest provision for clothing the child.]

43 G. 3. c. 58. § 3. 9 G. 4. c. 34. § 14. See Rex v. Cornwall, Russ. & Ry. 336., decided on the 43 G. 3. c. 58. now repealed.

‖By the 43 G. 3. c. 58. § 3. the above provision is repealed, and by 9 G. 4. c. 34. § 14. if any woman delivered of a child shall by secret burying or otherwise disposing of the dead body, endeavour to conceal the birth, she shall be guilty of a misdemeanor, and liable to be imprisoned for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, or at, or after its birth; provided that if any woman tried for the murder of her child shall be acquitted, the jury may find, in case it shall so appear in evidence, that she was delivered of a child, and that she did by secret burying or otherwise disposing of the body, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been convicted on an indictment for concealing the birth.‖

BIGAMY.

Cro. Eliz. 94. Hawk. P. C. c. 34. [This offence is corruptly called *bigamy*; for *that* properly signifies being twice married:

MATRIMONIAL causes are properly cognizable in the spiritual courts, and offences against the rights of marriage punishable by the ecclesiastical law; but this offence of bigamy, or marrying a second wife, the first being alive, is made felony by statute, but the offender is not ousted the benefit of his clergy.

it is more justly denominated *polygamy*, or having a plurality of wives.—Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of orders; and by a canon of the council of *Lyons*, A. D. 1274, holden under pope Gregory X. were *eximi privilegio clericali nudati et coercione fori secularis addicti.* (6 Decretal. l. 12.) This canon was adopted and explained in *England* by statute 4 E. 1. st. 3. c. 5., and bigamy thereupon became no uncommon counterplea to the claim of benefit of the clergy. (M. 40 E. 3. 42. M. 1 H. 4. 11. 48. M. 13 H. 4. 6. Staunf. P. C. 134.) ‖See 5 Evans's Stat. 216.‖ The cognizance of the plea of bigamy was declared by stat. 18 E. 3. st. 3. c. 2. to belong to the court christian, like that of bastardy. But by stat. 1 E. 6. c. 12. § 16. bigamy was declared to be no longer an impediment to the claim of clergy. See Dalt. 21. Dy. 201. 4 Black. Com. 163.—It may be added as a further mark, perhaps, of the odiousness of bigamy among the very early inhabitants of this island, that by the custom of gavelkind, which was very extensive, and is supposed to be a relic of the ancient *Britons* (1 Inst. 175 b.), a second marriage incurred a forfeiture of dower. 1 Inst. 33 b. 1 Wooddes. 425.]

1 Jac. 1. c. 11. See Observ. on Stat. 436. (3d edit.) wherein you

By the 1 Jac. 1. c. 11. it is enacted, "that if any person or "persons within his majesty's dominions of *England* and *Wales*, "being married, do marry any person or persons, the former "husband or wife being alive, that then every such offence "shall

" shall be felony, and the person or persons so offending shall " suffer death as as in cases of felony; and the party and " parties so offending shall receive such and like proceeding, " trial, and execution, in such county where such person or per- " sons shall be apprehended, as if the offence had been com- " mitted in such county where such person or persons shall be " taken or apprehended." (*a*) But it is provided, " that nothing " in this statute contained shall extend to any person or persons " whose husband or wife shall be continually remaining beyond " the seas by the space of seven years together (*b*); or whose " husband or wife shall absent him or herself the one from the " other by the space of seven years together, in any parts within " his majesty's dominions (*c*), the one of them not knowing the " other to be living within that time. Also provided, that the " statute shall not extend to any person or persons who shall " be at the time of such marriage divorced by a sentence in the " ecclesiastical court (*d*), or to any person or persons where the " former marriage shall be by sentence in the ecclesiastical " court declared to be void and of no effect; nor to any person " or persons, for or by reason of any former marriage had or " made within age of consent. (*e*) Also provided, that no at- " tainder for this offence shall make or work any corruption of " blood, loss of dower, or disinherison of heir or heirs."

will find an ill-grounded observation of the king of *Prussia*'s on this law, with the proper answer. [In prosecutions on this statute, a marriage in fact must be proved. 4 Burr. 2059.]

(*a*) It is agreed, that if the first marriage were beyond sea, and the latter in *England*, the party may be indicted here; but if the first were in *England*, and the latter beyond sea, it is said that the party cannot be indicted, because the second marriage, which made the offence, was not within any county here. Sid. 171. But 1 Hawk. P. C. c. 34. holds, that the party may in the last case be indicted, and relies on the express words of the statute. ‖(*c*) This exception applies, though the party in *England* has notice that the other is living. 1 Hale, 693. 3 Inst. 88. 4 Black. Com. 164. (*d*) Lord *Hale* says, these words must *in favorem vitæ* be intended to mean *England*, *Wales*, or *Scotland*; but the *Isle of Wight* is not beyond the seas within the first clause, because *infrà corpus comitatus Southampton*: so for *Scilly*, *Lundy*. *Quære*, of *Guernsey* and *Jersey*. 1 Hale, 693.‖ (*e*) If one of the parties only were under the age of consent at the time of such marriage, the exception extends as well to the party above the age of consent as to the other; because the power of disagreeing was equal on both sides. Roll. Abr. 340. 3 Inst. 89. Co. Lit. 79. H. P. C. 121. Hawk. P. C. 111. ‖The age of consent is fourteen years in a man and twelve years in a woman; and the construction on the clause has been, that if either of the parties were within that age at the time of the first marriage, not only the one within the age, but the other also who is above it, is entitled to the benefit of the exception. 1 Black. Com. 436. Rex v. Jordan, Mich. T. 1802. Russ. & Ry. 48. But if the parties agree to the marriage when of full age, it seems it would be within the act. Russ. on Cri. 191.‖ [The first and true wife is not an admissible witness against her husband. 1 Hale, 692. Even an affidavit by the first wife to postpone the trial against the husband on an indictment upon this statute, hath been rejected. O. B. *Feb.* 1786.; but see Adding. P. S. 411. But the second woman is competent to prove the marriage, for she is not his wife so much as *de facto*. 1 Hale, 693.]

‖The provisions of the above statute were in several respects defective. A person whose consort had been abroad for seven years, though known to be living, might have married again with impunity. And so might a person who was only divorced *a mensâ et thoro*. The statute has therefore been repealed by 9 G. 4. c. 31., which, by § 22. enacts, that any person, being married, who shall marry any other person during the life of the former husband or wife, whether the second marriage be in *England* or elsewhere, shall be guilty of felony, and liable to be transported for seven years, or to be imprisoned for any term not exceeding two years; and such offence may be tried and

9 G. 4. c. 31. See 1 Russ. on Cri. 188., and Addenda, p. 6.

punished in the county where the offender shall be apprehended or be in custody, as if actually committed there, provided the act shall not extend to any second marriage contracted out of *England* by any other than a subject of his majesty, or to any person married a second time, whose husband or wife shall have been continually absent from such person for seven years, and shall not have been known by such person to be living within that time; or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first martiage, or to any person whose former marriage shall have been declared void by the sentence of a court of competent jurisdiction.

The above statute of *James* remains in force, however, as to all offences committed before or upon the last day of *June* 1828.

1 Hawk. P. C. c. 34. 3 Inst. 89. H. P. C. 122. Kelynge, 27. Cro. Car. 461.

With respect to the exception in the statute 1 Jac. I. as to persons divorced, it is held that divorces *à mensâ et thoro causâ adulterii et sævitiæ* are within the exceptions, though the word *separamus* and not *divortiamus* be made use of in the sentence; for the statute being penal shall be construed favourably, and such separations are taken for divorces in common understanding.‖

Gibs. Cod. t. 22. c. 4.

[If a marriage be declared void by an ecclesiastical sentence, and there be an appeal to a higher spiritual tribunal, which, by suspending the sentence, is a supposed continuation of the marriage, yet one of the parties marrying again doth not incur the penalties of the law, although such second marriage is indeed unlawful.]

‖ Where, after the first marriage in *England* a divorce has been obtained in a foreign country, it appears that such divorce will not prevent a second marriage being indictable as bigamy in *England*, unless the divorce were obtained on grounds which, by the law of *England*, would warrant a divorce; the divorces and sentences referred to in the third section of the statute of *James* being held to mean divorces and sentences of the ecclesiastical courts, within the limits to which that statute applies. (*a*)

(*a*) The exception in the 9 G. 4. c. 31. is only of persons divorced *à vinculo*.

Rex v. Lolley, *Dec.* 1812. Russ. & Ry. C. C. 237. See Tovey v. Lindsay, 1 Dow. R. 118. where the important question of the power of a *Scotch* court to dissolve *English* marriages was raised in the House of Lords, but the cases were remitted back to *Scotland*; and see Fergusson's Reports of Decisions in Actions of Divorce.

The prisoner *Lolley* was indicted for bigamy; both his marriages were in *England*, but before his second marriage his wife obtained a divorce *à vinculo matrimonii* in a commissory court of *Scotland*. It appeared that he took his wife into *Scotland* that she might be induced to institute a suit against him there, and that he cohabited with a prostitute in order to irritate his wife, and furnish a ground for a divorce. A case being reserved, the judges held that no sentence of any foreign court could dissolve an *English* marriage *à vinculo* for grounds on which it was not liable to be so dissolved in *England*; and that no divorce of an ecclesiastical court was within the exception in the third section of the statute, unless it was a divorce of a court within the limits to which the statute extends.

With

With respect to the exception in the statute as to former marriages declared void by sentence of an ecclesiastical court, it was resolved by the judges, that a sentence of the Spiritual Court against a marriage, in a suit of jactitation of marriage, is not conclusive so as to stop the counsel for the crown from proving the marriage, that sentence having decided on the invalidity of the marriage only collaterally, and not directly; and further, admitting the sentence to be conclusive, yet the counsel for the crown may avoid the effect of it by proving it to have been obtained by fraud or collusion.

Duchess of Kingston's case, 11 Sta. Tri. 262. 1 Leach, 146.

In a prosecution on the statute a marriage *de facto* subsisting at the time of the second marriage must be proved, and is sufficient to bring a case within the statute, though such first marriage be voidable by reason of consanguinity, nullity, or the like. But it has been ruled, that, though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shewn, which it seems must be understood where there is *primâ facie* evidence of a lawful marriage.

3 Inst. 88.

1 Russ. on Cri. 192. 10 East 287. note (*b*)

In a case where the first marriage, which was with a Roman Catholic woman, was by a Romish priest in *England*, not according to the ritual of the church of *England*, and the ceremony was performed in *Latin*, which the witnesses did not understand, and could not therefore swear that the ceremony of marriage according to the church of *Rome* was read, it was directed that the defendant should be acquitted. *Willes* C. J., who tried him, seemed to be of opinion that a marriage by a priest of the church of *Rome* was a good marriage, if the ceremony according to that church could be proved, namely, the words of the contracting part of it.

Lyon's case, Old Bailey, 1738. 1 East P. C. p. 469. As to an *Irish* marriage by a minor, see Rex v. Jacobs, 1 Ry. & Moo. C. C. 140. As to the ceremonies of marriage, and the provisions of the marriage act, see tit. *Marriage and Divorce*, Vol. V.; and see Rex v. Waully, 1 Ry. & Moo. C. C. 163.

BILLS OF SALE.

A BILL of sale is a solemn contract under seal, whereby a man passeth the right of interest that he hath in goods and chattels: for if a man promise or give any chattels without valuable consideration, or without delivering possession, this alters no property, because it is *nudum pactum unde non oritur actio*; but if a man sell goods by deed under seal duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession, because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting.

Yelv. 196. Cro. Jac. 270. Brown, 111. 6 Co. 18.

[By

26 G. 3. c. 60. § 17. 3 Term R. 406. (a) A mere clerical mistake will not vitiate it. 4 Term R. 161. ‖As to the provisions respecting transfers of ships, see 6 G. 4. c. 110.; and see Abbott on Shipping, 45. (5th edit., by Mr. J. H. Abbott); and see tit. *Merchant and Merchandize*, Shipping, Vol. V.‖

[By statute 26 G. 3. c. 60. § 17. it is enacted, "that when and "so often as the property in any ship or vessel, belonging to any "of his majesty's subjects, shall be transferred to any other or "others of his majesty's subjects, in whole or in part, the certi- "ficate of the registry of such ship or vessel (required by this act) "shall be truly and accurately recited in words at length (*a*), "in the bill or other instrument of sale thereof; and that other- "wise such bill of sale shall be utterly null and void to all "intents and purposes."

The decisions upon bills of sale having arisen chiefly upon the statute of 13 Eliz. c. 6., the reader is referred for them to tit. "FRAUD," (C).]

BILL OF EXCEPTIONS.

2 Inst. 426.

AT common law a writ of error lay for an error in law, apparent in the record, or for an error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alleged any thing *ore tenus*, which was overruled by the judge, this could not be assigned, for error not appearing within the record, nor being an error in fact, but in law; and so the party grieved was without remedy; And therefore,

(*b*) *Viz.* 13 E. 1. c. 31. For precedents of bills of exceptions, and proceeding thereupon, *vide* Rast. Ent. 275. 523. Brownl. Ent. 139. Lutw. 906.

"By the statute *Westm.* 2. (*b*), when one impleaded before "any of the justices alleges an exception, praying they will "allow it; and if they will not, if he that alleges the exception "writes the same, and requires the justices will put to their seals, "the justices shall so do; and if one will not another shall; and "if, upon complaint made of the justices, the king cause the "record to come before him, and the exception be not found "in the roll, and the plaintiff shew the written exception, with "the seal of the justices thereto put, the justice shall be com- "manded to appear at a certain day, either to confess or deny "his seal; and if he cannot deny his seal, they shall proceed to "judgment according to the exception, as it ought to be allowed "or disallowed."

3 Burr. 1692. 1 Black. R. 556. Bull. Ni. Pri. 317.

In the construction of this statute, the following opinions have been holden:

2 Inst. 427.

That the statute extends to the plaintiff as well as defend- ant

ant (*a*); also to him who comes *in loco tenentis*, as one who prays to be received, or the vouchee, and in all actions whether real, personal, or mixed.

(*a*) But it does not extend to one not party to the record,

as bailiff of a franchise, who demands conusance. 2 Inst. 427.

[A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge, or some matter of law arising upon a fact not denied, in which either party is over-ruled by the court. If such bill be tendered, and the exceptions in it truly stated, the judges ought to set their seals in testimony that such exceptions were taken at the trial: but if the bill contain matters false, or untruly stated, or matters wherein they were not over-ruled, they are not obliged to affix the seal. A bill of exceptions is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted after the bill is sealed, for the adverse party is concluded from averring the contrary, or supplying the omission of it.]

Bridgman and Holt, Show. P. C. 120. Bull. Ni. Pri. 316.

It seems agreed, that no *bill of exceptions* is to be allowed in treason or felony, for the words of the statute are, *cum aliquis implacitatur coram aliquibus justiciariis, &c.*; and if such bills were allowed it would be attended with great inconveniency, because of the many frivolous exceptions that might be put in by prisoners to the delay of justice; besides, in criminal cases the judges are of counsel with the prisoner, and are to see that justice is done him.

Sid. 84. Sir Henry Vane's case. Lev. 68. S. C. Keb. 524. S. C. Raym. 486. S. C. cited. Kelynge, 15. S. C. resolved. But whether on indictments for offences not capital, a *bill of exceptions* is to be allowed, *quære*; *et vide* 2 Hawk P. C. c. 46. § 1. [In 1 Leon. 5. it was allowed in an indictment for a trespass; in 1 Vent. 336., in an information in nature of a *quo warranto*; in 1 Vern. 175. in an indictment for a riot; and in K. v. Bounce, cited in Ca. temp. Hardw. 250., it was allowed by Lord Raym. at *Ni. Pri.* that it might be done in an indictment for a libel. In the Exchequer it is allowed upon information; but those are properly civil suits for the king's debts: so in *devenerunt*, but they are called the king's actions of trover. *Per* Ld. *Hardwicke*, Ca. temp. Hardw. 251.] ‖Rex v. Stratton, 21 Howell, Sta. Tri. 1167.‖

[A bill of exceptions will not lie to the justices at sessions on hearing an appeal against an order of removal; for their authority is final as to matters of fact.]

Rex v. Preston, Burr. 77. S. C. 2 Stra. 1040. Ca. temp. Hardw. 249. 1 Barnard. K. B. 415. S. C.

The statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, *&c.*; also to challenges of jurors, and any material evidence offered and over-ruled.

2 Inst. 427. Dyer. 251. pl. 5. Raym. 486. But if, with respect to these, a falsity be inserted in the bill, the judges are not bound to seal it, but may return the special matter; for the command of the writ is conditional, *quod si ita est tunc sigilla vestra apponatis*. Show. P. C. 122.

If in a trial upon a title to a lease for years, the judges (though insisted upon) will not direct the jury that the probate of a will is conclusive evidence, but will only tell the jury that it is good evidence; and thereupon the jury find there is no such will; yet a bill of exceptions will not lie; for though the evidence be conclusive, the jury, if they will, may run the hazard of an attaint.

Raym. 404. Chichester and Philips, 2 Jones, 146. S. C. adjudged in *B. R.* upon a writ of error of a judgment in C. B. in *Ireland*, which was affirmed in *B. R.* there; and it was said, the proper method had been, to demur to the evidence. *Vide* Show. P. C. 120. 122, &c. That if the evidence allowed be not believed by the jury, no bill of exception lies.

If

Cro. Car. 341 Cort and the Bishop of St. David's, Jones, 331.

If one offers to demur upon evidence, and is over-ruled, and after judgment a writ of error is brought, this cannot be assigned for error, but it is a proper case for a bill of exceptions, and the remedy which the statute in that case appoints.

S. C. by which it appears that a bill of exceptions was tendered and signed. *Vide* 7 Mod. 53. where it is said, that if the judge erroneously overrule a matter offered in evidence, though the tendering of a bill of exceptions be the most regular method, yet it is good cause of a new trial; for each party has a right to have his legal witnesses heard, or evidence received by the jury.

2 Inst. 427. (a) It has likewise been holden, that it extends even to the King's Bench, on a trial at bar, though the proceedings there are *coram rege*. 2 Jones, 117.

My Lord *Coke* is of opinion, that the statute, notwithstanding these words, *et si forte ad querimoniam de facto justic. venire fac. dominus rex recordum coram eo*, extends not only to the Common Pleas, but to all other courts of record (a), on whose judgments a writ of error lies to the King's Bench, but also to the county court, the hundred, and court-baron; for therein, says he, the judges are most likely to err; and albeit of judgments given in them a writ of error lieth not, but a writ of false judgment in the C. B., yet the case being in the same or greater mischief, the putview of this statute doth extend to these inferior courts.

2 Lev. 237. Skin. 556. 2 Show. R. 147. Burr. S. C. 81.; but *contr.* 2 Show. R. 287. A bill of exceptions lies upon a trial in the Exchequer, though that record cannot be removed in *B. R.* but by error will be brought before other justices. 2 Lev. 238.

2 Inst. 427. Raym. 182. S. P. 2 Lev. 237. S. P. *Vide* Show. P. C. 116.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all, for which the party grieved may have a writ grounded upon the statute, commanding them to put their seals, *&c.*

where a petition was exhibited to the lords in parliament, to oblige the judges to sign, and there said, that the proper remedy against them was an action grounded on the statute, which was to be tried by a jury. ‖If a bill of exceptions be sealed by a judge, and he dies, a *scire facias* lies against his executors or administrators to certify it. 2 Inst. 428.‖

2 Inst. 427.

Although no time be appointed by this act when the justices shall put their seals, the party must pray the same before judgment: but if they deny it, then may they be commanded after judgment to put their seals, and then the putting of their seals after judgment shall be sufficient.

Salk. 288. pl. 26. Wright v. Sharp. ‖Dillon v. Doe dem. Parker, 1 Bing. 17. 11 Price R. 100.‖

But where a corporation-book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused, and no bill of exceptions was then tendered, nor was the exception then reduced to writing; and the trial proceeded, and a verdict was given for the plaintiff: The court being the next term moved for a bill of exceptions, it was urged for the bill, that the law requires *quod proponat exceptionem suam*, and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict is given against him; and the same memory that serves the judges for a new trial, will serve for a bill of exceptions. On the other side it was said, that this practice would prove a great difficulty to judges and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience: besides, the words of the act are in the present tense, and so is the writ formed on the act. *Holt* C. J., If this practice should prevail, the judge would be in a strange condition: he forgets

forgets the exception, and refuses to sign the bill, so an action must be brought: you should have insisted on your exception at the trial, you waive it if you acquiesce, and shall not resort back to your exception after verdict against you, when, perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point: the statute indeed appoints no time; but the nature and reason of the thing requires the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that they need be drawn up in form, but the substance must be reduced to writing whilst the thing is transacting, because it is become a record; so the motion was denied.

When this bill is signed, there goes out a *scire facias* (*a*) to the judge who signed it (*b*), *ad cognoscendum scriptum*; and the *scire facias* to the judge, and his return with the bill must be entered on the issue roll and made part of the record, and has a retrospect if done at the trial; which is to be removed by writ of error.

Vide Lutw. 905, 906. and 5 Bur. 1692. *&c.* the case of Money *et al.* v. Leach.

(*a*) Where the record is in the same court, there is no occasion for a *scire facias ad cognoscend.*, 2 Jones, 117. 2 Lev. 237., being present to confess or deny their seal. [But the bill of exceptions is in nature of a writ of error, and therefore cannot be determined in the court out of which the record issues. Davenport v. Tyrell, 1 Black. R. 675. Searle v. Lord Barrington, 2 Stra. 826. Money v. Leach, 5 Burr. 1692. But though that court hath no jurisdiction in such case, yet, if a special verdict be found in the same cause, upon which they pronounce judgment, and that judgment be right, their proceeding on the bill of exceptions will not alone be a ground for a court of error to reverse the judgment. Cowp. 501.] (*b*) If the judge dies, a *scire facias* lies against his executors to, &c. 2 Inst. 428. If the judge denies his seal, the party may prove it by witnesses. *Ibid.* Though the party grieved be dead, his heirs or executors may have error upon the bill of exceptions. *Id.* 427.

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed; having given their opinion upon it before; for his proper redress is by writ of error, and it is presumed that the court was satisfied in the point when the party tendered his bill of exceptions, though argued in *Lev.* that it ought to be used as well to *prevent* as to *reverse* the judgment.

Vent. 366, 367. 2 Lev. 237. 2 Jones, 117. [If the court of error give judgment in favour of the bill of exceptions, and are of opinion that the evidence, though not conclusive, ought to have been received, they will award a *venire de facias de novo*. Davies v. Pierce, 2 Term R. 125. But where there is a bill of exceptions, the court below will not grant a new trial on the very point contained in it. Fabrigas v. Mostyn, 2 Black. R. 929.] ‖The bill of exceptions must first be abandoned. Doe v. Roberts, 2 Chitt. 272. If a party brings a writ of error, and removes the record before he has obtained the judge's seal to the bill of exceptions, he waives the bill allowed by the judge. Dillon v. Parker, 1 Bing. 17., 11 Price, 102.; but see Willans v. Taylor, 6 Bing. 512.‖

‖If the question is not as to the admissibility of the evidence, but whether or not the facts deposed to prove the issue joined, the party should demur to the evidence, and not tender a bill of exceptions, which will not stop the case from going to the jury.

2 Barn. & C. 443. 1 Car. & Pa. 237.

A bill of exceptions, being no part of the record in the court below, is not to be included in the taxation of costs there. And where in *case* the plaintiff recovered a verdict, and had judgment in the Court of Common Pleas, and on a bill of exceptions returned

Gardner v. Baillie, 1 Bos. & Pull. 32. Bell v. Potts, 5 East R. 49.

returned into the Court of King's Bench judgment was reversed, and the plaintiff took nothing by his writ, the defendant was held not entitled to costs.‖

BOROUGH-ENGLISH.

Litt. § 165. Noy, 106. It is called Borough-English, because, as some hold, it first prevailed in *England*. Co. Litt. 110 b. Litt. § 211. 8 E. 4. 19 a.

BOROUGH-ENGLISH is a custom which prevails in certain ancient boroughs, by virtue of which the youngest son shall inherit his father as to the lands of which he is seised in fee-simple or fee-tail. The reason of this custom seems to be (*a*), that in these boroughs, people chiefly maintained and supported themselves by trade and industry; and the elder children being provided for out of their father's goods, and introduced into his trade in his life-time, were able to subsist of themselves without any land provision, and therefore the lands descended to the youngest son, he being in most danger of being left destitute.

(*a*) Others have told us, that the reason of this institution was, because the lord demanded the first night with the bride, so that they thought the eldest not legitimate. Preface to 5 Mod. R. [But this reason is rejected; for though, perhaps, sufficient to exclude the eldest, it would only, if taken in its full force, convey the inheritance to the second son, as the next worthy, and not to the youngest. This barbarous custom Sir *W. Blackstone* thinks, never prevailed in *England*, though, he saith, it certainly did in *Scotland*, (under the name of *mercheta*, or *marcheta*,) till abolished by *Malcolm* III. Mr. Robinson, however, tells us, that it prevailed here, in several manors in the northern counties, in which a fine is now paid as a commutation for the right; though he acknowledges that the custom of borough-english doth not particularly obtain in those manors where such fine is paid. Rob. on Gavelkind, Appendix. It should be observed, that in *Scotland*, it was the fine paid by way of commutation for the exercise of the right, not the right itself, which was called *marcheta*; Skene *verbo Marcheta*. Buchan. Hist. of Scot. lib. 7. And the same term is well known in our law, for a fine due to the lord on the marriage of the son or daughter of his villein. Co. Litt. 117 b. 140 a. Bract. lib. 2. f. 26. And a late ingenious writer hath thought, that the *mercheta* of the *Scots* is merely *British*, and nothing more than the Merch-ed of Howel Dha, the daughterhood, or the fine for the marriage of the daughter. Whitaker's Hist. of Manchester, vol. 1. 359. Sir *W. Blackstone* deduceth the origin of this custom from the *Tatars*, among whom, according to Father Duhalde, it also prevails. 2 Black. Com. 85.]

[There is no difference between the law concerning copyholds in borough-english, and freeholds in borough-english, as is agreed in Cro. Car. 411.]

Co. Litt. 110 b. 1 Salk. 244. *per Holt*, and S. P. resolved between Baxter and Dodswell.

If land in borough-english be given to *A.* and his heirs for the life of *B.*, and *A.* die in the life of *B.* leaving two sons, the youngest shall be the special occupant, because the heir that is representative of the father, as to land of that nature, must be the occupant, since the heir must take by descent, and not by purchase.

[2 Lev. 158. 3 Keb. 475. 486. 498. But he takes as heir. 2 Vern. 226. Vaugh. 201. Rob. Gavelkind, 97.]

Co. Lit. 33. 111. F.N.B. 150.

By the custom of borough-english, the widow shall have the whole of her husband's lands in dower, which is called her free-bench;

bench; and this is given to her the better to provide for the younger children, with the care of whom she is intrusted. Cro. Eliz. 415. Moo. pl. 566.

She shall have dower of rent common out of lands in gavelkind, borough-english, &c. for these ensue the nature of the land. Bro. Custom, 44. 58. The husband shall be tenant by curtesy of borough-english land. *Vide* head of *Curtesy of England.*

For a condition broken, the heir at common law shall enter, because the condition is a thing of new creation, and collateral to the land; but when the eldest son enters, the youngest son shall enjoy the land; for by breach of the condition he is restored to the ancient estate. Cro. Eliz. 204. Plow. 28. *Vide* head of *Gavelkind.*

The benefit of a warranty annexed to lands in borough-english shall not go to the youngest son. *Vide* head of *Warranty.*

If a man be seised of land of the nature of borough-english, and have issue two sons, and die, and the eldest son, before any entry made by the youngest, enter into the land by abatement, and die seised, this shall not take away the entry of the youngest brother, because the eldest shall be presumed to enter to preserve the estate in his family, which he or his heirs may some time or other, upon failure of his brother's line, happen to enjoy. Co. Lit. 242.

If a man seised of borough-english lands make a feoffment in fee to the use of himself and the heirs male of his body (*secundum cursum communis legis*), and die, leaving issue two sons, the youngest, notwithstanding the feoffment and these words, shall inherit those lands. N. Dyer, 179 b. Jenk. R. 220.

The law takes notice of the customs of gavelkind and borough-english (*a*); and therefore it is sufficient to allege generally, that the lands are of the custom of gavelkind or borough-english. Co. Lit. 175b. (*a*) But as to such customs as are no part thereof, but merely collateral, they must be shewn in pleading, as that the lands are devisable, &c.; but for this *vide* Cro. Car. 562. 2 Sid. 154. Sid. 77. 138. Lev. 80. Raym. 77, and tit. *Gavelkind.* [As to the special customs, some of them restrain, and others extend the general custom. Of the first sort are, 1. The custom of a manor in the duchy of *Cornwall*, that an estate in fee in the lands shall go to the eldest son; but if in tail, the tenements shall descend to the heir at common law; and this was holden a good custom in the case of Chapman and Chapman, March, 54. 2. In 32 E. 3. Age, 81., it is pleaded, that in the soke of *B.*, if a man has several sons by one wife, the youngest shall inherit after the death of the father; but if he has two sons by different venters, the eldest shall inherit to the father, and not the youngest; and this custom is there allowed good. Co. Lit. 140 b. Those more extensive than the general custom are, 1. That if the tenant has no sons, but several brothers, his youngest brother shall inherit. Co. Lit. 110 b. 2. That the youngest sister shall inherit. Co. Lit. 140 b.] — For other customs in the nature of borough-english, *vide* tit. *Descent* (D), and Co. Lit. 110. Dan. 548, 549.

If *A.* hath issue five sons, and the youngest dies in the life-time of the father, leaving issue a daughter, after which the father purchaseth lands in borough-english, and dies, the daughter of the fifth son shall, *jure representationis*, inherit those lands, and not the fourth son. Salk 243. pl. 4. Clements and Scudamore, adjudged. 6 Mod. 120. S. C. adjudged. 2 Ld. Raym. 1024. S. C. 1 P. Wms. 64. S. C.

[The youngest son, it hath been determined, shall have his whole distributive share of the personal estate of his father dying intestate, without bringing into hotchpot an estate of the nature of borough-english descended to him from his father; for that such estate descended is not within the statute of distributions.] Lutwyche v. Lutwyche, Ca. temp. Talb. 276.

BRIDGES.

BRIDGES.

[The reparation of public bridges was part of the *trinoda necessitas*, to which, by the ancient law, every man's estate was liable, *viz. expeditio contra hostem, arcium constructio, et pontium reparatio.* So in the *Roman* law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nulliusq. dignitatis ac venerationis meritis, cessare oportet.* C. 11. 74. 4.] 10 E. 5. 28. Roll. Abr. 368. 2 Inst. 701. 13 Co. 33. Hale P. C. 145. Cro. Car. 365. [The obligation to repair being upon all the inhabitants of a county, it follows that they are not liable to an action at the suit of an individual, for an injury sustained by him in consequence of a bridge being out of repair. 2 Term R. K. B. 667.] ‖A bridge may be a public bridge, though only used by the public at all such times as it is dangerous to pass through the river. 2 Maule & S. 262.‖

PUBLIC bridges, which are of general conveniency, are, of common right, to be repaired by all the inhabitants of that county in which they lie.

Rex v. Ecclesfield, 1 Barn. & A. 359. 13 East, 97.

‖But a hundred or parish, or any known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it. And there is no distinction as to the liability, whether the bridge be a foot, horse, or carriage bridge.‖

Hale's P. C. 143. Dalt. c. 14. (*a*) A body politic may be bound

But a corporation aggregate (*a*), either in respect of a special tenure of certain lands, or in respect of a special prescription; also any other person by reason of such a special tenure, may be compelled to repair them.

either *ratione tenuræ, sive præscriptionis.* 2 Inst. 700. 13 Co. 33. ‖As to the evidence of a prescriptive obligation in a corporation to repair, see The King v. The Mayor of Stratford-upon-Avon, 14 East, 548.‖ But a private person, though he may be bound *ratione tenuræ*, is not bound *ratione præscriptionis. Vide* Hawk. P. C. 221. Fareal. 54. 98. Salk. 358. pl. 5. 3 Salk. 77. 381. pl. 3. 6 Mod. 150. If a bishop, &c. hath once or twice of alms repaired a bridge, this binds not; yet it is evidence against him that he ought to repair, unless he proves the contrary. 2 Inst. 700. ‖If a party is indicted as liable to repair a bridge *ratione tenuræ*, and it appear that the tenement (a mill) originated within time of legal memory, the indictment cannot be sustained. Rex v. Hayman, 1 Moo. & Mal. 401.‖

Rex v. Kerrison, 1 Maule & S. 435.

‖An indictment charging a person with the repair of a bridge by *reason of his being owner and proprietor* of a certain navigation, is erroneous, since these words are not equivalent to the technical phrase *ratione tenuræ*, importing a condition in the original grant of the lands, and if judgment be given on such an indictment, it will be reversed on error.

The King v. Inhabitants of Machynleth, 2 Barn. & C. 166. Where an indictment is preferred by the inhabitants

If an indictment charge the inhabitants of a parish and township with the repair of a bridge *ratione tenuræ* of certain lands, it must shew that the bridge is situate within the township, or must shew some special consideration; and the *tenure of certain lands* is not such a consideration, because the inhabitants cannot hold lands, and therefore cannot be liable by reason of law.‖

of a parish against a county, and the question is, whether the county or parish are liable to repair, the court will not compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents. Rex v. Justices of Buckingham, 8 Barn. & C. 375.

Jones, 273. Poph. 192. 6 Mod. 307. 12 Mod. 198.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land, chargeable with the repairs of a common bridge, may be made defendants to an indictment for not repairing

ing it, and be liable to pay the whole fine assessed by the court for the default of such repairs; and shall be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge (*a*); for cases of this nature require the utmost expedition; and bridges, being of absolute necessity, are not to lie unrepaired till lawsuits are determined.

409. Lord Raym. 725. 2 Ld. Raym. 792. 804. Salk. 358. pl. 6. ‖4 Barn. & C. 194.‖

(*a*) Where the party grieved may, in such case, have a writ to the justices *de deonerando pro rata portione*. F. N. B. 255. Reg. 268. 2 Inst. 700. Where he may bring his bill in equity. Hardr. 131.

If a manor, holden by the service or tenure of repairing a common bridge, comes, by the alienation of the lord, into the hands of several persons, every alienee, being tenant of any parcel, either of the demesnes or services (*b*), shall be liable to the whole charges, and put to this remedy for a contribution from the rest; and though the lord, on such alienation, agreed that the purchasers should be exempt from the charges, yet however binding such agreement might be among themselves, it shall not work a general injury, by making the remedy the public had more difficult than it was before.

Salk. 358. pl. 5. *Per cur.* on a trial at bar. (*b*) If charged *ratione tenuræ* of a manor, the ancient freeholders and copyholders are not liable to contribute; for nothing is part of the manor but the demesnes and services; but those who have any part of the demesne lands by purchase must contribute. Hard. 131. *per cur.* 2 Ld. Raym. 792. 804. [A tenant at will of a house adjoining to a common bridge, is compellable, in respect of his possession, to repair the house, so as the public sustain no injury by it, though he is not bound to repair as to his landlord. 2 Ld. Raym. 856.]

So if a manor subject to such charge comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole manor, or any part thereof, shall be liable to an indictment or information, for want of due repairs.

Salk. 358. pl. 5. *per cur.*

‖If a man build a bridge in a public way without utility, it is indictable as a public nuisance; and so it is if built in a slight and incommodious manner, for no person can at his choice impose such a burden on the county.‖

2 East, 348.; and see 45 G. 3. c. 59. § 5.

If part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much; also, by a special tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of the county are to repair the rest.

1 Hawk. P. C. c. 77. § 1. Raym. 384.

It hath been resolved, that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves by shewing that they are not bound either to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said, that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea.

1 Hawk. P. C. c. 77. § 4. Poph. 192.

‖If the defendant plead that *A. B.* is liable to repair the bridge *ratione tenuræ*, this plea will not be supported by shewing that *A. B.* purchased part of the estate of *C. D.*, who had immemorially repaired the bridge, and who continued to repair after the sale to *A. B.*

Rex v. Inhabitants of Oxon, 16 East, 223.

On an indictment for not repairing where the question is, whether the bridge is or is not a public bridge, the defendants

Rex v. Inhabitants of

Northampton-shire, 2 Maul. & S. 262.

may on the general issue give evidence that the bridge has been repaired by private individuals.‖

Hawk. P. C. c. 77. § 5. Sid. 146. 2 Lev. 112. [An indictment for not repairing a bridge, must shew what sort of bridge it is, whether for carts and carriages, or for horses, or for footmen only. 2 Ld. Raym. 1175. Where the obligation to repair ariseth from the tenure of certain lands, the indictment must state where those lands lie. 2 H. H. P. C. 181.]

It is said, that where such defendants plead that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves; the attorney-general, in this special case, may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against *A. B.*, and that an issue ought to be taken of such second traverse; and that the attorney-general may afterwards surmise that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury.

43 Ass. pl. 37. Bro. tit. Presentments in Courts, pl. 22. 29. Dalt. c. 14. Hawk. P. C. c. 77. § 1.

It seems clear that those who are bound to repair such bridges, must make them of such height and strength as shall be answerable for the course of the water, whether it continues in the old channel, or makes a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying on the materials requisite for such repairs.

The King v. Inhabitants of Cumberland, 6 Term. R. 194.

‖Whether those who are bound to repair a bridge are bound to widen it as the exigencies of the public require, does not appear to be determined.

3 Bos. & Pull. 354. 2 East, 353.

Where parties bound to repair a foot bridge alter it into a carriage bridge, they are still bound to repair it *pro rata* as a foot bridge.

43 G. 3. c. 59.

But now by the 43 G. 3. c. 59. where any bridge, or road at the end thereof, repaired by the county, shall be narrow and incommodious, it shall be lawful for the justices at any quarter sessions, to direct the same to be widened, improved, and made commodious for the public; and where it is necessary or expedient to take such bridge wholly down, such justices may direct the same to be rebuilt, either on the old site or one more convenient, contiguous to or within two hundred yards of the former one, as to such justices shall seem meet; and if for such purpose it is necessary to purchase land, it shall be lawful for the county surveyor, under such justices' direction, to set out and ascertain the same, not exceeding one acre at any one such bridge, and to contract for the purchase thereof (*a*); and if the surveyor cannot agree with such owner, or the owner cannot be found, then the justices shall impannel a jury and assess the compensation and satisfaction for such land, and for the trespass and damage to be done in execution of the act, in the same way as authorized by the general turnpike act 13 G. 3., and all the clauses, powers, and provisions of that act are extended and applied to the works by this act authorized, as far as the same are applicable; provided that no money shall be applied to the amendment or alteration of any such bridge, until presentment made of the insufficiency, inconveniency, or want of reparation thereof in pursuance of some statute concerning bridges.‖

(*a*) The justices of *Dorset* having under this statute contracted for the building of a new bridge in a different site, in lieu of the old one, and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials, the court refused a prohibition to

to restrain them from pulling down the old before the new bridge was passable, though there were strong affidavits of the inconvenience to the neighbourhood, the court leaving the complainants to the ordinary remedy by indictment. Rex v. Justices of Dorset, 15 East R. 594. The powers of the 43 G. 3. c. 59. § 2., as to the purchase of lands, are extended to the purchase of buildings by the 54 G. 3. c. 90. § 1.

No inhabitant of a county ought to be a juror for the trial of an issue, whether the county be bound to such repairs or not; but it is said, that he may be a good witness. (*b*)

6 Mod. 307.

[(*b*) He is made so by 1 Ann. stat. 1. c. 18. § 13. Upon a suggestion on the record, that the question was between the citizens of *Norwich* and the inhabitants of the county of *Norfolk*; and they being interested, there could be no indifferent trial had there; the court awarded the *venire* for the trial of an information for not repairing a bridge within the boundaries of the county of the city of *Norwich* into *Suffolk*. And the trial in *Suffolk* was ruled to be proper by three justices against *Fortescue* J.; though the defendants had pleaded only the general issue. Stra. 177. And if the justices are all interested, the trial shall be in the next county. 2 Burr. 859. If the boundaries of a city are enlarged by letters patent, the obligation to repair bridges upon the newly annexed lands, passeth with those lands. Stra. 177.]

No man can be compelled to build or contribute to the charges of building any new bridge, without an act of parliament; nor can the inhabitants of the whole county, by their own authority, change a bridge or highway from one place to another.

2 Inst. 701. Carth. 193. 6 Mod. 307. By *Magna Charta*, c. 15. no town or freeman shall be distrained to make bridges *nisi ab antiquo et de jure facere consueverunt*, which *vide* explained, 2 Inst. 29.

If a man makes a bridge for the common good of the king's subjects he is not bound to repair it.

2 Inst. 701. Roll. Abr. 368.

‖See the record in the *Stratford* Bridge Case, in 8 Edw. 2., 2 Maule & S. 521. and the remarks of Ld. *Ellenborough*, *Id.* 519. and *infrà*.‖ If a private person builds a bridge, which afterwards becomes a public conveniency, the inhabitants of the county are bound to repair it. Salk. 359. pl. 7. 6 Mod. 307.

[Where an owner of a mill cut a channel to it across the highway, and threw a bridge over that part of the highway which was so cut through, which bridge was used as a public bridge; it was adjudged that the repair of it lay upon him. But where a township that were bound to repair a foot-bridge, pulled down that bridge, and built another for horses and carriages in a different and more commodious part of the river; and this bridge became afterwards of general public utility; it was holden that the county, and not the township, ought to repair it. In this latter case, besides that the bridge was of a *different* kind, and in a *different* situation, from that which the township were originally charged with the repair of, it did not appear that they derived any greater or other advantage from it than the public at large; but in the former case, the bridge was erected in consequence of the new cut which the owner of the mill had made, which cut was a public nuisance, and was merely for the particular accommodation of his mill, so that he received benefit from the bridge beyond that which the public enjoyed by it. This distinction was made by Lord *Kenyon*, in the case of the *King* v. *The Inhabitants of Glamorganshire*. To an indictment against the county for not repairing a bridge, they pleaded that it had been built by a Mr. *Mackworth* for his private accommodation, in order to lead to his tin mines; and that the present proprietor of those mines still made use of it for that purpose.

Roll. Abr. 368. pl. 2. Com. Dig. tit. Chemin, (B) 2. 5 Burr. 2594. 2 Black. R. 685.

Summer assizes at *Hereford*, 1788.

But as there was no evidence that the *Mackworth* family had done any thing which induced the necessity of erecting that bridge, and as it was become of public utility, the learned judge ruled, that the county was bound to repair it, notwithstanding that it still continued to be a benefit to the present proprietors of the mines.]

The King v. Inhabitants of Bucks, 12 East R. 192.

‖Every bridge in a highway is taken to be a public bridge within the statute of bridges, and is to be repaired by the county, unless they shew by plea that some other person or body politic or corporate is liable. And therefore, where queen *Anne*, in 1708, for her greater convenience in passing to and from *Windsor Castle*, built a bridge over the *Thames* at *Datchet*, in the common highway leading from *London* to *Windsor*, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials were converted to the use of the king, by whom the ferry was re-established as before; it was held, that the inhabitants of the county of *Bucks*, who were indicted thirteen years after the pulling down of the bridge, during which time the public had used the ferry, were still liable to rebuild and repair the bridge, since it was a public bridge used by the public, and they could not throw the burden on any other party.

Rex v. Inhabitants of Oxfordshire, 1 Barn. & Adol. 289.

The county is bound to repair bridges over such water only as answers the description of *flumen vel cursus aquæ*; that is, water *flowing in a channel between banks more or less defined*, although such channel may be occasionally dry. And therefore, where the road by which a bridge was approached, passed between meadows which were occasionally flooded by a river, and for convenient access to the bridge a raised causeway had been made, having arches or culverts at intervals for the passage of the flood-water, which were equally necessary to the safety of the main bridge and the causeway; it was held, that the inhabitants of the county were not bound to repair such arches being at a distance of more than 300 feet from the end of the main bridge.

Rex v. West Riding of Yorkshire, 2 East, 342.

And though a bridge is built by trustees, under the powers of an act of parliament, which authorizes them to raise tolls for support of the roads, still, if it be of public utility and used by the public, the inhabitants of the county must repair it, the act making no special provision for transferring the liability, or exonerating the county from it.

The King v. Inhabitants of Kent, 2 Maule & S. 513. All question as to the liability of the county or the erecter of a bridge to repair it seems removed as to bridges erected since 24th *June* 1803. by the 43 G. 3. c. 59. § 5. which provides that

And accordingly, where a person, forty-five years back, erected a mill and dam for his own use and profit, *per quod* he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had always since used; it was held, that the county, and not the miller, was chargeable with the repairs.

that no bridge thereafter to be built by any individual or body corporate shall be deemed a county bridge which the county is compellable to repair, unless erected in a substantial manner, under the direction or to the satisfaction of the county surveyor or person appointed by the justices at sessions, and which surveyor is required to superintend the erection of such bridge when requested by the party desirous of erecting the same; and in case the parties shall be dissatisfied the matter shall be determined at the sessions.

So also, where the county, in answer to an indictment for not repairing a bridge, pleaded that, by a certain act of parliament for amending the road, trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges, that the trustees under the act erected the bridge in question, and that they were liable and ought to repair; it was held, that the bridge being built for public purposes, the common-law liability to repair attached on the county, and that the plea was insufficient to exonerate them, since it did not state that the trustees had funds adequate to the repairs; and even if it had done so, it seems it would have been insufficient, since the county were primarily liable, and must take their remedy against the trustees. Rex v. Inhab. of Oxon, 4 Barn. & C. 194.

But where a navigation company were empowered under a local act to make a river navigable, and take tolls, and amend and alter such bridges or highways as might hinder the passage or navigation, leaving them others convenient in their room, having destroyed a ford across the river in the common highway by deepening its bed, and having built a bridge there, they were held bound to keep such bridge in repair; for they were only empowered to take and alter the old highway, on condition of leaving another passage as convenient in its room, and the condition continued and obliged them to repair it. The King v. Inhab. of Kent, 13 East, 220.; and see The King v. Inhab. of Lindsey, 14 East, 317. Rex v. Kerrison, 5 Maule & S. 526.

And where an act of parliament appointed trustees for taking down the old and building a new bridge over the river *Tone*, and empowered them to take tolls, and that it should be lawful for them, out of the monies received, to build a new bridge, and vested the property in the old and new bridge, during the continuance of the act, in the trustees, and that as soon as the purposes of the act should be executed, then and from thenceforth the tolls should cease, and the bridge should be repaired by such persons as were by law bound to repair the old bridge; it was held, that during the time the trustees were engaged in executing the powers of the act until they were completed, the county was not liable to repair the bridge.‖ The King v. The Inhab. of Somerset, 16 East, 305.

[Justices at sessions cannot make an order for the repair of a bridge, but must proceed by indictment.] 1 Salk. 359. pl. 7. ‖*Sed vide* 59 G. 3. c. 143. § 5. *post*.‖

‖And the sessions cannot impose more than one fine on a judgment on an indictment for not repairing, the punishment being inflicted by the first fine.‖ The King v. Machynlleth, 4 Barn. & A. 469.

[Nor can they make an assessment upon a hundred, for reimbursing two of the inhabitants the expenses they incur by being distrained to appear and defend an indictment for not repairing a bridge within the hundred.] Vin. Abr. tit. Bridges (B), pl. 38.

By the 22 H. 8. c. 5., "the justices of peace in every shire, "franchise, or borough, or four of them (*a*), whereof one to be "of the *quorum*, may enquire and determine, in their general "sessions, of annoyances of bridges broken in the highways (*b*), "and make such process and pains on every presentment, "against the persons charged, *&c.*, as the King's Bench is used "to do, or as it shall seem by their discretions to be necessary "and convenient."

(*a*) Unless the justices of the peace of a county or town, &c. be four in number, and one of them of the *quorum*, they have no manner of jurisdiction by virtue of this statute. 2 Inst. 701, 702. But it is said, that the justices of the peace of the county, in which such town, being not a county of itself, and wanting such a number of justices, shall lie, may, by virtue of this clause of the statute, determine all annoyances of bridges within such town, &c. if it be known what persons in certain are bound to repair the same; but if it be not known, it seems that such annoyances are left to the remedy of the common law; because the clause, which in such case authorizes the justices of the peace to tax all the inhabitants, seems expressly to confine the power of taxing the inhabitants of such town to their own justices. 2 Inst. 704. Hawk. P. C. c. 77. § 15. (*b*) This statute extends to bridges in the highways only. 6 Mod. 255, 256. Salk. 359. pl. 8. 2 Ld. Raym. 1174. But justices of peace are said to have jurisdiction over nuisances to other common bridges, by virtue of 1 Eliz. c. 3., and the general words of the statute of Edw. 3. c. 10. *Vide* 2 Hawk. P. C. c. 8. § 39.

"And where it cannot be known who ought to make such "bridges decayed, they shall be made by the inhabitants of the "shire, city, or town corporate wherein they shall be (*c*); and "if part shall be in one shire, *&c.*, and part in another, the "inhabitants of each shall repair and make such part as lies "within their respective limits.

(*c*) It hath been questioned, whether a borough which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 Hawk. P. C. c. 77. § 19. *Vide* Skin. 254. pl. 2.

"And for speedy reformation of such bridges, the justices of "peace of such shire or town, or four of them, whereof one "to be of the *quorum*, may call before them either the constables, or else two of the most honest inhabitants of every "town and parish, and with the assent of the said constables or "inhabitants, may tax every inhabitant within their limits (*d*), "in such sums as may be thought convenient; and shall cause "the name and sums of each person to be written on a roll "indented, and shall have power to make two collectors of "every hundred for the collection of such tax; which collectors "receiving one part of the roll indented, under the seals of the "justices, shall have power to collect all the sums therein contained, and to distrain those who shall refuse to pay; and the "same justices, or four of them, may also name two surveyors, "who shall see every such decayed bridge repaired from time "to time, to whom the said collectors shall pay the said sums "by them received; and the collectors and surveyors, and their "executors, shall from time to time make a true account to the "justices, or four of them, whereof one of the *quorum*, of their "receipts, payments, and expenses; and if any of them shall "refuse that to do, the same justices, or four of them, may "make processes against them by attachment under their seals, "returnable at the general sessions; and, if they appear, may "compel them to account, or else, on their refusal, may commit "them *quousque*.

(*d*) *Viz.* shall make a distinct tax on each householder living in the county and each occupier of land lying in the county, whether he dwell in it or not; and whether such householder or occupier be a body politic or natural; and though he claim an exception by a prior act of parliament. 2 Inst. 703, 704. Keb. 91. *Note* — This method of taxation, and raising money taxed, seems by 1 Ann. stat. 1. c. 18. *quod vide.*

"And

"And it is further enacted, that where the bridge is in one shire, and the person bound to amend it in another, or where the bridge is in a town corporate, and the person bound to repair it out of it, the justices of such shire or town corporate may enquire and determine all such annoyances within their limits; and on a presentment may make process against such persons; and do further in every behalf, in every such case, as they might do by the said act, in case that such persons were in the same shire, *&c.*; and all sheriffs and bailiffs of liberties shall serve such process, on pain to make such fine as shall be set by the said justices.

No money to be expended in the repair of bridges without the presentment of the grand jury. 14 G. 2. c. 33. ‖*Sed vide* 59 G. 3. c. 143 § 5.‖ Justices of the peace may purchase adjoining grounds for enlarging bridges. As to statutes relative to particular bridges, see the Tables to the Statutes, title Bridges. ‖See the statutes, *post*.‖

"Provided, that nothing in this act shall be prejudicial to the liberties of the five ports; but that the warden, mayors, bailiffs, and *jurats* of the same ports, may enquire and determine all annoyances of bridges therein, and make such process, *&c.* as the justices of peace may do in other places, by virtue of the said act.

"And it is further enacted, that the said justices, *&c.* may allow such reasonable costs and charges to the said surveyors and collectors, as by their discretion shall be thought convenient.

"And it is further enacted, that such parts of highways as lie next adjoining to the ends of bridges by the space of 300 feet, shall be amended as often as need shall require; and that the justices, or four of them, whereof one of the *quorum*, within their several limits, may enquire and determine in their general sessions all annoyances therein, and do in every thing concerning the same, in as ample a manner as they may do for making and repairing bridges."

‖The obligation on the county to repair newly erected public bridges extends also to the 300 feet of highway at the ends of the bridge, and they cannot discharge themselves from repairing such portion of the highway any more than the bridge itself, unless they shew by special plea that some other is bound by prescription or tenure to repair the same.

Rex v. West Riding of York, 7 East R. 588. affirmed in *Dom. Proc.* 5 Taunt. 284.

But though the county repairing a bridge is bound to repair the 300 adjoining feet of road, notwithstanding they may be situate in another county, yet if another bridge is erected on those 300 feet, and adopted and used by the county where it is situate, *they* are liable to the repair of it; since the new bridge is not to be considered an appendage to the old one, in the same manner that the 300 feet of road were under the stat of H. 8. before the new bridge was erected.‖

Rex v. Devon, 14 East, 477.

[By stat. 1 Ann. sess. 1. c. 18. the act of 22 H. 8. c. 5. is confirmed, except where altered by this act.

By § 2. Justices at their general or quarter sessions have power upon preferment that any bridge is out of repair within their commissions (*a*), which by them ought to be repaired, to lay such sum on every parish as it hath usually been assessed at towards the repair of such bridge (*b*), which shall be levied by

§ 2.

(*a*) The bridge to be repaired must be stated in the present-

ment to be a public bridge, and out of repair; and this must appear upon the face of the order of assessment;

the constables of each parish, or such other persons as the justices shall appoint, and by them in six days after the receipt thereof paid to the high constables, who are to pay it over in ten days to the persons appointed by the sessions to be treasurers.—On nonpayment in ten days after demand, the money to be levied by distress and sale.

but it is not necessary that the jury should present by whom the bridge ought to be repaired Andr. 285. (*b*) A general rate by the sessions on the several parishes, &c. with orders to the churchwardens, &c. to assess the inhabitants, is sufficient. *Id.* 101.

§ 3. § 3. Constables neglecting to assess, collect, or pay the money, to forfeit forty shillings, and treasurers paying any money but by order of justices at sessions, to forfeit five pounds.

§ 4. § 4. Fines imposed upon presentments or indictments not to be returned into the Exchequer, but to be paid to the treasurers, and applied towards the building or repairing of the bridges.

§ 5. § 5. All matters concerning the repair of bridges to be determined in the county where they lie, and not elsewhere: and no presentment or indictment for non-repair of bridges and the highways at the end thereof, to be removed by *certiorari*. (*c*)

(*c*) This act extends only to bridges which the county is bound to repair; for where a private person, or a parish, is charged, and the right will come in question, the stat. of 5 & 6 W & M. c. 11. hath allowed the granting of a *certiorari*. 2 Stra. 900. 1 Barnard. 445.

§ 6. § 6. Justices to allow a sum not exceeding three pence in the pound to persons concerned in the execution of this act.

§ 7. § 7. Persons prosecuted for any thing done by them under this act to plead the general issue, and give this act, and the act of 22 H. 8. c. 5., and the special matter, in evidence; and upon the plaintiff being nonsuited, or having a verdict against him, to have double costs.

§ 8. § 8. This act not to discharge particular persons, estates, or places heretofore liable to the repairs of any bridge.

§ 9. § 9. All forfeitures and penalties incurred by this act to be applied towards repairs.

§ 13. § 13. In all informations or indictments the evidence of the inhabitants of the town or county in which decayed bridges or highways lie, shall be admitted.

12 G. 2. c. 29. § 13. ‖See 55 G. 3. c. 143. § 5.‖

By 12 G. 2. c. 29. § 13., no part of the county rate to be levied by that act shall be applied to the repair of any bridges, but upon presentment of the grand jury.

§ 14. (*a*) Where the justices at sessions appointed a committee of magistrates to inspect the state of a county bridge, and to make any contract for repairing or re-building, to be executed

By § 14. Justices at their general or quarter sessions (*a*) may contract for the repairs of bridges for any term not exceeding seven years, the contractor giving security for the due performance of his contract, and the justices giving notice at their sessions of their intention of entering into such contract. The contract to be made at the lowest price proposed, and when agreed to, to be entered, together with all orders relating thereto, in a book to be kept by the clerk of the peace, *&c.*, who shall keep it among the records of the county, *&c.*, to be open to the inspection of any of the justices within the limits of their commissions, and by persons employed under this act, without fee or reward.

by the clerk of the peace on behalf of the county; and afterwards made an order adopting a contract

contract for re-building, proposed by the committee, and directed to be prepared by the clerk of the peace; which contract was thereupon executed by the clerk of the peace; and the justices, at a subsequent sessions, confirmed all the resolutions of the committee: the acts of the committee, so confirmed, were the acts of the sessions, and the authority given to the committee, and so exercised by them, was not such a delegation of power by the sessions as invalidated their order. 5 Term R. 279.

By 14 G. 2. c. 33. Justices at their general or general quarter sessions are empowered to purchase lands near to any county bridge (*a*) for the purpose of enlarging or rebuilding such bridge, not exceeding one acre for each bridge, which land shall be paid for out of the monies raised by the county rate under the 12 G. 2., by the county treasurer thereto authorized by order under the hands and seals of the majority of the justices at sessions, and shall be conveyed to such person or persons as the majority of the said justices at such sessions shall appoint, in trust for the enlarging or rebuilding of the respective bridges.] 14 G. 2. c. 33.

(*a*) This power of purchasing lands, impliedly gives the power of altering the position of the bridge to suit the convenience of the public. 5 Term R. 282, 283.

‖By the 43 G. 3. c. 59. § 1. it shall be lawful for the surveyors of bridges and other public works, appointed by the justices at the general quarter sessions, to search for, take, and carry away gravel, stone, *&c.* for the repair of such bridges and roads at the end thereof, as the county repair, and to remove obstructions and annoyances from such bridges and roads in the same manner as surveyors of the highways are by the 13 G. 3. authorized to do; and the powers and authorities thereby vested in the surveyors, and the penalties, matters, *&c.* in the said act contained relating to highways, are extended and applied, as far as the same are applicable, to such bridges and roads at the end thereof, the said surveyors making satisfaction and compensation, *&c.* in the same manner as they are required by the said act. (For § 2. see *antè*, p. 786.) 43 G. 3. c. 59. § 1.

By § 3. the property in all tools, timber, materials, *&c.* purchased or gotten by order of the justices, or belonging to such counties, shall be vested in the surveyor for the time being, in whom, upon any action or indictment, the property may be laid. (*b*) § 3.

(*b*) If *A.* grants licence to *B.* to build a bridge on his land, and *B.* covenants to build it for the public use and to repair and not demand toll, the property in the materials when built and dedicated to the public, continues in *B.*, subject to the right of passage by the public, and when severed and taken away by a wrong doer, *B.* may bring trespass. Harrison v. Parker, 6 East, 154.

By § 4. the inhabitants may sue for damage done to bridges and other works, and for recovery of property belonging to the county, in the name of the surveyor, and no action or prosecution shall abate or be discontinued on account of the death or removal of such surveyor, or by the act of the surveyor without the consent of the justices at sessions; the surveyor to be reimbursed by the county such costs as he may incur by reason of being made plaintiff or defendant, and the costs of any such indictment. § 4.

By § 6. orders and proceedings respecting county bridges in *Yorkshire* shall be had at the *Easter* sessions, and no other. § 6.

By § 7. nothing therein is to extend to bridges or roads which § 7.

which any person or corporation shall be liable to maintain or repair by reason of tenure or prescription, or to alter or affect the right to repair such bridges.

54 G. 3. c. 90. By the 54 G. 3. c. 90. the provisions of the above act are extended to bridges repaired by inhabitants of hundreds, and other general divisions of counties.

55 G. 3. c. 143. By the 55 G. 3. c. 143. it is enacted, that it shall be lawful for surveyors of county bridges, and bridges repaired by inhabitants of hundreds, and other general divisions of counties, and also bridgemasters and persons under contract for re-building or repairing any public bridge, with consent and by order of two justices of the county, to search for, dig, get, and carry away any stone or stones from any quarry within the county, other than quarries in a garden, yard, avenue to a house, lawn, park, paddock, or enclosed plantation, or as may have ornamental trees growing thereon, without the licence of the owner of such quarry, provided such quarry, has been worked within three years preceding the time of rebuilding or repairing such bridge; the said surveyor or other person making such satisfaction and recompense for the value of such stone, and also for the damage done, as shall be agreed on between him or them and the owner or occupier, or other person interested in such quarry, and if they cannot agree, then the justices at the general or quarter sessions shall cause the value to be enquired into by a jury, and shall order a view, if necessary, and shall order the sum assessed to be paid.

§ 5. And by § 5. it is enacted, that it shall be lawful for the justices of any county, city, riding, division, town corporate or liberty, at their general quarter sessions, to contract and agree, or authorize any person to contract and agree with any person for the maintaining in repair any county or hundred bridge and so much of the road at the ends thereof as are liable to be repaired by the county, hundred, city, &c. and the justices are empowered to order such sums as may be contracted to be paid for repairing such bridges, &c. to be paid (in case the county is liable to repair) by the treasurer out of the county rate, or (in case the hundred is liable to repair) by the bridge-master (a) or other proper officer, for any term not exceeding seven years, nor less than one year, although no presentment of the insufficiency, decay, or want of repair shall have been made, and although no notice shall have been given by the justices of their intention as directed by the act of the 12 G. 2.: provided that before any such contract shall be made, the justices shall cause notice to be given in some paper circulated in the county, &c. of their intention to contract.

(a) The sessions cannot order the payment by the bridge-master to the clerk of the peace of a per centage on all money raised for the repairs of bridges in a particular district in lieu of all his fees for indictments, presentments, &c. for bridges within it. The King v. Houlgrave, 1 Barn. & A. 512.; and see 3 Barn. & A. 215.

1 G. 4. c. 116. By 1 G. 4. c. 116. § 2. such parts of all former acts relating to bridges as enact that persons wilfully and maliciously blowing up, pulling down, or destroying any bridge, or attempting to do so, or unlawfully removing any works thereto belonging, shall be guilty of felony without benefit of clergy, are repealed.

By

By 7 & 8 G. 4. c. 30. § 13., if any person shall unlawfully and maliciously pull down or in any wise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge, or any part thereof, dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such punishment. ‖ 7 & 8 G. 4. c. 30. § 13.

BURGLARY.

BURGLARY is a felony at the common law, in breaking and entering the mansion-house of another, or a church, or the walls or gates of a walled town, in the night, with an intent to commit some felony, whether such felonious intention be executed or not. H. P. C. 80. 3 Inst. 63. S. P. C. 30 a. Dalt. c. 99. Crom. 31. 22 Ass. pl. 95. 1 Hawk. P. C. c. 38. [4 Black. Com. 223. *Burglatores*, or *burgatores*, were so called, according to Sir H. Spelman, *quod dum alii per compos latrocinantur eminùs, hi burgos pertinaciùs effringunt, et deprædantur.* And, in the opinion of the same writer, the word *burglaria* was brought here by the *Normans*, for he doth not find it among the *Saxons*. The crime, however, is noticed in our earliest laws, under the names of hurbrec, and hamfocne, and was punishable with death. *Vide* LL. Canuti, cap. 61. and Hen. 1. c. 13. — The description of the offence hath varied at different times, and hath been much larger than it is at present: nor doth the circumstance of *time*, which is now of its very essence, seem to have been formerly much, if at all, attended to; its malignity, for many centuries, being supposed to consist merely in the invasion on the right of habitation, of which the law of *England* hath always had so tender a regard. It doth not appear, at least the editor's researches have not enabled him to discover, at what particular period this circumstance was first deemed essential to the crime. However, it must have been setttled before the reign of E. 6.; for, in the fourth year of that king, we find it expressly laid down, that it shall not be adjudged burglary, "*nisi ou le infreinder del "meason est per noctem*," Bro. tit. Corone, pl. 185.; and two years before, we meet with *per noctem*, introduced, as of course, in the mention of this offence. *Id.* pl. 180.]

In this definition it will be necessary to consider,

(A) What Breaking is sufficient to constitute this Offence.

(B) What Entry.

(C) Whether both be necessary.

(D) What shall be accounted Night-time for that Purpose.

(E) In what Place this Offence may be committed.

(F) Of

(F) Of the Intention to commit some Felony.

(G) How this Offence is punished, and the Offender excluded his Clergy.

(A) What Breaking is sufficient to constitute this Offence.

H. P. C. 80. 3 Inst. 64. 1 Hawk. P. C. c. 38. § 4.

ONE who comes down by a chimney, who opens a window, or breaks the glass thereof, unlocks a door, or draws the latch of a door, is guilty of breaking the house, as much as if he had actually forced open the door, or had broken a hole in the wall, *&c.*

Crom. 32. Andr. 115. *cont.* 1 Hawk. P. C. c. 38. § 4., leaves this a *quære.*

Also, if one assault a house with an intent to rob it and the owner of the house, in order to drive him away, opens the door, and he thereupon enters, he is guilty of breaking the house. Yet see the next clause.

Kelynge, 42. 65. Crom. 32. Dalt. c. 99. H. P. C. 81. 1 Hawk. P. C. c. 38. § 5.

If persons coming to a house with an intent to rob it, are let in under a pretence of business with the owner, and then rifle the house; or if persons, having such a felonious intent, take lodgings in a house, and then fall on the landlord and rob him; or if persons, having such intent, raise a hue and cry, and prevail on the constable to search the house, and being let in by that means, bind the constable and rob; in these cases the offenders have been adjudged guilty of burglary.

Kelynge, 50. 67. H. P. C. 81., 82. 1 Hawk. P. C. c. 38. § 4. Stra. 481. H. H. P. C. 562. Hut. 20. 38.

It is burglary for one who enters by an open door, or lies in a house by the owner's consent, to unlatch a chamber-door with a felonious intent. So if a servant draws the latch of the chamber-door in which his master lies, with an intent to murder him.

Rex v. Hall, Russ. & Ry. C. C. 355.

Where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it, forcing it open by pushing against it is a breaking.

Rex v. Lewis, 2 Carr. & P.

If a cellar window have an aperture to admit light large enough for a person to get through, and the prisoner enter the house by going through it in the night, this is not burglary.

Rex v. Smith, *Id.* 417.

The prisoner broke the glass of the prosecutor's side door on the *Friday* night with intent to enter at a future time, and actually entered on the *Sunday* night; the judges held this burglary, the breaking and entering being both by night, and the breaking being with intent afterwards to enter.

Rex v. Brice, *Id.* 450.

Getting into a chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms.

Rex v. Haynes, Russ. & Ry. 451.

Pulling down the sash of a window is a breaking though it has no fastening, and is only kept in its place by the pulley weight; it is equally a breaking though there is an outer shutter which is not put to.

But

But if a window be partly open, but not sufficiently to admit a person, the raising of it sufficiently to admit a person is not a breaking.‖ Rex v. Smith, Ry. & M. C. C. 178.

By the 12 Ann. stat. 1. c. 7. it is recited, "that there had "been some doubt, whether the entering into a mansion-house "without breaking the same, with an intent to commit some "felony, and breaking the said house in the night-time to get "out, were burglary; and thereupon it is declared and enacted, "that if any person shall enter into the mansion or dwelling-"house of another by day or by night, without breaking the "same, with an intent to commit felony, or being in such house "shall commit any felony, and shall in the night-time break the "said house to get out of the same, such person is and shall be "adjudged and taken to be guilty of burglary, and ousted of "the benefit of clergy, in the same manner as if such person had "broken and entered the said house in the night-time, with an "intent to commit felony there." 12 Ann. st. 1. c. 7. 2 Stra. 881. H. H. P. C. 553. [Lord *Bacon* was of opinion that it was burglary; but Lord *Hale* thought that it was not. Bac. Eliz. 65. H. H. P. C. 554.]

‖By the statute 7 & 8 G. 4. c. 27., so much of the 18 Eliz. c. 7., as relates to burglary, and also the 12 Ann. stat. 1. c. 7. are repealed, and by the 7 & 8 G. 4. c. 29. § 11. it is enacted, that every person convicted of burglary shall suffer death as a felon; and it is thereby declared, that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary. 7 & 8 G. 4. c. 27.

Where the prisoner broke out of a cellar by lifting up a heavy flap by which the cellar was closed on the outside next the street, the flap not being bolted but having bolts, six of the judges were of opinion that there was a sufficient breaking to constitute burglary, and the remaining six were of a contrary opinion.‖ Rex v. Callan, Russ. & Ry. C. C. 157.

But if one enter into a house by a door which he finds open, or through a hole which was made there before, and steal goods, *&c.*, or draw any thing out of a house through a door or window which was open before, or enter into a house by the doors open in the day-time, and lie there till night, and then rob and go away, without breaking any part of the house, he is not guilty of burglary; and therefore such breaking, as is implied by law in every unlawful entry on the possession of another, whether it lie open or be enclosed, though it will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonicè et burglariter fregit.* 3 Inst. 64. H. P. C. 80. Hawk. P. C. c. 38.

Cupboards, presses, lockers, and other fixtures of the like kind, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of these utensils and adapted to the same use; and therefore the breaking open a chest in the house, or the door of a cupboard let into the wall of a house, is not burglary. See Fost. Cr. Law, 108, 109.

(B) What

(B) What Entry.

Dalt. c. 99. H. P. C. 81. Andr. 115. Crom. 31, 32. Hawk. P. C. c. 38. Fost. Cr. Law, 107, 108. [(a) But it

ANY the least entry, either with the whole or but with part of the body, or with an instrument or weapon (*a*), will satisfy the word *intravit* in an indictment of burglary; as if one do but put his foot over a threshold, or his hand, or a hook or pistol within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, *&c.*

seems, that the instrument must actually be introduced for the purpose of committing the felony; and therefore, where thieves had bored a hole through the door with a centre-bit, and part of the chips were found in the house, but they had neither gotten in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled to be incomplete. *O. B.* 1785. Hawk. P. C. (6th edit.) 162. n. 1.] ‖Where the prisoner broke a window in order to steal property, and his finger went within the house, it was held a sufficient entry. Rex v. John Davis, Russ. & Ry. C. C. 499. So also introducing the hand between the glass of an outer window and an inner shutter. Rex v. Bayley, *Id.* 341. So an entry down a chimney is a sufficient entry into the house, for the chimney is part of it. Rex v. Brice, Russ. & R. 450. But where the defendant threw up a window and introduced a crowbar to force the shutters which were three inches from the window, but no part of the hand was within the window, this was holden not to be an entry, although the defendant did it with intent to steal. Rex v. Rust, Ry. & Moo. C. C. 183.‖

Crom. 32. H. P. C. 80, 81. Hawk. P. C. c. 38.

Also, in some cases, an entry in law is sufficient, though there be no actual entry; as where divers come to commit a burglary, and some stand in adjacent places, and the others enter and rob, they are guilty; for the act of one is the act of all.

Hawk. P. C. c. 38. But *quære;* for *Hale* says it is

And upon this ground *Hawkins* argues, that a servant within a house, who, in confederacy with a rogue lets him in to him, is as much guilty of burglary as if he had been without the house.

only robbery in the servant. H. P. C. 81. H. H. P. C. 553. says it is burglary in both. See 2 Stra. 881.* 10 St. Tr. 434.

* Cornwal's case similar to the text; and at a meeting of all the Judges at Serjeant's Inn, they were all of opinion it was burglary in both.

(C) Whether both be necessary.

H. P. C. 80. 3 Inst. 64. Hawk. P. C. c. 38. S. P. accord. But he

THERE must be both a breaking and an entry; for both the words *fregit* and *intravit* are necessary in the indictment; and therefore if, on a bare assault upon a house, the owner fling out his money, it is no burglary.

says there are some loose opinions to the contrary; for which *vide* the authorities there cited.

(D) What shall be accounted Night-time for this Purpose.

Dalt. c. 99. S. P. C. 30. Crom. 33. H. P. C. 79. 3 Inst. 63. 7 Co. 6. Hawk. P. C. c. 38.

THE word *noctanter* being precisely necessary in every indictment for this offence, cannot therefore be satisfied in a legal sense, if it appear upon the evidence that there was so much daylight at the time (*a*), that a man's countenance might be discerned thereby.

But in some of these books, there are opinions that burglary may be committed at any time after sun-set, and before sun-rising. [(*a*) But this does not extent to moonlight; for then many midnight burglaries would go unpunished; and besides, the malignity of the offence

offence doth not so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner, and rendered his castle defenceless. 4 Black. Com. 224.]

(E) In what Place this Offence may be committed.

ACCORDING to the constant use of late precedents and opinions, it seems necessary to have the word *mansionalis* in the indictment; and therefore that the offence can be only committed in a dwelling-house. H. P. C. 82. Hawk. P. C. c. 38. 4 Co. 40. a. 3 Inst. 64. 67.; but Andr. 302. and S. P. C. mention precedents of indictments of burglary *in domo* without adding *mansionali*. Also it is agreed, that burglary may be committed in breaking churches, or the walls or gates of a walled town, in which the word *mansionalis* cannot be made use of; but these are said to be distinct burglaries; though Lord *Coke* says, that as to a church, it may properly enough be alleged, being the mansion-house of God; *quære*. 3 Inst. 64. Bro. Coron. 93. 22 Ass. 39. 95. Poph. 42. 27 Ass. 38. Dalt. c. 99. 4 Black. Com. 224. ‖See 7 & 8 G. 4. c. 29. § 10.‖ Burglary in an apartment in the *African* House, it must be laid to be the *mansion*-house of the Company. Fost. Cr. Law, 38, 39.

A house which a man dwells in but for part of the year, or which he hath hired to live in, and brought part of his goods into, but hath not yet lodged in (*b*), or which his wife hath hired, though without his privity, and lives in without him, will satisfy the words *domus mansionalis* in an indictment of burglary, though no person were in it at the time of the offence. Crom. 33 b. Dalt. c. 99. H. P. C. 82. Mo. 660. pl. 903. 4 Co. 40. a. Cro. Car. 473. Jones, 394. Kelynge, 52. Poph. 42. 52. 3 Inst. 64., so agreed by all these books. Hawk. P. C. c. 38. Fost. Cr. Law, 77. [(*b*) But it hath been determined, that a house under repair, but not yet inhabited, though the owner have deposited part of his effects in it with a view to reside in it, is not his dwelling-house, and therefore not the object of burglary. Lyon's case, O. B. *Jan.* 1778. Leach's Cases, 169. So of an unfinished house, though one of the workmen constantly slept in it for the purpose of protecting it. Fuller's case, O. B. *Dec.* 1782. *Ibid.* n.] ‖So also of a house which the owner uses for meals and for business, but in which he never sleeps. Rex v. Martin, Russ. & Ry. C. C. 108. So also of a house which is merely used as a warehouse and workshop, though two women employed in the prosecutor's business (not domestic servants) slept in it. Rex v. Flanagan, *Id.* 187. But where the prosecutor had left his house without intention of returning to it, and had let some of the rooms to lodgers, but continued his business there, and his apprentice and foreman and foreman's wife, who was also his servant employed in keeping the apartments clean, dwelt there, receiving weekly wages, it was holden to be the dwelling-house of the prosecutor. Rex v. Gibbons, Russ. & Ry. C. C. 442. And where a servant boy of the prosecutor always slept over a brewhouse of the prosecutor, separated from his dwelling-house by a public passage, but occupied therewith, it was held that the brewhouse was the dwelling-house of the prosecutor, though not the dwelling-house in which he actually dwelt. Rex v. Westwood, Russ. & R. C. C. 495.; and see Rex v. Stock, *Id.* 185.‖

Also all out-buildings, as barns, stables, dairy-houses, *&c.* adjoining to a house, are looked upon as a part thereof, and consequently burglary may be committed in them; but if they be removed at any distance from the house, it seems that it has not been usual of late to proceed against offences therein as burglaries. 3 Inst. 64. Dalt. c. 99. Bro. tit. Coron. 180. Crom. 32 b. H. P. C. 82. Hawk. P. C. c. 38. [Garland's case. Leach's Cas. 130.]

‖An important alteration of the law has been made by the 13th section of 7 & 8 G. 4. c. 29., which enacts, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building 7 & 8 G. 4. c. 29. § 13.

building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.

Rex v. Burrows, Chester G. Sess. 1830., decided by the twelve Judges.

Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house, on the ground floor, and of three bed-rooms up stairs, one of them over the wash-house, and the bed-room over the living-rooms communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under one roof, and the defendant broke into the wash-house, and was breaking through the partition wall between the wash-house and the house place; it was holden that the defendant was properly convicted of burglary in breaking the house.‖

But it does not seem agreed that an apartment hired by a lodger for a certain time, and not divided from the rest of the house, by having a different door, &c. can be called his mansion house. Kelynge, 83., holds, that it cannot; but Hawk. P. C. c. 38. § 15., seems *cont.* [If the owner of the house inhabit any part of it, and there be no separate outer door to such part, the house shall be said to be his dwelling-house; but if he do not sleep under the same roof, then the different apartments shall be said to be the respective dwelling-houses of the several persons renting them. Rex v. Rogers, Leach's Cas. 84. Cowp. 1. Leach, 205. 333. Lofts over coach-houses and stables, converted into lodging-rooms, and having an outer door common to the several inmates, may be said to be the dwelling-houses of their inhabitants, though not rated to the parish books as dwelling-houses, but merely as appurtenances to the coach-house and stables. Leach, 205.] ‖In all these cases, if there is any doubt whether it is the dwelling-house of *A.*, *B.*, or *C.*, different counts should be inserted alleging it in different ways.‖

A chamber in one of the inns of court wherein a person usually lodges, or a lodging in a part of a house actually divided from the rest of the house, and having a door of its own to the street, are agreed to be called properly mansion-houses.

Kelynge, 27. Hawk. P. C. 104. ‖Rex v. Stock, 2 Taunt. 339.; and see 16 East, 33.‖

If several persons dwell in one house, as servants, guests, or tenants at will, and a burglary be committed in any of their apartments, it seems clear that the indictment ought to lay it in the mansion-house of the proprietor. (*a*)

[(*a*) This was determined in the case of *Somerset-house*, belonging to the *Queen-mother*. If a burglary be committed in the apartments of a palace, it must be stated to be in the mansion-house of the king. 1 Hal. 522. But *quære*, in whose house stealing in the Invalid-Office at *Chelsea* should be laid to be? ‖And see Rex v. Wilson, Russ. & Ry. 115. If burglary be committed in apartments in the house of a corporation, which are appropriated as lodgings for the servants, it must be laid to have been committed in the dwelling-house of the corporation. Rex v. Picket, 2 East P. C. 501. Rex v. Hawkins, Foster, 58. But where a company in the country rented a house in *London* for their agent, in the upper part of which he resided with his family, and in the lower part transacted his business, it was holden, that a burglary might be laid to have been committed in the house of the agent. Rex v. Margetts, 2 Leach. 930. So if the owner of a cottage lets one of his workmen live there free of rent and taxes, and he lives there principally, if not wholly, for his own benefit, it may be described as his dwelling-house, Rex v. Jobling, Russ. & Ry. 525.; and if the servant live in it at a yearly rent, it cannot be described as the master's house, though on the premises where the master's business is carried on. Rex v. Jarvis, Ry. & Moo. C. C. 7. Where a toll-gate house occupied by a collector employed by the lessee of the tolls to collect the tolls at weekly wages, with the privilege of living in the toll-gate house erected by the trustees of the road for that purpose, was broken and entered in the night time, it was holden that the house was well described as the dwelling-house of the toll-gate keeper, because he had the exclusive possession and it was unconnected with the premises of the lessee, who did not appear to have any interest in it. Rex v. Camfield, Ry. & Moo. C. C. 42.; and see Rex v. Witt, Ry. & Moo. C. C. 248.‖ If burglary be committed in one of two adjoining houses belonging to two partners, it ought to be laid to be in the separate mansion of the partner in whose house it was committed, if there be no internal communication between the two houses, although the rent and taxes of the house are paid out of the partnership fund. Martha Jones's case, Leach, 434.]

Burglary

Burglary cannot be committed in a shop or workhouse which is leased to one for his use in the day-time only (*a*), nor in a ground enclosed, nor in a booth or tent. (*b*) H. P. C. 83. 22 Ass. 95. Bro. Coro. 93. S. P. C. 30.

Dalt. c. 99. Crom. 31. 1 Hawk. P. C. c. 38. [(*a*) It hath been determined, that burglary may be committed in a shop adjoining to a house, if under the same roof and within the curtilage, although there be no internal communication between the shop and the house, and no person sleep in the house, and the shop together with some apartments in the house be rented out by the owner. Gibson, Mutton, and Wigg's case, Leach, 287.;] ‖and see Rex v. Sefton, Russ. & Ry. 202. *Sed vide* Rex v. Egginton, 2 Bos. & Pull. 508. 7 & 8 G. 4. c. 29. § 13.‖ (*b*) Clergy is taken away from those who rob any person in their dwelling-house or booth. 5 & 6 Ed. 6. c. 9. 18 Eliz. c. 7.

[By 18 G. 3. c. 38. burglary in any house, shop, *&c.* belonging to the plate-glass company, with intent to steal or destroy the stock or utensils, is declared to be single felony, and punished with transportation for seven years.] 15 G. 3. c. 58.

(F) Of the Intention to commit some Felony.

THE indictment must allege, and the verdict find, an intention to commit some felony, though it be not necessary that a felony be actually committed; for if it appear that there was only an intention to commit a trespass, there can be no burglary; but it seems that an intention to commit a rape, or such other crime, which was a trespass only at law, and is made felony by statute, will make a man guilty of burglary, as much as if such offence were a felony at common law; because, wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. Dyer, 99. pl. 58. Dalis. 22. 3 Inst. 65. Kelynge, 30. H. P. C. 83, 84. Crom. 32. *cont.* Dalt. c. 99. 1 Hawk. P. C. c. 38. § 19.

‖The intent laid must be proved in evidence. Where the intent laid was to kill a horse, and the intent proved was merely to lame him, to prevent him running a race, the variance was fatal. Rex v. Dobbs, 2 East P. C. 513.

Where the intent laid was to steal, and the defendant was discovered in the chimney of a shop in the night time, and the jury found him guilty of burglary with intent to steal, the evidence was held to warrant the conviction. If the intent is doubtful, it may be laid in different ways.‖ Rex v. Brice, Russ. & Ry 450.

(G) How this Offence is punished.

THIS offence has been punished, like all other felonies, by hanging, since the following statutes, which oust the offenders of the benefit of their clergy. For,

By 1 Ed. 6. c. 12. § 10. the principal is excluded in all cases except that of challenging more than twenty, if any body be in the house at the time of breaking, and thereby put in fear, *&c.* 1 Ed. 6. c. 12. § 10. *Vide* 2 Hawk. P. C. c. 33. § 89. &c. and the authorities there cited.

Also the principal in every burglary, whether any person were in the house at the time or not, is excluded from his clergy by 18 Eliz. c. 7., upon a conviction by verdict, outlawry, or confession.

3 & 4 W. & M. c. 9. ‖By the 7 & 8 G. 4. c. 27. the three above statutes are repealed; and by the 7 G. 4. c. 64. § 7., this provision of 3 & 4 Will. is extended to all offences then or thereafter to be excluded from clergy; and by 7 & 8 G. 4. c. 28. § 6. benefit of clergy is abolished; and by 7 & 8 G. 4. c. 29. § 11. it is enacted, that every person convicted of burglary shall suffer death as a felon.‖

Also by 3 & 4 W. & M. c. 9. every person who shall counsel, hire, or command any person to commit any burglary, being thereof convicted or attainted, or being indicted, and standing mute, or challenging peremptorily above twenty, shall not have his clergy; and by this statute principals in burglary standing mute, or challenging peremptorily more than twenty, are ousted of their clergy.

10 & 11 W. 3. c. 23. § 2. ‖(a) By the 7 & 8 G. 4. c. 27. this statute is repealed; and by 7 & 8 G. 4. c. 29. § 54. if any person shall receive any property whatever, the stealing whereof is felony, knowing the same to have been feloniously stolen, the receiver shall be guilty of felony, and may be indicted and convicted as accessory after the fact, or for a substantive felony; and in the latter case, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and the receiver being convicted shall be transportable for not more than fourteen years nor less than seven, or may be imprisoned for not more than three years.‖

[By 10 & 11 W. 3. c. 23. § 2. the prosecutor of a burglar to conviction is entitled to a certificate, which may be once assigned, and which discharges him or his assignee from all parish and ward offices. The 5 Ann. c. 31. hath added a reward of 40*l*., and an accomplice being out of prison, discovering two or more felons, is entitled to the like reward and a pardon. And by the last act, the receivers of the goods stolen, and receivers of the burglars, are declared accessories, and excluded from their clergy. And if the principals cannot be taken, they may be tried as for a misdemeanor. By 10 G. 3. c. 48. (a), the receivers of stolen jewels, gold, or silver plate, watches, where the stealing shall be accompanied with a burglary, or robbing on the highway, shall be triable as well before conviction of the principal, whether he shall be in or out of custody, as after, and be transported for fourteen years. By 23 G. 3. c. 88., every person apprehended having upon him any implement of house-breaking, with intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or out-house, shall be deemed a rogue, *&c.* within 17 G. 2. c. 5.]

BY-LAWS.

Meor, 583. 5 Co. 62. [The word *by-law* is derived by some from bupuȝ, buȝ, buph S. byr, I., a town or borough, and la a, S. law. By others from by, S. bȝ, denoting private, and laȝa.]

A BY-LAW is a private law made by those who are duly authorized (*a*) thereunto by charter, prescription (*b*), or custom (*c*), for the conservation of order and good government within some particular place or jurisdiction. (*d*)

(*a*) A power of making by-laws is included in the very act of incorporating, and incident to every corporation aggregate, without express words in the charter: all by-laws must ever be subject and squared to the rule of the general law of the realm, as subordinate to it. Hob. 211. [Where the power of making by-laws is by charter given to a select body, they do not represent the whole community, and therefore cannot assume

assume to themselves what belongs to the body at large. But where the power is in the body at large, they may delegate their right to a select body, who thus become the representative of the whole community. 3 Burr. 1857. But where a power is given by charter to a select number to make by-laws *in the stead, for, and in the name of the whole*, and a by-law is returned as made by the body at large, such by-law may be good; for it may have been made by the select body acting in the name of the whole, and if found to be made *in due manner*, it shall be so intended. 1 Burr. 130, 131.] ‖See R. v. Westwood, 4 Barn. & C. 781.‖ (*b*) By the 19 H. 7. c. 7. it is enacted, that no ordinance shall be made in diminution, or to the disinheritance of the prerogative of the king, nor against the common profit of the people, unless they are examined and approved by the chancellor, treasurer of *England*, chief justices of either bench, or three of them, or both justices of assise in their circuit, where the ordinance is, &c., nor shall restrain any to sue to the king against such ordinances. [This statute extends only to guilds, fraternities, &c., not to cities, boroughs, &c. *Per* Att. *Quo W.* 44. And if lawful and reasonable the by-law will be good, though not confirmed or allowed according to this statute.] Roll. Abr. 365. 5 Co. 63. Comb. 222. (*c*) Where a by-law, founded on a particular custom before allowed, and become part of the common law, shall be operative by the custom, though otherwise it would be void. *Vide* head of *Customs*, and Raym. 294. Carter, 68. 114. Bridgm. 140. Brown. 177, 178. Skin. 375. (*d*) The inhabitants of a town, without any custom, may make by-laws for the repair of their church, highways, or such other thing as is for the public good; and in such case the greater part without any custom shall bind all. 5 Co. 63. Moo. 579. Brownl. 288. Hob. 212. Mod. 194. Of by-laws for the better regulation of commons, *vide* head *Common*, and Roll. Abr. 365. Leon. 190. Andr. 234. 3 Leon. 38. 264. Dals. 95. Palm. 396.

[The validity of a by-law cannot be questioned in a summary way upon motion, on the return to a *habeas corpus cum causâ*, from any other corporation but that of *London*; but the plaintiff must begin *de novo*, and declare over again in the superior court. The reason of this distinction between the city of *London* (*a*) and all other cities and corporations, may perhaps arise from particular methods of recovery being established and allowed by the customs of *London*, which cannot be pursued in the superior courts; so that the shewing that to be the cause, is a good cause of detainer; for upon these writs of *habeas corpus*, the person to whom they are directed must shew a good cause of detainer: and if the superior courts cannot proceed, as the customs of *London* authorize their courts to proceed, it is a good cause of detainer; therefore the superior court will there enter into the validity of the by-law, to see whether that be the case or not; and if the by-law appears to be bad, the party shall be discharged, as being detained without cause.]

2 Burr. 777.

(*a*) *Per Denison* J. *Id.*

As every by-law must be reasonable in itself, and agreeable to the general laws of the realm, and be framed so as to advance the benefit of that place where it is made to operate, I shall therefore consider, —

8 Co. 126. [It is said to have been asserted by *Holt* C. J. that every by-law, by which the benefit of the corporation is advanced, is for that reason good; such common benefit being the true touchstone of all by-laws. Carth. 482. But the true test of all by-laws, according to Mr. Just. *Wilmot*, is the intention of the crown in granting the charter, and

(A) Such By-Laws as relate to the appointing and electing of Members of a Corporation.

(B) Such as are made in Restraint of Trade.

(C) Such as are made to prevent Nuisances.

(D) Such as affect Strangers.

(E) Such as in the Frame and Make of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law.

and the apparent good of the corporation. 5 Burr. 1858. Perhaps the criterions are not sufficiently marked out and explicit by either of these authorities. — It is not necessary to set out in the preamble all the reasons of the by-law. 5 Burr. 1524.] ‖A by-law imposing a fine for not attending courts is a good by-law. 7 Barn. & C. 858. But a by-law that every freeman of a company should pay eight shillings, and every journeyman four shillings yearly, and every person refusing should forfeit twice the sum, was bad, inasmuch as it did not appear that any rightful expenditure of the company required such a contribution. *Ibid.* *Sed vide* Innholder's case, 1 Wils. 281. Ford's MSS. vol. 5.‖

(A) Such By-Laws as relate to the appointing and electing Members of a Corporation.

Vide head of *Corporations.* 4 Co. 78. Jenk. R. 275. S. C. [1 Stra. 314. S. P. 5 Burr. 1833. S. P. But a by-law cannot strike off an integral part of the electors, neither can it narrow the description of persons eligible, or superadd a qualification not required by the charter. Rex v. Spencer, 3 Burr. 1827. See, too, 4 Burr. 2204.]

IF there be a corporation made and incorporated by the name of *mayor and commonalty*, and by the charter the mayor be appointed to be chosen by the commonalty, and in the said charter there be a power given to them to make by-laws for the better order and government of the said corporation (*a*), they may make a by-law, that a select number of the commonalty shall be chosen, by whom the mayor shall be chosen, for avoidance of popular confusion.

(*a*) But where members of parliament are to be chosen by all the commonalty, the election cannot by a by-law be given to a select number; for free elections for members of parliament are *pro bono publico;* and this is not to be compared to the case of elections of mayors, &c. 4 Inst. 48, 49.

The King v. Ashwell, 12 East, 22.; and see 15 East R. 367. 2 East, 70.

‖And where the charter gave the right of electing aldermen to the mayor and burgesses at large from themselves, a by-law was held reasonable and valid, which restrained the election to the mayor and certain of the burgesses of the town, *viz.* the recorder, aldermen, coroners, common councilmen, and such of the burgesses of the town as had served the office of chamberlain or sheriff of the town, and called the *livery* or *clothing burgesses* for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor was to be one or the major part of them; for the body at large had a right thus to delegate the elective function to a select part of themselves, upon the principle of avoiding popular confusion.

Rex v. Westwood, 4 Barn. & C. 781. by *Holroyd* and *Littledale* Js. *Bayley* J. *diss.* *Abbott* C. J. *dubitante.*

And so also where, by the charter, the power of electing burgesses was vested in the mayor and burgesses, and the corporation at large made a by-law, vesting the right in the mayor and common council (the common council consisting of the bailiffs and aldermen chosen out of the burgesses); it was held, that the by-law was good, the burgesses at large being represented by the common council, who were elected from them, and no integral part of the corporation, being thus excluded.

Rex v. Ginever, 6 Term R. 739.

But a corporation cannot make a by-law contrary to their constitution; therefore, where a charter directed the election of senior bailiff to be made by a majority of a select body, a by-law, giving a casting voice to the presiding officer, in case of an equality of votes, was held to be bad.

The

The power to make by-laws being incidental to the whole body of every corporation, where the charter expressly gave to a select body the power to make by-laws for the rule and government, *&c.* of the burgesses, artificers, *&c.*, this was held not to exclude the body at large from making by-laws on matters not included; as, for instance, the by-law above mentioned, restraining the power of election.‖

Rex v. Westwood, *ubi supra*.

If a by-law is made by the company of vintners in *London*, that every freeman of the said company who shall be chosen and admitted to be a liveryman, shall pay 31*l.* 13*s.* 4*d.*, *&c.*, this is a good by-law; for this being a degree of pre-eminence to which men of substance only are raised; and there being a necessity for money to support the honour and reputation of the company, were the sum more or less, it could not make the by-law void, while it binds only the members of the corporation; for when a man doth agree to be of a company, he doth thereby submit himself to the laws thereof.

Raym. 446. Tavernier's case. Comb. 221. A by-law by the company of barber-surgeons, that every one chosen steward shall forfeit 20*l.* on refusal of his taking

upon him the office, held good. 2 Lev. 252. *Vide* Lutw. 402. ‖So also a by-law, that if *any person* chosen to be a warden of a company should refuse to accept the office, he should forfeit to the company 6*l.* 13*s.* 4*d.*, was held good, since the words *any person* would apply only to persons eligible under the charter. Master, &c. of Tobacco Pipe-makers' Company v. Woodroffe, 7 Barn. & C. 838.‖

A by-law made in *London*, that no freeman chosen sheriff, *&c.*, shall be excused, unless he voluntarily swear he is not worth 10,000*l.*, and bring six other citizens to vouch in like manner, on their oaths, that they believe it to be true; and if he openly refuse to take the office, then to forfeit the sum of 500*l.*; *viz.* 400*l.* to the city, and 100*l.* to the next man that shall hold the office; held a good by-law. (*a*)

Salk. 142. pl. 1. Ld. Raym. 496 S. C. 12 Mod. 270. 686. S. C. Carth. 480. S. C. at large, and several exceptions taken to it.

5 Mod. 438. 440. S. C. (*a*) That every common-councilman who resigns his office, shall forfeit 10*l.*, a good by-law. Lutw. 402. 405. (*b*) Of a company to elect upon their livery such and so many of their members as should seem most meet and convenient to them, on pain to forfeit 25*l.* on refusal to accept or to pay the admission-fee, is a good by-law. 1 Burr. 259.

[Where a corporation having right to make by-laws to govern the inhabitants, and to make secondary burgesses out of the inhabitants, and capital burgesses out of the secondary burgesses, made a by-law, that every inhabitant chosen a burgess, and refusing to serve, should forfeit, *&c.*; this was holden to be a good by-law; though as framed, it could affect only an inhabitant refusing to be a secondary burgess, not a secondary burgess refusing to be a capital burgess.

Mayor, &c. of Wokingham v. Johnson, Ca. temp. Hardw. 284.

Where the title to the freedom of a borough as given by the constitution of the crown was by birth, servitude, or election, a by-law that any person (not so entitled) should be admitted to the freedom of the borough, upon payment of the sum of ten pounds, was holden bad.

Rex v. Breton, 4 Burr. 2260.

Where the mode of electing officers is not particularly pointed out by charter or prescription, the corporation may from time to time make by-laws to regulate their elections.]

Newling v. Francis, 3 Term R. 189.

‖Where a by-law of a corporation directed that, upon the happening of any vacancy in the number of twenty-four common

Rex v. Bailiffs of Eye, 4 Barn. & A. 271.

council, such vacancies should be filled by the freemen inhabiting the town, and that a court should be holden once in every year, at which it should be lawful for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year; it was held, that this by-law did not give to every person, who had been so resident for that period, an absolute right to be admitted to the freedom of the borough, and the court refused a *mandamus* to the bailiffs to admit such a person; and they also refused such a *mandamus* to a resident, though he had been fined for carrying on trade within the town, without being admitted to the freedom; the court considering the words "it shall and may be lawful to admit," *&c.*, as not obligatory on the corporation.

Rex v. Bailiffs of Eye, 1 Barn. & C. 85.

(B) Such as are made in Restraint of Trade.

A NEW corporation not having any prescription to appropriate to themselves (*a*), and exclude others, cannot make a by-law to exclude all persons from using an art or trade in their town to which they were not apprentices in the same town, though they have served as apprentices to it in another place.

Roll. Abr. 564. Hob. 211. 212. Norris and Stapes, Hutton, 5, 6. S. C. Moor, 869.

(*a*) But a by-law founded upon prescription or custom, may restrain a man from the exercise of his lawful trade in a particular place. Lutw. 564. Carter, 86. 114. But a by-law shall not be carried farther than the prescription warrants. *Vide* Raym. 294. 2 Brownl. 178. 182. Bridg. 140. A by-law founded on the custom of *London* that no person not being free of the city of *London* shall keep any shop, or use any trade within the city, resolved good in Waggoner's case. 8 Co. 129.; and so the practice has been to this day.——So where the corporation of weavers claimed by custom that none shall intermeddle with their art within *London* and *Southwark* but those of their guild or fraternity, held good. Cro. Eliz. 805.

Therefore, if a corporation make a bye-law, that no one shall use the art of weaving within the corporation who has not served seven years as an apprentice there, or who has not exercised that trade there for five years before the making of the by-law (*b*), nor unless he be allowed and approved of by the wardens of the company, this is a void by-law; for any person may lawfully follow what trade he pleases, and where he pleases, unless prohibited by the general law of the land.

Hob. 211. Norris v. Stapes, or the Weaver of Newbery's case. Hut. 6. S. C. Moor, 869. S. C. Brownl. 49.

(*b*) If the king creates a corporation, and by the same charter grants to the members that none shall use a trade within the said corporation but such as shall be approved by them, or any two of them, this grant is void, being against the liberty of the subject, and tending to a monopoly, and what the king cannot immediately do cannot be done by any derivative authority from him. Godb. 252. Lutw. 564.

So where the Corporation of Taylors in *Ipswich* made a by-law, that none should exercise the trade of a tailor in *Ipswich* (*c*), *qui non fuerit allocatus per legale warrantum vel authoritatem datam* by the said corporation, or three of the masters and wardens; nor should set up any shop for this art, nor exercise it, until they presented themselves to the master, *&c.*, or three of them, or proved that they had served in this trade as apprentices for seven years.

11 Co. 53, 54. The Tailors' of Ipswich case adjudged. Roll. R. 4, 5. S. C. adjudged. Godb. 252. S. C. adjudged. Roll. Abr. 364, 365. S. C. adjudged.

[But a by-law that every candidate for the freedom of a city shall be called at three several meetings of the mayor, &c. and approved of by the majority, hath been holden good, as providing a method for previously examining into the right of those who claim to be made free. Green v. Mayor of Durham, 1 Burr. 131.] (*c*) That if a servant makes clothes for his master,

master, mistress, or their children, this is not exercising the trade of, &c.; but for this, *vide* Roll. R. 4. 11 Co. 54. Hob. 211. Godb. 253. Bridg. 141. 8 Co. 129.; and *vide* stat. 5 Eliz. c. 4., and 28 H. 8. c. 5., that no apprentice or journeyman shall by oath or bond be compelled not to keep any shop, &c. without licence of the master.

So where the town of *Bedford* made a by-law, that none, except freemen, should exercise any art, trade, or mystery, within the corporation, this, not being founded on any custom they had of excluding foreigners, was holden void. Lutw. 562. Mayor of Bedford v. Fox, adjudged. See, too, Com. R. 269.

If the Merchant Tailors of *London*, by virtue of their charter, make a by-law, that no merchant shall put his cloth to be dressed but at a cloth-worker's of their company, this is a void by-law; for it is against reason and the general liberty of the subject, to be restrained from putting his work to whom he pleases. Roll. Abr. 364. Moor, 576, 577, &c. 591. pl. 766. adjudged between Davenant and Hardis. 2 Inst. 47. S. C. 11 Co. 83. S. C. cited. Carth. 116. S. C. cited.

So a by-law in *London*, that none shall bring any sand, nor sell nor use any within the city or suburbs, but only that which is taken out of the rivers *Thames*, &c. is void, because it is against reason that a freeman should be restrained from merchandizing and selling; and this may concern the inheritance of some who may have sands in their land. Godb. 106, 107. adjudged. Raym. 293. S. C. cited.

If the city of *London* make a by-law, that no person shall follow the profession of a dancing-master within the city, who is not free of the Company of Musicians, this is a void by-law, for if he free of any other company it is sufficient; and the obliging a man to be free of a particular company, when he has no remedy to compel that company to admit him, is creating a kind of monopoly in such company, and putting a certain number of men under the final jurisdiction and power of others. 5 Mod. 104. The Chamberlain of London v. Groscourt, adjudged. Comb. 373. S. C. (a) Under a general power to make by-laws without any particular custom, a by-law cannot be made to restrain trade; therefore a by-law, that no freeman of the city of *London* shall exercise the trade of a butcher without being free of the butchers' company, adjudged void. Harrison v. Goodman, 1 Burr. 12. Hesketh v. Braddock, 5 Burr. 1847. ‖And a by-law that no person not being free of the Pewterers' Company, shall exercise the trade of a pewterer within the city of *London*, is void, without proof of a special custom to support it. Chamberlain of London v. Compton, 7 Dow. & Ry. 597.; and see Clark v. Le Cren, 9 Barn. & C. 52. The custom must correspond with the by-law. See Clark v. Denton, 1 Barn. & Adol. 92.‖ But *vide* Rex v. Harrison, T. 2 G. 3. 3 Burr. 1324., and 1 H. Black. R. 372., where a by-law that butchers not free should take up their freedom in the Butchers' Company, and no butcher be admitted to the freedom of the city in any other company; and all butchers not free of the city, and entitled to their freedom of another company, should be made free of the Butchers' Company, on paying the usual fees and fine, was adjudged good. [And a by-law that no stranger shall use a particular trade within a city, is good if founded upon a custom. Woolley v. Idle, 4 Burr. 1951. Bodwic v. Fennel, 1 Wils. 233. *Secùs*, if there be no such precedent custom. 1 P. Wms. 184. But general customs in aid and support of by-laws may include new things and objects which have not existed beyond the time of memory, if they are within the reason of such customs. 1 Ld. Raym. 499.] (a) A by-law made by the merchant-adventurers that no man should buy or sell at four fairs within such a prince's dominions without first compounding with them and paying a fine, was made void by the stat. 12 H. 7. c. 6., because it was an infringement of the liberties of all others not being free of that company. Roll. Abr. 363.

But if an ordinance be made in *London* by the common-council, (who have power by custom, which is among other customs confirmed by act of parliament by general words,) that 5 Co. 62. Chamberlain of London's

if

case. Roll. Abr. 565. S C. 3 Leon. 264. S.C. ill-reported.

if any freeman, citizen, or stranger within the city, shall put any broad-cloth to sale within the city of *London*, before it be brought to *Blackwell-hall* to be viewed and searched, so that it may appear to be saleable; and that hallage be paid for it, *scilicet*, one penny for every cloth, that he shall forfeit for every cloth 6*s.* 8*d.*; this is a good ordinance, as well to bind strangers as freemen; because it is made to prevent fraud and falsity in cloth, and for the better execution of the statutes without deceit; and the one penny for hallage is but a reasonable recompense or charge, for the benefit which the subject hath by it.

Palm. 305. *per cur.*

If in *London* there is an act of common-council made, that the bricklayers shall not plaister with lime and hair, but with lime and sand only, and that plaistering with lime and hair shall belong to the plaisterers, under the penalty of, *&c.* (admitting this before to have been part of the trade of a bricklayer) the by-law is void; for though they have *regimen personarum* in their manufactures, yet this power extends only to their demeanour in their trade, and not to annex that to one trade which before belonged to another.

Lev. 229. adjudged.

But if a by-law is made by the Corporation of Throwsters in *London*, that none shall have above such a number of spindles in one week, this is a good by-law, for it is not in restraint of trade, but to make a more equal distribution of it.

Rex v. Surgeons' Company, 2 Burr. 892.

[A by-law of the Surgeons' Company in *London*, "That no "member should take an apprentice who does not understand "the *Latin* tongue, his ability wherein should be tried by the "governors, or one of them, before his being bound," adjudged good.]

Rex v. Company of Coopers of Newcastle, 7 Term R. 543.

‖But a by-law of a company in a corporation restraining the number of apprentices to be taken by any of its members, was held void as in restraint of trade.

The King v. Tarpenden, 3 East R. 186.

Where the Company of Free Fishermen and dredgermen of the manor and hundred of *Faversham* in the county of *Kent*, claimed in a return to a *mandamus* a right by immemorial custom to make by-laws for reasonably restraining and regulating the number of persons to be taken apprentices by any freeman, and in virtue of such custom, made a by-law that no tenant of the manor should take any apprentice other than his own son or the son of his wife by any former husband, or other than the son of any other tenant, or of his wife by any former husband; the court did not decide on the validity of such a custom, but held the by-law bad, as being inconsistent with it, since it did not merely abridge the number of apprentices, but altered the qualification of the persons to be taken.‖

Rex v. Marshal, 2 Term R. 2.

[A by-law requiring the indentures of apprenticeship of such as are bound apprentices to freemen to be enrolled within four months from the date, in order to entitle them to their freedom, seemeth to be good.]

Harrison v. Williams,

‖In an action for breach of a by-law restraining non-freemen from exercising trades within the limits of a corporate city, the court

court will compel the corporation to allow the defendant to inspect the by-law in the corporation books.‖ 3 Barn. & C. 162.

(C) Such as are made to prevent Nuisances.

IT seems clearly agreed, that wherever any trade by its excrescence tends to a nuisance, and thereby proves of public inconvenience, it may be restrained by a by-law; therefore if the mayor, *&c.* of *London*, having time out of mind had the right to order and dispose of cars, *&c.*, to the end the streets may not be pestered with cars, *&c.*, make a by-law, that but 420, *&c.* shall be permitted to work for hire within the city and the liberties thereof, and that the president, *&c.* of *Christ's Hospital* shall have the regulation thereof; and that 20*s.* admittance, and 17*s.* and 4*d.* yearly, shall be paid, *&c.* to the use of the poor of the said hospital; this *quoad* the fine and rent is void (*a*), but in all things else a good by-law, because a multitude of cars, by the stoppage of the streets, may prove a public nuisance. Raym. 288. &c. 328. adjudged between Player and Vere. Sid. 284. S. C. adjudged. Keb. 463. 496. Vent. 21. 2 Keb. 27. S.P. adjudged between Player and Jenkins. *Vide* Vent. 195, 196. Like point between Player and Broadnox admitted, such by-law being founded on the custom; and *vide* Skin. 371. pl. 19. to 384. 4 Mod. 228. A by-law to restrain the number of hackney-coaches, and that they should not exceed 400, and objected that coaches being of a new invention, a by-law founded on the custom was void; but there is no resolution; and now *vide* the statutes 5 W. & M. c. 22. 9 Ann. c. 23. 1 G. 1. c. 57. 26 G. 3. c. 72. (*a*) A by-law that no carman within the city of *London* should go with his cart without a licence from the guardians of such an hospital, &c. is void, for this only tends to the private benefit of the guardians of the hospital, and is in nature of a monopoly. Roll. Abr. 564. *Vide* Bulst. 11, 12.——And all by-laws ought to be for the common benefit of, &c., and not for the private benefit of a particular man. Goldsb. 79. Moor, 580. Carth. 480. Ld. Raym. 496. Salk. 142. pl. 1. 5 Mod. 458. 12 Mod. 270. 686. 2 Will. R. 209.

So if the number of taverns, alehouses, *&c.* increases to so great a number as to become nuisances, they may be restrained by a by-law. Sid. 284. *per cur.*

So if a trade becomes a nuisance by its situation, it may be restrained by a by-law; and therefore a by-law to restrain butchers and chandlers (*b*), and such others (*c*) from setting up in *Cheapside*, or such other eminent parts of the city, is good, because such trades are offensive, and may be apt to create diseases, and therefore for fear of infection, and for the sake of public decorum and conveniency, such kind of offensive trades may be removed to places of more retirement. Skin. 380. (*b*) Sid. 284. *per cur.* March, 15. S.P. (*c*) So of a brewhouse, March, 15. *per cur.* A man restrained from setting up a tavern in *Birchin-lane*. March, 15.

So if a by-law be made in *London*, that none shall make a hotpress, nor use it within the city, under the penalty of 10*l.* for the making thereof, and 5*l.* for the use thereof, this is a good by-law; because the use of those presses is dangerous with regard to fire, and also deceitful, inasmuch as they make cloth and stuffs look better to the eye than in truth they are. (*d*) Roll. Abr. 365. adjudged. (*d*) That brewers' drays should not be in the streets in *London* after eleven in the forenoon in summer, and one in winter, is good. Bosworth v. Hearne, H. 11 G. 2. Stra. 1085. Ca. temp. Hardw. 405. Andr. 91.

(D) Such as affect Strangers.

Bulst. 11. adjudged. See Lucas, 131. 135. (*a*) For the general learning where strangers shall be bound by by-laws or not, *vide* Moor, 579. Dals. 103. Savil, 74. Godb. 180. Carter, 179. Salk. 142. pl. 1. Ld. Raym. 496.

IF the Corporation of Butchers in *London*, having power to make by-laws, make one, that no butcher, or person being a stranger, shall sell any veal within the city of *London*, unless they dress the kidneys of their veal in such a manner as the kidneys of sheep are dressed, under the penalty of, *&c.*; a stranger, selling veal in *London* (*a*), is not bound to take notice of this by-law.

Bulst. 12. *per cur.* [See *acc.* Pierce v. Bartram, Cowp. 269. Butchers' Company v. Morey, 1 H. Black. 370.]

But if such by-law is made to suppress fraud, or any general inconvenience used by a foreigner, as corruption, *&c.* in the sale of meat, this is a good by-law, and such of which he must take notice. (*b*)

(*b*) That strangers coming into a corporation must, at their peril, take notice of the by-laws of such corporation. Skin. 350. pl. 19. Lutw. 404.

Jones, 144. *Vide* Bridg. 141. and 2 Vent. 33. Where the University of *Oxford* made a by-law, That whoever, *privilegiatus sive non privilegiatus*, should be taken walking in the streets after nine at night, and having no reasonable excuse to be allowed by the proctor, should forfeit 40*s.*, and whether this could affect or extend to a townsman, *dubitatur*; and a prohibition granted, to the end the merits may be determined. 1 H. Black. 375.

If the master, wardens, and assistants of the *Trinity-house* in *Deptford-strand*, being incorporated by letters patent of *Charles* the Second, and having thereby power to make by-laws, do make one, that every mariner, within twenty-four hours after anchorage in the river of *Thames*, shall send his gunpowder on shore, if the weather will permit, under the penalty of, *&c.*, though *quoad* the matter, this is a good by-law, because for the public good, and prevention of the danger which might otherwise accrue to the city of *London*; yet, because the by-law extended beyond the jurisdiction of the makers, *dubitatur*.

5 Mod. 159. adjudged.

If the Company of Horners of *London*, being incorporated by letters patent, and empowered to make by-laws for the better government of their corporation, make a by-law, that two men by them appointed shall buy rough horns for the said company, and bring them to the hall, there to be distributed every month by the master, *&c.* for the use of the company; and that no member of the company shall buy rough horns within twenty-four miles of *London*, but only of those two men appointed, under the penalty of, *&c.* this is no good by-law; for they being a company incorporated in the city of *London*, have no jurisdiction elsewhere; and may as well extend their power all over *England*, as for twenty-four miles.

(*c*) Salk. 143. pl. 7. *per cur.* *Vide* Salk. 192. pl. 5. S. C. that they being a corporation cannot make a corporation, but may a fraternity. See 10 Mod. 338., &c.

A by-law that all strangers coming into the port of *London* should employ city porters to carry their goods, *&c.* is naught; they may indeed make a by-law that none but freemen shall be porters (*c*): but to confine strangers to none but such as are city porters, is unreasonable; for if the city will appoint no porters, they have no remedy against the city: also strangers cannot know who are city porters, nor compel them to serve them.

(E) Such

(E) Such as in the Frame and Make of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law.

BY-LAWS are usually made with certain penalties, which regularly are to be recovered by action of debt (*a*), or may be levied by distress. (*b*)

5 Co. 64.

(*a*) A by-law by the city of *London*, and that the penalty shall be recovered by the chamberlain, is good. 5 Co. 63. —— But if the mayor and commonalty limit the penalty of the by-law to themselves, it cannot be recovered in the mayor's court unless he be severed. Salk. 397. pl. 3. 398. Ld. Raym. 501. Where, upon a by-law made in *London*, the penalty was limited to be recovered by action of debt, wherein no essoin, protection, or wager of law should be allowed; the justices said they were very presumptuous in making by-laws in so legislative a strain, and said they might be sued in *B. R.* for their presumption and insolence. Godb. 107. 3 Mod. 193. —— The action cannot be restrained to the court of the corporation in which the by-law is made; but debt, notwithstanding, will lie thereupon in the superior courts. 2 Sid. 105. 178. [A by-law, which declared that none but freemen should keep a shop, and confined the action to the Portmote courts where the sheriff or coroner (who must be freemen) arrayed the jury, was adjudged bad. Hesketh v. Broddock, 3 Burr. 1847.] —— Where, under the penalty of such a sum (not exceeding 40*s.*), as by the makers of the by-law should be assessed. Brid. 159. 142. — How the penalty must be ascertained. 2 Lutw. 1324. (*b*) A penal sum to be forfeited for nonperformance of a by-law, cannot be levied by distress, without a prescription, or express limitation by the by-law. 5 Co. 64. ‖See 2 Maule & S. 60.‖

But a by-law with a penalty of imprisonment (*c*), or forfeiture of goods and chattels, is void: for, by the general law of the kingdom, no man is to be imprisoned, or dispossessed of his goods and chattels, *nisi per legale judicium parium suorum, vel per legem terræ;* and were by-laws with such penalties allowed, it would be enabling corporations to set up private particular laws, in contradiction to the laws of the land; which would be against the very nature and essence of a by-law; which, though it may be *præter* the general law of the realm, it cannot be *contra.*

5 Co. 64. 8 Co. 127. S. P. Resolved. 2 Inst. 54. Moor, 411. S. P. (*c*) And there the by-law was, that if any gave opprobrious words to the mayor, he should be imprisoned, &c. *Per cur.* Such a by-law is not lawful; but a by-law to disfranchise the offender had been good. — The city of *London* cannot set a fine, &c. for nonperformance of a by-law. Comb. 10.

If the Company of Tailors in the city of *Exeter*, being incorporated by letters patent of Edward the Fourth, and having thereby power given them to make by-laws, make a by-law under a certain penalty, to be levied by distress and sale of the offender's goods (*d*); this is no good by-law; for the forfeiture cannot levied by sale of the offender's goods.

2 Vent. 182. adjudged between Clerk and Tucker. (*d*) So a by-law cannot be made upon pain of forfeiture of the goods, &c. 2 Inst. 47. 8 Co. 127 b. 2 Vent. 185. 1 Keb. 733., [though the corporation be created by act of parliament, if no such power be expressly given. Kirk v. Nowill, 1 Term R. 118.] ‖But a by-law that members of a company shall pay calls made on them in a certain time after notice, or otherwise forfeit their shares, is good, and equity will not relieve against a forfeiture incurred by neglect. Sparks v. Liverpool Water-works Company, 15 Ves. 428.‖

‖And a by-law made by the freemen of the Company of Free Fishers and Dredgers of *Whitstable*, prohibiting any freemen from being engaged in the trade of sending oysters to market from any other ground on the *Kentish* shore than the oyster ground of the company, under a penalty of 10*l.*, and in case of refusal to pay the same, that such freeman should thenceforth,

Adley v. Reeves, 2 Maule & S. 53. The Court of K. B. refused a *mandamus* to the

company to restore the plaintiff his office of freeman. 7 East, 353.; and see 17 Ves. 315. 1 Meriv. 107. S. C.

thenceforth, and until the fine was paid, be excluded from all share of the profits to be made thereafter by the joint trade of the company, was held to be a void by-law, there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for breach of such orders, and for prohibiting freemen from being engaged in other oyster grounds, under penalties to be stopped out of the money arising by the sale of the stint of oysters of such freemen. Lord *Ellenborough* C. J. said, "A by-law giving a remedy by distress for the recovery of the penalty would be bad. And is not this worse? The company are not content with levying the fine, but they withhold all share of the profits till the fine is paid."— *Qu.* Whether the by-law would have been good if it had not contained these extraordinary means of compelling payment of the penalty. According to 8 Term R. 352. it seems that it would; but that what may well be the subject of contract in a partnership may not be good as a by-law of a corporation, see 17 Ves. 328.‖

Moor, 411.

If in *London* a by-law is made, that if any freeman takes the son of an alien to be his apprentice the bonds and covenants shall be void, this is no good by-law; for though the common-council might have inflicted a fine or other punishment upon such master, yet they cannot make the bonds and covenants void.

Totterdell v. Glasby, 2 Wils. 266. 1 Wils. 237. 5 Co. 62 b.

[Although a by-law, in exclusion of foreigners from the exercise of a trade, may be good with a precedent custom to support it, yet it is void if the penalty is made recoverable by a stranger, not a member of the corporation: it must be made recoverable by the corporation, or some person for their use, as, in *London*, by the chamberlain, else it would be like assigning a *chose in action*.

Rex v. Dean of Dublin, 1 Stra. 536.

Under a power by charter to make by-laws, a corporation cannot make a law requiring their members to take an oath for the due observance of their statutes and ordinances, or to authorize themselves to administer an oath.]

Master, &c. of Tobacco Pipemakers' Company v. Woodroffe, 7 Barn. & C. 838.

‖A by-law imposing a fine on every master, warden, or assistant of a company who shall not attend all courts to be holden, is valid.‖

END OF THE FIRST VOLUME.

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ADDENDUM.

BANKRUPT.

BY 1 & 2 Will. 4. c. 56. it is enacted, "That it shall be law- 1 & 2 W. 4.
"ful for his majesty, his heirs and successors, by charter or c. 56.
"letters patent under the great seal of the United Kingdom of
"*Great Britain* and *Ireland*, to erect and establish a court of ju-
"dicature which shall be called 'The Court of Bankruptcy,'
"and by commission under the great seal to appoint one person,
"being a serjeant or a barrister at law of not less than ten years'
"standing, to be the chief judge of the said court, and three per-
"sons, being serjeants or barristers at law of not less than ten
"years' standing at the bar, or of five years' standing at the bar,
"having previously practised five years as a special pleader below
"the bar, to be other judges of the said court, and six persons, being
"barristers at law of not less than seven years' standing at the bar,
"or of four years' standing at the bar, having previously practised
"as a special pleader for three years below the bar, to be called
"commissioners of the said court, and from time to time to
"supply any vacancy in the number of the said judges and
"commissioners; and the same court shall be and constitute a
"court of law and equity, and shall, together with every judge
"and commissioner thereof, have, use, and exercise all the
"rights, incidents, and privileges of a court of record or judge
"of a court of record, and all other rights, incidents, and pri-
"vileges, as fully to all intents and purposes as the same are
"used, exercised, and enjoyed by any of his majesty's courts of
"law or judges at *Westminster*."

By § 2. it is enacted, "That the said judges, or any three of § 2.
"them, shall and may form a Court of Review, which shall
"always sit in public, save and except as may be otherwise
"directed by this act, or by the rules and regulations to be
"made in pursuance hereof, and shall have superintendence
"and controul in all matters of bankruptcy, and shall also have
"power, jurisdiction, and authority to hear and determine,
"order and allow all such matters in bankruptcy as now usually
"are or lawfully may be brought by petition or otherwise
"before the Lord Chancellor, whether such matters may have
"arisen in the said Court of Bankruptcy or elsewhere, except

" as is herein otherwise provided, and also to investigate and " examine, hear and determine all such other matters within " the jurisdiction of the said Court of Bankruptcy as are by " this act, or may be by the said rules and regulations, assigned " and referred to the said Court of Review.

§ 3. " § 3. And be it enacted, that all such matters to be heard and " determined in the said Court of Review, shall be brought on " by way of petition, motion, or special case, according to the " rules and regulations to be established as hereinafter provided, " subject to an appeal to the Lord Chancellor on matters of " law and equity, or on the refusal or admission of evidence " only; and in all cases of appeal to the Lord Chancellor by " virtue of this act, such appeal shall be on a special case, and " in no other mode whatsoever, except the Lord Chancellor " shall in any case otherwise direct; which special case shall be " approved and certified by one of the judges of the said Court " of Review in matters arising in the said court, and by the " judge trying the issue in matters arising out of the trial of " issues; and the determination of such judge on the settlement " of such case shall be final and conclusive: provided always, " that all appeals to the Lord Chancellor by virtue of this act " shall be heard by the Lord Chancellor only, and not by any " other judge of the High Court of Chancery."

§ 4. By § 4. it is enacted, " That it shall be lawful for the said " Court of Review to direct any issue of fact arising therein to " be tried by a jury before one of the judges thereof, or before " a judge of assize, and to issue process to compel the attend- " ance of jurors and witnesses, and to enforce the orders and " decrees of the said Court of Review, and to that end to exer- " cise all the powers vested for such purposes in any of his ma- " jesty's courts of record at *Westminster*.

§ 5. " § 5. And be it enacted, that all costs of suit between party " and party in the said Court of Review shall be in the discre- " tion of the Court, and shall be taxed by one of the masters of " the High Court of Chancery.

§ 6. " § 6. And be it enacted, that the said six commissioners may " be formed into two subdivision courts, consisting of three " commissioners for each court, for hearing and determining the " matters and things, and making the examinations hereinafter " referred thereto; and all references or adjournments by a sin- " gle commissioner to a subdivision court by virtue of this act, " shall be to the subdivision court to which he belongs, unless " the said commissioner, in case of the sickness of some one or " more of the commissioners of such subdivision court, or other " sufficient cause, shall think fit otherwise to direct, and the " subdivision courts may sit either in public or private as they " shall see fit, unless where it shall be otherwise provided by " this act, or by the rules to be made as hereinafter mentioned."

§ 7. By § 7. it is enacted, " That in every bankruptcy prosecuted in " the said Court of Bankruptcy, it shall and may be lawful for " any one or more of the said six commissioners to have, per-

" form,

"form, and execute all the powers, duties, and authorities by "any act or acts of parliament now in force vested in commis- "sioners of bankrupt, in all respects as if they or any one or "more of them were in every instance specially authorized and "appointed for the purpose by a separate commission under the "great seal of the United Kingdom of *Great Britain* and *Ire-* "*land*: provided always, that no single commissioner shall have "power to commit any bankrupt or other person examined be- "fore him, otherwise than to the care and custody of a messen- "ger or other officer of the said court, to be by him detained in "his custody, and brought up before a subdivision court, or the "Court of Review, within three days after such commitment, "for which purpose one of such courts shall be forthwith "assembled, and to which court such examination shall be "adjourned."

§ 9. regulates the appointment of registrars and deputy registrars. § 9.

By § 10. attorneys and solicitors of the superior courts at *Westminster* may be admitted in the Court of Bankruptcy, and may appear and plead without counsel in any proceedings (except proceedings before the Court of Review, and trials of issues by juries). § 10.

By § 12. it is enacted, "That in every case where the Lord "Chancellor, by virtue of any former act, hath power to issue a "commission of bankrupt under the great seal, it shall and may "be lawful for him, and also for the Master of the Rolls, the "Vice-Chancellor, and each of the masters of the Court of "Chancery acting under any appointment by the Lord Chan- "cellor to be given for that purpose, on petition made to the "Lord Chancellor against any trader having committed any act "of bankruptcy by any creditor of such trader, and upon his "filing such affidavit, and giving such bond as is by law re- "quired, to issue his fiat under his hand in lieu of such com- "mission, thereby authorizing such creditor to prosecute his "said complaint in the said Court of Bankruptcy, or to prose- "cute the same elsewhere before such discreet and proper per- "sons as the Lord Chancellor, or as the Master of the Rolls, "Vice-Chancellor, or one of the Masters of the Court of Chan- "cery, acting as aforesaid by such fiat, may think fit to nominate "and appoint; and that the persons so appointed shall thereby "have the like power and authority to all intents and purposes "as if they were assigned and appointed special commissioners "by virtue of a commission under the great seal. § 12.

"§ 13. And be it enacted, that every such fiat, prosecuted in "the said Court of Bankruptcy, shall be filed and entered of "record in the said court, and shall thenceforth be a record of "the said court, and it shall thereupon be lawful for any one "or more of the commissioners thereof, to proceed thereon in "all respects as commissioners acting in the execution of a "commission of bankrupt, save and except as such proceedings "may be altered by virtue of this act. § 13.

§ 14. " § 14. And be it enacted, that the Judges who go the several " circuits in *England* and *Wales*, may be directed by the Lord " Chancellor from time to time to return to him the names of " such number of barristers, solicitors, and attorneys practising " in the counties to the said circuits belonging, and upon such " persons being returned, and approved by the Lord Chancellor, " the fiat or fiats aforesaid, not directed to the Court of " Bankruptcy, shall be directed to some one or more of such " persons in rotation, to act as commissioners of bankrupt, " according to the districts or places for which such persons " shall be so returned, and to no other persons than such as " shall be included in such return: provided always, that it shall " be lawful for the Lord Chancellor, at any time, to remove any " person from the lists so to be returned, for such causes as to " him shall seem fit.

§ 16. " § 16. And be it enacted, that all the laws and statutes, rules " and orders, now in force relating to bankrupts, or to com- " missioners of bankrupt, or to proceedings under such com- " missions, or to the subject matter of such proceedings, or to " the persons concerned therein or in any way affected thereby, " shall in like manner extend and be construed to extend in " every respect, as far as the same may be applicable, to this " act, and to fiats issued in pursuance thereof, and to all pro- " ceedings under the same, and to all the subject matter of " such proceedings, and to all persons concerned therein or in " any way affected thereby, to all intents and purposes what- " soever, as if every such fiat were a commission of bankrupt " under the great seal of the United Kingdom of *Great Britain* " and *Ireland*, save and except as may be otherwise directed by " this act.

§ 17. " § 17. And be it enacted, that if any trader adjudged " bankrupt shall be minded to dispute such adjudication, and " shall present a petition praying the reversal thereof to the " said Court of Review, such petition to be presented within two " calendar months from the date of such adjudication, if such " trader shall be then residing within the United Kingdom, or " within three calendar months from the date aforesaid if then " residing in any part of *Europe*, or within one year from the " date aforesaid if then residing elsewhere, or within such other " time as the said court shall allow, (not exceeding one year, to " be computed from the date aforesaid,) such Court of Review " shall proceed to hear and decide on the said petition; or at " the option of the said bankrupt, and on his finding such " security for costs (if the said court shall think fit to require " any security) as by the said court shall be approved, shall " direct an issue to try any matter of fact affecting the validity " of such adjudication, by a jury to be duly impannelled and " sworn for that purpose, before the chief judge, or any one or " more of the other judges of the Court of Bankruptcy; and if " the verdict on such issue shall not be set aside on application " to the said Court of Review, within one month after the said " trial,

" trial, or if the adjudication of the commissioner shall not be set " aside by the said Court of Review on the petition aforesaid, such " verdict or such adjudication of the said commissioner, shall " in all cases, as against the said bankrupt, and also as against " the petitioning creditor, and as against any assignee to be " chosen of any such bankrupt's estate and effects, and as " against all persons claiming under the said assignees, and all " persons indebted to the bankrupt's estate, be conclusive " evidence that the party was or was not a bankrupt at the date " of such adjudication, any other act, debt, or trading, than the " act, debt or trading proved at such trial notwithstanding: " providing always, that an appeal shall be to the Lord Chan- " cellor from the decision of the said Court of Review, upon " matter of law or equity, or on the refusal or admission of " evidence only.

" § 18. Provided always, and be it further enacted, that after § 18.
" any such issue shall have been tried as aforesaid, it shall and " may be lawful for the Lord Chancellor, on petition to him, to " be presented within one calendar month after such verdict, " and upon notice thereof to the bankrupt upon special circum- " stances, to be submitted to the said Lord Chancellor, to order " that another fiat do issue at the instance of any other than the " former petitioning creditor against the said bankrupt, and that " such fiat shall and may be supported by any debt, trading, or " act of bankruptcy, other than those given in evidence on the " trial of such issue.

" § 19. And be it enacted, that it shall be lawful for the Lord § 19.
" Chancellor, upon the reversal of any adjudication of bank- " ruptcy, or for such other cause as he shall think fit, to order " that any fiat issued by virtue of this act, shall be rescinded or " annulled; and such order shall have all the force and effect of " a writ of *supersedeas* of a commission, according to the existing " laws and practice in bankruptcy.

" § 22. And be it enacted, that a number of persons, not § 22.
" exceeding thirty, being merchants, brokers, or accountants, or " persons who are or have been engaged in trade in the cities of " *London* or *Westminster*, or the parts adjacent, shall be chosen " by the Lord Chancellor to act as official assignees in all bank- " ruptcies prosecuted in the said Court of Bankruptcy; one of " which said official assignees shall, in all cases, be an assignee " of each bankrupt's estate and effects, together with the as- " signee or assignees to be chosen by the creditors; such official " assignee to give such security, to be subject to such rules, to " be selected for such estate, and to act in such manner as the " said chief and other judges, with the consent of the Lord " Chancellor, shall from time to time direct: and all the personal " estate and effects, and the rents and profits of the real estate, " and the proceeds of sale of all the estate and effects, real and " personal, of the bankrupt, shall, in every case, be possessed " and received by such official assignee alone, save where it " shall be otherwise directed by the said Court of Bankruptcy,

" or

" or any judge or commissioner thereof; and all stock in the " public funds, or of any public company, and all monies, " exchequer bills, India bonds, or other public securities, and " all bills, notes, and other negotiable instruments, shall be " forthwith transferred, delivered, and paid by such official " assignee into the Bank of *England*, to the credit of the ac- " countant-general of the High Court of Chancery, to be subject " to such order, rule, and regulation for the keeping of the " account of the said monies and other effects, and for the pay- " ment and delivery in, investment, and payment, and delivery " out of the same, as the Lord Chancellor, or the said Court of " Review, or any judge of the said Court of Bankruptcy, if " authorized so to do by any general order of the same court, " shall direct: and if any such assignee shall neglect to make " such transfer, delivery, or payment, every such assignee shall " be liable to be charged in the same manner as by the said " recited act is provided, in cases of neglect by assignees to " invest money in the purchase of exchequer bills, when directed " so to do: provided always, that until assignees shall be chosen " by the creditors of each bankrupt, such official assignee so to " be appointed to act with the assignees so to be chosen by the " creditors, shall be enabled to act, and shall be deemed to be, " to all intents and purposes whatsoever, a sole assignee of each " bankrupt's estate and effects.

§ 23. " § 23. Provided always, and be it enacted, that nothing " herein contained shall extend to authorize any such official " assignee to interfere with the assignees chosen by the cre- " ditors in the appointment or removal of a solicitor or attorney, " or directing the time and manner of effecting any sale of the " bankrupt's estates and effects.

§ 24. " § 24. And be it enacted, that it shall be lawful for the Lord " Chancellor, from time to time as any vacancy may occur in " the said before-mentioned number of official assignees, to " appoint some other such person as aforesaid to fill any vacancy " so occurring; and in case of the death or removal of any official " assignee who shall have been appointed to act in any bank- " ruptcy, it shall be lawful for the said Court of Bankruptcy, " subject to any rules to be made by virtue of this act, to " appoint another official assignee, of the number hereby pre- " scribed, to act in the same bankruptcy, in the place of the " assignee who shall have so become dead or been removed.

§ 25. " § 25. And be it enacted, that when any person hath been " adjudged a bankrupt, all his personal estate and effects, pre- " sent and future, which by the laws now in force may be as- " signed by commissioners acting in the execution of a com- " mission against such bankrupt, shall become absolutely vested " in and transferred to the assignees or assignee for the time " being, by virtue of their appointment, without any deed of " assignment for that purpose, as fully to all intents and pur- " poses as if such estate and effects were assigned by deed to " such assignees, and the survivor of them; and as often as any

" such

" such assignees shall die or be lawfully removed, and a new " assignee duly appointed, all such personal estate as was then " vested in such deceased or removed assignee shall, by virtue " of such appointment, vest in the new assignee, either alone " or jointly with the existing assignees as the case may require, " without any deed of assignment for that purpose.

" § 26. And be it enacted, that where any person shall be § 26. " adjudged a bankrupt, all such present and future real estate " of such bankrupt, whether in the United Kingdom of *Great* " *Britain* and *Ireland*, or in any of the dominions, plantations, " or colonies belonging to his majesty, as by the said recited " act is directed to be conveyed by the commissioners to the " assignees, shall vest in such bankrupt's assignee or assignees " for the time being, by virtue of his or their appointment, " without any deed of conveyance for that purpose; and as " often as any such assignee or assignees shall die, or be law- " fully removed or displaced, and a new assignee or assignees " shall be duly appointed, such of the aforesaid real estate as " shall remain unsold or unconveyed, shall by virtue of such " appointment vest in the new assignee or assignees, either alone " or jointly with the existing assignees, as the case may require, " without any conveyance for that purpose."

(For further provisions see the act.)

END OF THE FIRST VOLUME.

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